Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27650
THIRD DIVISION Docket No. MW-26676
88-3-85-3-424

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Elgin, Joliet and Eastern Railway Company

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

(1) The Carrier violated the Agreement when it assigned outside forces to blacktop grade crossings at Cadillac Road, Division Street, Essington Road and South Oswego Road on May 11, 18, 28, and June 1, 1984, respectively (System File BJ-2-4-5-6-84/UM-11-14-15-16-84).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations furloughed B&B employes B. Davis, J. Bersano and B. Ruzich shall each be allowed thirty-two (32) hours of pay at their respective straight time rates."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On July 10, 1984, the Organization filed a claim for three (3) senior furloughed carpenters for eight (8) hours each because the Carrier had used an outside contractor to lay blacktop by a crossing "...at Cadillac Road." According to the claim, "...historically and traditionally the work had been performed by Bridge and Building Carpenters at the conclusion of renewing road crossing." Since the regular B&B road gang was not available, the Organization argues that the work should have been done by the furloughed Claimants. On July 17, 1984, the Organization filed three more claims for the same Claimants on grounds that the Carrier had also contracted out blacktop work

at the crossings at Essington Road, Division Street, and South Oswego Road at the conclusion of renewing the road crossings at those points. All of these claims are included here under the same docket.

In its denial of the claims, the Carrier stated that the "...Carrier has no contractual responsibility to blacktop public streets at the approach to a railroad crossing."

In its appeal, the Organization argued that the work in question entails "an integral part of any road crossing" and that such blacktop has traditionally and historically been placed "above the road proper" by B&B employees and that this is the manner in which Rule 2 (a) had always been interpreted. The Organization also stated that after checking with the various townships, it found out that it was the Carrier that "paid for" the blacktopping by the contracting company.

The Carrier in turn argues that the contractor did not lay blacktop "on" any of the crossings as the original claims imply but that the crossings were made of timbers laid by B&B forces. It further argues that the blacktop was laid on public domain irrespective of who paid for the actual work (i.e. a public entity or the Carrier). As the Carrier puts it, "...(t)he funding is merely incidental to the decision of installing a new crossing. We are still concerned with public roadways and your Organization has no inherent right to this work." The Carrier argues that the Illinois Commerce Commission defines a railroad crossing and approaches as extending twenty-four (24) inches outward from the outer rail of each track and that the contractual rights of employees to do Carrier work is within those limits. Lastly, the Carrier argues that various municipal, state, and federal laws, rules and regulations place requirements on it with respect to the quality of work to be done on blacktopped surfaces approaching grade crossings and that such supersede and void contract rules to the contrary, if such exist.

With respect to this last point, the Board offers no opinion since its jurisdiction is limited, by the Railway Labor Act, to the interpretation of labor agreements per se. See Third Division Award 19790 wherein the Board states:

> "...(t)he jurisdiction of this Board has been clearly defined and set forth by statute, defined and limited in innumerable awards and decisions. In point of fact, this Board lacks jurisdiction to enforce rights created by State or Federal (or local) statutes and is limited to questions arising out of the interpretation and application of Railway Labor Agreements." (Also see Second Division Award 6462 and Third Division Award 20368.)

The Rules at bar in this case are the following.

"Rule 2

(a) All work of constructions, maintenance, repair or dismantling of buildings, bridges, including tie renewals on open deck bridges, tunnels, wharves, docks, coal chutes, smoke stacks and other structures built of brick, tile, concrete stone, wood or steel, cinder pit cranes, turntables and platforms, highway crossings and walks, but not the dismantling and replacing of highway crossings and walks in connection with resurfacing of tracks, signs and similar structures, as well as all appurtenances thereto, loading, unloading and handling all kinds of bridge and building material, shall be bridge and building work."

"Rule 3

(a) All work in connection with the constructions, maintenance or dismantling of roadway and track, such as rail laying; tie renewals (except on open deck bridges); ballasting, lining and surfacing track, including the dismantling and replacing of highway crossings and walks required by such surfacing; maintaining and renewing frogs, switches, and railroad crossings, ditching, sloping and widening cuts; rights of way fences; snow and sand fences; mowing and cleaning; brush cutting; patrolling and watching; loading, unloading and handling of all kinds of track material; all other work incident thereto, shall be track work."

"Letter of Understanding dated September 28, 1945

It is agreed that any construction project of such magnitude or intricacy that cannot be performed by employees covered by the agreement, or when city or other ordinances do not permit the work to be done by railroad employees, may be performed by outside contractors."

"Article IV - Contracting Out

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.
>
> Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.
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> Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement."

This case centers on whether the Carrier was in violation of the Agreement Scope Rule cited above when it did not use B&B forces, in this case on furlough, to do the work of blacktopping roadways at crossings after the latter had been repaired by its regular forces. The Carrier disputes the validity of no blacktop laid "on" any of the crossings. Rather blacktop was laid on the roadway adjoining the crossings. This objection is dismissed by the Board. The whole record before it leads the Board to believe that the original intent of the claims was relatively clear to all concerned despite what may be called certain imprecise use of prepositions when the claims were originally framed. The merits of the claims must center on whether the B&B forces, as a matter of past practice, had always done the work in question. Since the Carrier paid for the work involved, irrespective of what the source of revenue was which ultimately paid the contractors, the Board must reasonably conclude that all repair work at crossings, including the work to public right of ways, may indeed be B&B work if such had always been done by B&B forces in the past. As moving party to the instant claim, however, the Organization has the burden of proof by means of substantial evidence to show that it had always done this work in the past. A close scrutiny of the record shows that the Organization has not adequately met this burden. The Carrier argues that after the mid-1970's, B&B forces did place blacktop on public roadways approaching crossings. In the early 1980's, however, the Carrier states that some local jurisdictions advised the Carrier that they were not satisfied with the quality of the work done by railroad forces when they

blacktopped public accesses to crossings and that public sector employees would do this work in the future. This resulted in public accesses being blacktopped by, in given instances, B&B forces but also by county forces and by outside contractors. The Carrier has documented this in record. In its February 21, 1985, correspondence to the Carrier, the Organization does not deny that it shared this type of work with either public employees or contractors. The Organization goes on to argue, however, that criticism about the quality of the work performed by Carrier forces when doing blacktopping would not have occurred if the Carrier had provided proper equipment. B&B forces shared this type of work with others, irrespective of the equipment available, and by so doing it had not exercised exclusivity over the work questioned.

The above discussion, however, goes only to the merits of whether the Carrier had the right to contract out the work. The issue of notice, however, does not involve a question of exclusivity, but rather a question of whether the employees have performed such work in the past. The Organization argues that the Carrier was in violation of Article IV of the May 17, 1968 National Agreement. We agree the record establishes that B&B forces have performed this work in the past and thus were entitled to advance notice and an opportunity to meet with the Carrier to discuss the Carrier's plans to contract out the work. The Carrier's failure to provide such notice was in violation of Article IV of the May 17, 1968 Agreement. However, while the Board believes that the work in question is covered by the aforequoted Rules for the purpose of advance notice, we also are of the view that the remedy requested herein would, under the unique circumstances of this case, be inappropriate. The Board takes note that the type of work involved here has been performed by county employees and contractors for several years without objection by the Organization. It is, therefore, the opinion of this Board that the Organization cannot now claim a violation of the Agreement without first putting the Carrier on notice that it believed advance notification was required. Accordingly, it is our judgment that the Board herein is limited to directing Carrier to provide notice in the future. See Third Division Awards 26301, 25930 and 26832. The Carrier was not in violation of Rule 2 or 3 or the Letter of Understanding dated September 28, 1945, as alleged. In accordance with the Findings, however, the Carrier is directed to provide advance notice to the Organization, in the future, when contemplating contracting out work of the type in question. All other relief requested in the Statement of Claim is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1988.