

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Missouri Pacific
(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 (Neosho Construction Company) to perform bridge work on Bridge No. 365.92 in the vicinity of Hiawatha, Kansas from July 9 through 24, 1987 (Carrier's File 871192 MPR).

(2) As a consequence of the aforesaid violation, B&B Carpenter J. W. Cavaness shall be allowed one hundred twelve (112) hours of pay at his straight time rate and pay at his time and one-half rate for any overtime hours worked by the contractor's forces."

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 employees involved in this dispute are respectively carrier and employees 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.

Carrier served notice, dated May 8, 1987, of its intention to contract out the replacement of wood trestle bridge 365.92, located approximately 4 miles south of Hiawatha, Kansas, with a concrete bridge. The Carrier and the Organization conferred on May 18, 1987, but did not reach an agreement. The contractor commenced work in July, 1987, and this Claim was filed shortly thereafter.

The Organization contended, throughout the handling on the property, that the disputed work had been customarily and historically performed by the bargaining unit such that it was reserved to the Claimant by the Scope Rule.

It provided some thirteen written statements of current and retired employees, including Claimant, which described, in varying detail, their past performance of bridge construction and maintenance work. In addition, the Organization cited other provisions of the Agreement, a December 11, 1981 National Letter of Agreement and several prior Awards of this Board in support of its contention that the work was reserved to the employees it represents notwithstanding that the work had not been historically performed exclusively by them.

The Carrier defended primarily on the ground that the work was not covered by the Scope Rule of the Agreement. Carrier asserted that the applicable Scope Rule was a "general" type of provision which does not reserve specific work. Citing several prior Awards of this Board, including Awards involving these same parties, Carrier urged that the Organization must show a practice of exclusive performance of the disputed work by the employees to establish Scope coverage. It says, in direct contrast to the Organization's claims, that the work was customarily and historically performed by outside contractors. Carrier provided exhibits, on the property, listing over 250 past instances of contracting out work of a similar character over many years.

The pivotal issue in this dispute is whether the work performed was within the Scope of the Agreement. The Scope Rule involved is a "general" type of provision in that it does not specifically describe the work of the various job titles it lists. Prior Awards too numerous to require citation, have consistently held that a general scope rule imposes a burden on the Organization to prove that the work in question has been customarily and historically performed by the employees before a finding may be made that the work was reserved exclusively to them.

The precise nature of the burden of proving customary and historical performance is the subject of vigorous dispute. This Board is keenly aware of the sharp divergence of prior Third Division Awards regarding the "Exclusivity Doctrine." A substantial number hold that a showing of exclusive performance by the employees, to the exclusion of all others, is the only evidence sufficient to warrant a finding of customary and historical performance. Another substantial body of prior Awards requires something less than exclusive performance. Our careful review of two recent Awards involving these same parties suggests that similar divergence exists on this property. We read Third Division Award 28654, involving bridge work, as an endorsement of the requirement to show past performance to the exclusion of all others. Third Division Award 28849, on the other hand, regarding grade crossing work, seems to reject the "Exclusivity Doctrine" and finds Scope coverage. However, the Award ultimately denies the Claim for other reasons.

Our review of the Agreement suggests that the Exclusivity Doctrine is not an appropriate test for Scope coverage vis-a-vis employees and outside contractors. The language of Article IV of the parties' Agreement clearly demonstrates, to us, an intent to establish an environment whereby the Organization should, under appropriate circumstances, be able to agree to the contracting out of bargaining unit work without suffering permanent erosion of

the protected work. Such a cooperative environment is also consistent with the provisions of the December 11, 1981 National Letter of Agreement. Yet such cooperative agreements would be incompatible with an exclusivity requirement. After work had been performed by an outside contractor, albeit by agreement, the Organization would no longer be able to prove exclusive performance by the employees. Such a result is not logically consistent with the cooperation terms of Article IV of the Agreement or the December 11, 1981 National Letter of Agreement. We conclude, therefore, that evidence demonstrating something less than strict exclusive performance is sufficient to establish Scope coverage.

The record before us shows that the employees have been involved in many, if not all, phases of bridge construction and repair work. But Carrier says that such work was, at best, only performed by employees on a shared basis with contractors. Moreover, Carrier says its evidence of past contracting instances demonstrates that such work was customarily and historically performed by contractors. On the facts of this record, we agree with the Carrier's contentions.

The Organization has the burden of proving by a preponderance of the evidence that the disputed work is of a character customarily and historically performed by the employees it represents. While, as described earlier, we do not find this burden to require a showing of exclusive performance, it does require proof of more than a shared or mixed practice. On this record, we find that the Organization's evidence falls short of demonstrating such regularity, consistency and predominance in the performance of the disputed work to warrant a finding that it has customarily and historically performed the work. The Organization has not, therefore, satisfied its burden of proof, in this case, that the disputed work is reserved to the employees by the Scope Rule.


The Organization raised several procedural objections to the content of the Carrier's Ex Parte Submission. We have found all but one of the objections to be without merit. The remaining objection is moot as a result of our award.

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 24th day of September 1991.