Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28213
THIRD DIVISION Docket No. MW-27833
89-3-87-3-341

The Third Division consisted of the regular members and in addition Referee John E. Cloney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Houston Belt and Terminal 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 mow weeds beginning April 25, 1986.

(2) As a consequence of the aforesaid violation, Messrs. L. Flores and J. E. Young shall each be allowed eight (8) hours of pay at the tractor mower operator's appropriate rate (straight time or overtime) for each work day and holiday worked by outside forces beginning April 25, 1986, continuing until the claimants are assigned as tractor mower operators with seniority as such dating from April 25, 1986."

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.

Beginning April 25, 1986, Carrier assigned grass cutting work in its passenger terminal area to an outside contractor who used two employees to do the work.

On April 1, 1986, Carrier wrote the Organization:

> "This is to advise that the HB&T intends to contract the services of two mowers and operators for the cutting of weeds. In that we do not own the equipment to perform this work, we will be contracting same on or about April 23, 1986. This notice is being given pursuant to Article IV of the 1968 National Agreement."

On April 9, 1986, the parties discussed the matter and Carrier notified the Organization it was going ahead with its plan.

On March 13, 1986, Carrier had advertised two Tractor Mower Operator positions, located at the Terminal. When these positions were filled the members of the Organization were assigned that mowing work.

Rule 1, the Scope Rule states:

"SCOPE

These rules govern the hours of service and working conditions of all employes, in the Maintenance of Way and Structures Department, not including supervisory forces above the rank of foreman. It is understood and agreed that this Agreement does not annul or conflict with existing Agreements in effect with other Organizations."

Rule 32, Rates of Pay, establishes a wage rate for the category Mower Operator.

In its May 21, 1986, Claim the Organization contended:

"Operating tractor mowers to cut grass is work belonging to the Maintenance of Way employes. Carrier has as late as March 13, 1986 bulletined two positions of operator tractor mower to the Maintenance of Way Employes . . . ."

Carrier responded in part:

"3. Claim is untimely as this work has been contracted for the past four years without protest by the Organization."

The Organization argues the work is reserved to it by Rules 1 and 32 and Carrier's notice is evidence of its recognition of that fact. Further, as the work is reserved to it, the Organization states contract work performed in the past is of no consequence. However as this Board held in Third Division Award 25370:

"We do not agree that by notifying the Organization of its intent to contract out the roofing repairs, Carrier was admitting that the work was specifically covered under the Scope Rule. The giving of such notice is simply a procedural requirement pursuant to Article 36. It does not establish, affirmatively or negatively, that the disputed work is exclusively covered under the Scope Rule."

In that same Award we held a similar Scope Rule to be general in nature. We have also held Rules which protect rates of pay differ from:

> "...a Scope Rule which contains specific job description rules and specific reservations of particular work to a designated class or craft." (Third Division Award 20841).

The Organization also argues that where there is evidence the work has been done in the past by the claiming organization, proof of exclusivity is not necessary, contending such proof is almost impossible to obtain. Finally, the Organization takes the position exclusivity is of importance only between contending crafts and is of no moment in contracting out situations. In response, we can only say we have been referred to no authority in support of these positions and we believe precedent is to the contrary.

We hold the Scope Rule here is general. Accordingly, in order to prevail the Organization must establish historic exclusivity. This it did not do. Therefore the Claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of December 1989.

LABOR MEMBER'S DISSENT
TO
AWARD 28213 - DOCKET MW-27833
(Referee John E. Cloney)

To say that the Majority used circuitous reasoning to find a way to deny this claim is an understatement. Not only was the logic behind the decision flawed, it was based upon an argument raised at the Board level. Moreover, it perpetuates a myth that allows the Carrier to circumvent collective bargaining agreement throughout the industry.

In the last two paragraphs of the Award, the Majority held that:

> "The Organization also argues that where there is evidence the work has been done in the past by claiming organization, proof of exclusivity is not necessary, contending such proof is almost impossible to obtain. Finally, the Organization takes the position exclusivity is of importance only between contending crafts and is of no moment in contracting out situations. In response, we can only say we have been referred to no authority in support of these positions and we believe precedent is to the contrary.
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> We hold the Scope Rule here is general. Accordingly, in order to prevail the Organization must establish historic exclusivity. This it did not do. Therefore the Claim must be denied."

Notwithstanding the fact the Carrier did not raise the exclusivity issue during the handling of this dispute on the property, the exclusivity myth has been again erroneously applied to a contracting out of work case. Without reciting in depth the often held Board principle that the exclusivity doctrine applies to disputes over the proper assignment of work between different classes and crafts of the Carrier's own employes rather than disputes involving outside contractors, I must strenuously object to the Majority's finding of no authority was presented in support of that position Understandably, since no argument concerning exclusivity was raised during

the on-property handling, no argument or precedent was presented in Organization's Ex Parte Submission. However, the Organization's Rebuttal contained extensive argument concerning the exclusivity concept along with the authority to support the argument. See Third Division Awards 13236, 13237, 14121, 27012 and 27014 which were presented in their entirety to the Referee during oral argument.

Third Division Award 25934 held:

> "Further, the Board held that the Organization does not here carry the burden of demonstrating exclusivity because that doctrine is not applicable to situations where work is contracted to an outside contractor. See, e.g., Third Division Award 23217 (citing Award 13236, which held that 'The exclusivity doctrine applies when the issue is whether Carrier has the right to assign work to different crafts and classes of its employees - not to outsiders.').
>
> The foregoing does not mean that the Organization carries no burden to show entitlement to the work; rather, as stated in Special Board of Adjustment of the BN/BRAC Agreement, Award 113:
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> > 'The Organization must demonstrate unilateral removal and assignment to strangers to the contract of a significant portion of that work which actually was performed as of (the effective date of the rule) by positions listed . . .'"

It is only too apparent that the Majority chose to ignore the authority presented and at this late date attempts to redefine a precedent already established. Moreover, based on the Majority's reasoning here, the Agreement between the Parties is made meaningless. It is ironic that just prior to this claim being filed the Carrier bulletined and assigned two Maintenance of Way employes to perform weed mowing work. The contractor was then brought on the property because the Carrier allegedly did not have sufficient equipment to complete the work. The action by the Carrier of regularly assigning Maintenance of Way employes work of this character clearly

presupposes any argument that the work was not Scope covered. Certainly the Parties to the Agreement entered into same realizing that work would be assigned to Maintenance of Way employes and recognition thereof was Carrier's regular assignment of such employes to the work performed in this dispute. The Majority's narrow interpretation of whether a scope rule is general or not ignores the Scope of an agreement which must embody the work customarily and traditionally performed by Carrier's employes. Such was clearly the Parties intent and conception when the Agreement was made. I, therefore, dissent.

D. D. Bartholomay, Labor Member