Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28733
THIRD DIVISION Docket No. MW-28600
91-3-88-3-427

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former
(Oklahoma-Kansas-Texas Railroad Company

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

(1) The Agreement was violated when the Carrier assigned outside forces to reshape drainage ditches and clean the right-of-way between Sunray and Addington, Oklahoma from August 10 through September 25, 1987 (System File MW-87-3-OKT/2579-OKT).

(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 violations referred to in Parts (1) and/or (2) above, Machine Operators R. L. Pulley, D. A. Herbel, E. A. Baker and L. A. Coffman shall each be allowed two hundred eighty (280) hours of pay at their 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 October 2, 1987, the Organization filed a Claim on behalf of the four Claimants asserting the Carrier had utilized outside forces from August 10, 1987, through September 25, 1987, to operate a dozer, motor grader, backhoe, and front end loader to reshape drainage ditches, clean the right of way, and bury old tie butts. The Carrier maintains this Claim is without merit and has no Agreement support. It is the Carrier's position that for the Organization to prevail, it must show the disputed work has been performed customarily and traditionally at locations throughout the system to the exclusion of all other save members of the Organization.

Article IV of the May 17, 1968, National Agreement states in relevant part that:

> "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."

The record establishes the Carrier gave no notice of its intent to use outside forces and as indicated defended its action by claiming the work involved cannot be shown to be exclusively reserved to the Organization. Apparently, the Carrier relies upon the fact the disputed work has never been performed by members of the Organization. This argument begs the underlying issue which essentially involves the intent to be given the phrase "... within the scope of the applicable schedule agreement." This Board has repeatedly held the above quoted phrase of Article IV of the 1968 National Agreement does not mean such work must be performed customarily and traditionally at all locations in the system by members of the Organization. On the contrary, this Board has consistently ruled that the phrase "within the scope of the applicable schedule agreement" cannot be expanded so as to the embrace the exclusivity doctrine which applies in disputes involving challenges to a Carrier's right to assign work to different crafts and/or classes of employees. In other words, Article IV of the 1968 National Agreement cannot be read so as to infer that work within the scope means work reserved exclusively to the Organization by history, custom or tradition. See Third Division Awards 18687, 23203, 24137 and 24280. As noted above, the Carrier's assertion that it has always contracted out such work was never rebutted. This is an important consideration which indicates the Organization has slept on its right to receive notice in accordance with Article IV of the 1968 National Agreement when it intends to contract out work which is within the scope of the schedule agreement as was the case herein. If it is the future intention of the Organization to require the Carrier to comply with the notice provisions of Article IV, it is advised to do so in a clear and unambiguous manner, thereby avoiding the Board's refusal to remedy the claimed violation. In summation, the evidence of record supports a finding the Carrier's failure to give notice was a violation of the provisions of Article IV of the 1968 National Agreement. The Organization's inability to rebut the Carrier's assertion the disputed work has never been performed by members of the Organization causes this Board to deny the monetary remedy claimed.

A W A R D

Claim sustained in accordance with the Findings.

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Docket No. MW-28600
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NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.

CARRIER MEMBERS' CONCURRENCE AND DISSENT
TO
AWARD 28733, DOCKET MW-28600
(Referee McAllister)

The Majority found that the "exclusivity doctrine" applies in disputes involving challenges to a Carrier's right to assign work to different crafts and classes of employees. While the finding was irrelevant to the issue in the case, it nonetheless is correct. While also irrelevant to the issue in the case, the Majority likewise could have found that the Board has consistently ruled that the "exclusivity doctrine" is applicable in contracting out cases where the sole issue is the right of the Carrier to contract out work. Third Division Awards: 28654, 27626, 27040, 24853, 23423, 23303, 20841, among many others.

We do have difficulty however, in understanding the Majority's rationale in finding that notice was required. Even assuming, arguendo, that exclusivity need not be shown where the issue is one of notice, where, as here, the Majority found that not only has the Carrier contracted out the work involved in the past, but also, that the disputed work has never been performed by members of the Organization, it would appear to be obvious that such work is not even arguably covered by the scope rule and no notice is required.

M. W. Fingerhut

P. V. Varga

R. L. Hicks

J. E. Yost

M. C. Lesnik

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' CONCURRENCE AND DISSENT
TO
AWARD 28733, DOCKET MW-28600
(Referee McAllister)

Without conceding that the exclusivity theory has validity in any type of case, it most certainly does not have any relevance to contracting out of work disputes. The Majority correctly found that "*** In other words, Article IV of the 1968 National Agreement cannot be read so as to infer that work within the scope means work reserved exclusively to the Organization by history, custom or tradition. ***" In other words, work that has been customarily, historically and traditionally performed by members of the bargaining unit is not to be contracted out unless the Organization is notified and the Carrier can present evidence of probative value that one of the exceptions in the rule, which cannot be reasonably remedied by discussions with the Organization, apply.

The "rationale" for finding that notice was required even though the work was never performed by members of the Organization is that the Majority recognized that the work was covered by the Scope Rule albeit the Organization's lapse in challenging the contracting out of such work.

Respectfully submitted,

D. D. Bartholomay
Labor Member