Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD THIRD DIVISION

Award No. 29034
Docket No. MW-29083
91-3-89-3-523

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 (Osmose) to perform bridge repair work on the bridge at Gasconade Jct. from November 2, through 30, 1987 (Carrier's file 871130 MPR).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed B&B Foreman D. L. Fall, Motor Car Operator S. Parastar, and Carpenters J. C. Boyer, C. R. Caton and J. W. Penrod shall be paid:

> '... for eight (8) hours per day, per Claimant and including any overtime and Holiday pay, and any additional expense incurred by these FURLOUGHED employees that would normally be covered by benefits paid by the Carrier. This claim is for NOVEMBER 2, 3, 4, 5, 6, 7, 8, (overtime), 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, (Holiday), 27, 28, 29, and 30, 1987.'"

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.

In this dispute, the Carrier used an outside contractor to perform certain repair work on its concrete bridge at Gasconade Junction, Missouri. The Organization alleges that this action violated the parties' Agreement. In addition, the Organization contends the Carrier violated Article IV of the May 17, 1968 National Agreement when it initiated the work without having provided the Organization with advance written notice of its intent to do so.

The record reveals that no notice was provided pursuant to the Contracting Out provisions of Article IV of the parties' Agreement. While Carrier admits it did not give notice, it maintains that it was not required to do so. The disputed work, in its view, is not covered by the Scope Rule and, hence, no notice was required.

The parties have raised a number of issues and sub-issues in this matter. Based on our analysis of the record, we see these major issues for determination: First, whether the work was within the Scope of the Agreement such that it was reserved to the employees for exclusive performance, and second, whether the work was within the Scope of the Agreement for notice purposes and, if so, what is the impact of Carrier's failure to provide the required notice.

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 of this Board, 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 to them.

The precise nature of the burden of proving customary and historical performance has been the subject of vigorous dispute. This Board is 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, January, 1991 decision 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, a June, 1991 decision regarding grade crossing work, seems to reject the "Exclusivity Doctrine" and finds Scope coverage. However, the Award ultimately denies the Claim for other reasons.

As we explained more fully in a companion case, Third Division Award 29007, our analysis of the Agreement and prior Third Division Awards convinces us that the Exclusivity Doctrine is not an appropriate test for Scope coverage vis-a-vis employees and outside contractors. We concluded there, and affirm that judgment here, that evidence demonstrating something less than strict exclusive performance is sufficient to establish Scope coverage.

The record evidence in this matter is sharply conflicting regarding customary and historical performance of the disputed work by the employees and by outside contractors. The Organization has provided employee statements attesting to the past performance of bridge work. On the other hand, the Carrier has provided evidence of several hundred instances where work of the same or similar nature was contracted out. These instances transpired over more than seven decades.

The Organization has the burden of proving by a preponderance of the evidence that the disputed work has been customarily and historically performed by the employees. While, as described earlier, we do not find this burden to require proof of exclusive past performance, it does, in our judgment, require a showing of more than a shared or mixed practice. After close review of the considerations bearing on this issue, we conclude, on the instant record, 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. Accordingly, we find that the Organization has not, on these facts, satisfied its burden of proof that the disputed work was reserved to the employees.

As we understand the prior Awards of this Board, however, a showing of past performance of the disputed work by the employees has been held to be sufficient to establish scope coverage for purposes of the Article IV Notice and meeting provisions (see, for example, Third Division Award 26301.) In that regard, we find that the Organization's evidence warrants a finding that it was entitled to notice. Indeed, though Carrier, in its Submission, officially denies it was required to provide notice, it more than tacitly admitted, in its correspondence on the property, that it was. We find, therefore, that Carrier did violate the Agreement when it failed to provide notice.

Regarding the damages issue as a result of the Notice violation, Carrier says that it has for years contracted out the disputed work, without providing notice, and the Organization has not protested such actions. The record does demonstrate extensive past contracting out of similar work and, at least until the very recent past, the record is devoid of challenges by the Organization. As this Board said in Third Division Award 26792,

> "It appears to have been past practice on the property. We are not persuaded by the Organization's arguments to the contrary. The Board will sustain the claim, but without compensation. When the Carrier has for a number of years considered its actions valid due to acquiescence by the Organization, the Board must deny compensation."

The instant circumstances are substantially similar. The record shows that the Organization has not insisted on the Article IV notice until recently. Although the Organization contends to the contrary, we do not find that Carrier acted in bad faith in failing to provide notice. On this record, the Organization has cited only two Awards of this Board that predate the instant dispute. Both Awards, however, involve different work and different language. These Awards, in our judgment, would have provided minimal previous guidance to Carrier regarding its notice obligations. The facts of this record do not persuade us that Carrier was a repeated and flagrant violator of the notice provisions. Accordingly, we partially sustain the Claim by directing Carrier to provide the requisite notice of its intent to contract out work in the future. However, we deny the portion of the Claim which seeks compensation.

Because of our Award herein, we did not reach the merits of the Organization's procedural objections to the content of Carrier's Submission.

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 28th day of October 1991.