NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26162

THIRD DIVISION Docket Number MW-26055

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned grade crossing reconstruction work at Cameron Street in Victoria, Texas to outside forces beginning on August 22, 1983 (System File MW-83-110/402-60-A).

(2) The Carrier also violated Article 36 when it did not give the General Chairman advance written notice of its intention to contract out said work.

(3) System Machine Operator R. H. Hernandez, R. H. Lopez and L. C. Fisher shall each be allowed ninety-six (96) hours of pay at their respective straight time rates and forty-four (44) hours of pay at their respective time and one-half rates because of the above-mentioned violations."

OPINION OF BOARD: The basic facts in this case are set forth as follows: By letter, dated August 1, 1983, Carrier served notice that it intended to implement a street reconstruction project at Victoria, Texas. This notice followed two prior notices issued respectively on August 25, 1981, and September 28, 1982, wherein Carrier advised the General Chairman that it proposed to have an outside contractor perform dirt work, placement of cement stabilize base material, saw cut concrete streets, remove existing concrete between cuts and reinstall concrete, including curbs.

In response to these notices, the General Chairman indicated that he could not agree with the contracting-out proposal, since Maintenance of Way Employes traditionally performed this work. As initially planned by Carrier, contractor forces employed by the Pat Baker Contracting Company performed work at the Cameron Street Grade Crossing at Victoria, Texas, from August 22, 1983, through September 6, 1983, thus prompting the filing of the instant Claim on September 21, 1983.

According to the Organization, outside forces not holding seniority within the Roadway Machine Department performed work of a character that historically and customarily had been performed by Carrier's Roadway Machine Operators with equipment owned and/or leased by Carrier. The work identified by the Organization included using a bulldozer, motor grader and tractor backhoe to remove existing track, old ballast and dirt. It also included the placement and compacting of new fill material, the unloading, placement and

lining of panel and the placement of clean ballast. It was the Organization's position that said utilization of outside forces violated Articles 1, 2, 6, 17 and 36 of the Controlling Agreement. It submitted letters from three (3) Roadway Machine Operators with over twenty (20) years seniority (each) attesting that they historically performed this type of work.

Carrier contends that it complied with the notification requirements of Article 36 when it served notice on the General Chairman and defends its actions on the grounds that the Organization has not demonstrated that the contested work was performed exclusively on a system-wide basis by members of the Organization. It observes that it has never denied that Maintenance of Way employees may have performed this type of work in the past, but it avers that the Rules cited do not extend exclusivity.

In our review of this case, we concur with the Organization's position. To be sure, Carrier provided proper notice under Rule 36, but the Organization was not subsequently precluded from initiating a grievance challenge. During the course of the on-situs appeal and in its Ex Parte Submission, Carrier argued that the Organization has not demonstrated an exclusive right to the disputed work, but we are not convinced by this argument. The Organization has established a prima facie case via the written statements of the three long service employees that said work was performed by employees in the Roadway Machine Department, and these affirmations have not been persuasively rebutted by Carrier. Further, there are no indications that other crafts have performed this work nor indications that the Organization has previously acquiesced to the use of outside contractors. Accordingly, we find that said work was improperly contracted out and the Claim is sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1986.

LABOR MEMBER CONCURRENCE
AND
DISSENT
TO
AWARD 26162 - DOCKET MW-26055
(Referee Roukis)

The Board was correct in determining that the Carrier violated Articles 1, 2, 6, 17 and 36 of the Agreement when it contracted work within the scope of the Agreement to outside forces. Moreover, the Board was correct in allowing the remedy requested in Part (3) of our "Statement of Claim".

However, while we are in basic concurrence with the Board's decision in Award 26162, we are impelled to dissent based on language in the final paragraph of the Board's Opinion. Within that paragraph, the Board held:

> "Further, there are no indications that other crafts have performed this work nor indications that the Organization has previously acquiesced to the use of outside contractors."

From the above-quoted sentence, it appears as though the Board is implying that the claim would have been defeated if the record contained evidence that the Organization had ever acquiesced the use of outside contractors for the performance of work similar to that involved in the dispute. In short, the Board seems to be accepting the application of the so-called exclusiviy doctrine to disputes involving contracting out of work. In doing so, the Board had apparently disregarded, without so much as a scintilla of explanation or reasoning, more than ten (10) pages of explanation and award citation in the

Organization's submission which conclusively establishes that the exclusivity doctrine has no application to disputes involving contracting out of work.

As the Board was clearly informed, Awards 13236, 13237, 14121, 23217 and 25934 held to the effect that the exclusivity doctrine applies to disputes concerning the proper assignment of work between different classes and crafts of a carrier's own employes--it does not apply to disputes involving outside contractors.

The so-called exclusivity doctrine has no application to contracting out of work disputes because that doctrine is simply not in harmony with Article IV of the May 17, 1968 National Agreement (Article 36 of the Schedule Agreement) or similar rules involving advance notice and good faith discussion prior to contracting out of work. Article IV contemplates that under certain circumstances scope covered work may be contracted out. There is no serious question among people schooled in collective bargaining that the parties to collective bargaining agreements cannot possibly envision all future situations when creating Agreement language. In fact, this principle was clearly enunciated by the Supreme Court of the Unites States in the now famous Steel Workers Trilogy. Article IV embodies this principle. The key elements of Article IV are advance notice and good faith discussions at the local level to determine if there is really a valid reason for contracting out scope covered work under a particular set of circumstances that may not have been specifically envisioned by the parties at the time the Agreement

was negotiated. The application of a rigid concept such as exclusivity is contrary to, and in effect precludes, good faith discussions by the General Chairman. While a particular set of circumstances may indeed suggest that contracting out would be the rational way to proceed in a given case, the General Chairman would be loath to agree to such contracting in the face of the exclusivity doctrine, That is, even though work of a particular character had been performed by scope covered employes in the past, and a peculiar set of circumstances suggested contracting out similar work in a particular instance, the General Chairman faced with the exclusivity concept would be hesitant to agree to contracting for fear of removing the work from the scope of the Agreement, i.e., once he had done so, he could no longer prove "exclusivity" in any future cases. Hence, it is clear that the rigidity of the exclusivity doctrine is contrary to the intentions of the parties as expressed in Article IV and similar rules which are based on good faith discussions and the flexibility necessary to give life to the collective bargaining agreement. The application of said doctrine to contracting out of work claims, in essence, renders Article IV meaningless and it cannot validly be concluded that the parties intended to do a meaningless act when they negotiated Article IV.

The Organization is not so naive as to believe that good faith discussions will occur in every instance or that when they do occur, that they will result in agreement between the parties. Therefore, in cases where the rules could be construed as ambiguous with respect to certain work, we recognize the need for

a standard of proof that must be met in order for the Organization to claim work in preference to an outside contractor. However, the standard that is the harmony with Article IV and similar rules is the "significant portion" standard enunciated in Award 25934 supra, rather than the rigid standard of exclusivity.

We are impelled to point out that where this Board has applied the so-called exclusivity doctrine to contracting disputes (erroneously in our opinion), it has done so primarily to disputes that arose prior to the December 11, 1981 National Mediation Agreement. As a part of that Agreement, the parties signed a Letter of Agreement dated December 11, 1981, attached hereto as Exhibit A, concerning contracting out of work. The seventh paragraph of that letter reads:

> "The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

The above-quoted paragraph requires the carries to assert a good-faith effort to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable. "Good-faith efforts" and extent practicable" are the operative phrases. The promise to use maintenance of way forces to the "extent practicable" as determined by "good-faith efforts" certainly must be construed as a promise to use maintenance of way forces to perform work which falls into a category which is much more broad than the category of work which is exclusively reserved to them. If the exclusivity doctrine

ever had any valid application to contracting disputes, which it did not, for the reasons first stated by the renowned Referee Dorsey in Award 13236 supra, that application must be reexamined in light of the promise to assert a good-faith effort to reduce the incidence of subcontracting and increase the use of maintenance of way forces to the extent practicable as stipulated in the December 11, 1981 National Mediation Agreement.

While concurring with the Board's decision to sustain the claim, I must dissent to the language in the Award which implies, without reason, the application of the so-called exclusivity to contracting out of work disputes.

D. D. Bartholomay
Labor Member

NATIONAL RAILWAY LABOR CONFERENCE
1901 L STREET N.W. WASHINGTON, D.C. 20036/AREA CODE 202—862-7200

CHARLES I. HOPKINS, Jr.
Chairman

ROBERT BROWN
Vice Chairman

D. P. LEE
General Counsel

R. T. KELLY
Director of Labor Relations

December 11, 1981

Mr. O. M. Berge
President
Brotherhood of Maintenance
of Way Employes
12050 Woodward Avenue
Detroit, Michigan 48203

Dear Mr. Berge:

During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the carriers' forces.

The carriers expressed the position in these discussions that the existing rule in the May 17, 1968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carriers' right to contract out work in situations where warranted. The organization, however, believed it necessary to restrict such carriers' rights because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

Conversely, during our discussions of the carriers' proposals, you indicated a willingness to continue to explore ways and means of achieving a more efficient and economical utilization of the work force.

The parties believe that there are opportunities available to reduce the problems now arising over contracting of work. As a first step, it is agreed that a Labor-Management Committee will be established. The Committee shall consist of six members to be appointed within thirty days of the date of the December 11, 1981 National Agreement. Three members shall be appointed by the Brotherhood of Maintenance of Way Employes and three members by the National Carriers' Conference Committee. The members of the Committee will be permitted to call upon other parties to participate in meetings or otherwise assist at any time.

The initial meeting of the Committee shall occur within sixty days of the date of the December 11, 1981 National Agreement. At that meeting, the parties will establish a regular meeting schedule so as to ensure that meetings will be held on a periodic basis.

EXHIBIT A

The Committee shall retain authority to continue discussions on these subjects for the purpose of developing mutually acceptable recommendations that would permit greater work opportunities for maintenance of way employees as well as improve the carriers' productivity by providing more flexibility in the utilization of such employees.

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

Notwithstanding any other provision of the December 11, 1981 National Agreement, the parties shall be free to serve notices concerning the matters herein at any time after January 1, 1984. However, such notices shall not become effective before July 1, 1984.

Please indicate your concurrence by affixing your signature in the space provided below.

Very truly yours,

Charles I. Hopkins, Jr.

I concur:

CARRIER MEMBERS' RESPONSE TO
LABOR MEMBERS' CONCURRENCE AND DISSENT TO
AWARD 26162, DOCKET MW-26055
(Referee Roukis)

The Concurrence and Dissent concludes that the Majority held that the exclusivity doctrine applies in contracting-out-of-work disputes. Such conclusion is entirely correct.

In upholding the applicability of the doctrine, however, contrary to the contention of the Labor Member, the Board was merely adding its decision to a long list of Awards. See for example, Third Division Awards 26016, 25370, 24853, 24508, 23423, 23303.

The fact of the matter is that there never has been any rational basis for confining the exclusivity doctrine to employees of the Carrier in other crafts and rejecting its applicability to nonemployees. While there were older Awards that did make such arbitrary distinction, no persuasive explanation was made to explain the basis for the disparate treatment. Fortunately, as the instant Award demonstrates, such older Awards are fading into obscurity and disrepute.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost