

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29878
Docket No. MW-28551
93-3-88-3-371

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Grand Trunk Western Railroad Company (formerly
(The Detroit and Toledo Shore Line Railroad
(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 the grass at the Administration Office Building in Lang Yard at Toledo, Ohio on June 15, July 23, August 4, 11, 24, September 9, 16, October 5, 12 and 19, 1987 (Carrier's Files 8365-1-232, 8365-1-236, 8365-1-241 and 8365-1-244.)
- (2) The Agreement was further violated when the Carrier failed to notify, confer and reach an understanding with the General Chairman prior to contracting the work in question.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Trackmen S. Cislo, M. Callahan and F. Watters, Jr., shall each be allowed seventy-two (72) hours of pay at the trackman's straight time rate."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

The record shows that from July through October, 1987, the parties agree that Carrier contracted out certain lawn mowing work at Lang Yard in Toledo, Ohio, to the Toledo Lawn Service. The parties further agree that Carrier did not first give written notice to the General Chairman of its intent to contract out the work.

Article 52 of the Agreement provides:

"ARTICLE 52

CLASSIFICATION OF WORK

* * * *

(b) Track Work:

All work in connection with the construction, maintenance or dismantling of roadway and track, such as rail laying, tie renewals (except bridge ties), ballasting, lining and surfacing track, maintaining and renewing frogs, switches and railroad crossings, ditching, tiling, sloping and widening cuts and banks, mowing and cleaning, patrolling and watching (except B&B work), loading, unloading and handling all kinds of track materials and all other work incident thereto, shall be track work and shall be performed by employees in the track Sub-Department.

* * * *

- (m) Although it is not the intention of the company to contract construction or maintenance work when company forces and equipment are adequate and available, it is recognized that, under certain circumstances, contracting of such work may be necessary. When such circumstances arise the Chief Engineer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be carried out,

giving consideration to performance by contract of grading, drainage, and bridge and structural work of magnitude or requiring special skills not possessed by the employees or the use of special equipment not owned by or available to the company, and to performance by company forces of track work and other structures work.

The company will contract for construction and maintenance work for which company forces and equipment are neither adequate nor available, but shall in each instance give the General Chairman advance notice of the specific work to be thus performed, and on request will confer with the General Chairman in respect thereto."

The Organization contends that by contracting out the work in question, Carrier deprived Claimants of work to which they were entitled pursuant to express contractual language and historical practice. Carrier argues that the mowing work was performed around the administration building and therefore did not constitute mowing on the track "right of way" as stated in Article 52(b); that such work was not reserved exclusively to the employees; and, finally, that the remedy sought is excessive and improper.

The initial dispute in this claim centers around whether the contracted out work at issue falls within the meaning of Article 52(b). Carrier contended that the mowing work referred to therein refers only to the maintenance of track area and therefore mowing around an office building would not be included. The Organization has argued that no "bright line" can be or had been drawn parallel to the track structure beyond which work is no longer reserved to the employees; and that the building in question is located between two yard tracks within 25 feet distance on each side.

Since the Rule itself does not shed any light on the physical parameters of the track area and the work reserved therein to the employees, evidence of past practice is helpful in determining the parties' intent.

In the instant case, Carrier has not refuted the statements proffered by employees during the handling of this dispute on the property regarding past practice except to say that the work has not been exclusively reserved to the Organization. However, this Board has consistently held that claims of exclusivity apply to

work assignment or work jurisdiction disputes among crafts of the Carrier's own employees, and not to disputes involving outside contractors. Third Division Awards 13236; 25934. We find, therefore, that in this case the practice of the parties provides probative evidence in support of the Organization's case and that the Carrier violated the Agreement by failing to give prior notice and contracting out the work in question.

As to the remaining question of remedy, the record shows that Claimant Callahan was fully employed as a laborer on the claim dates and therefore would not be entitled to any additional compensation under the Agreement. Arguments raised by the Carrier regarding the remaining two Claimants have not been considered by the Board since they were not raised during the handling of this dispute on the property. This Board does not have the authority to entertain arguments or evidence de novo.

Regarding the claim for 72 hours of pay for each of the Claimants, Carrier has repeatedly indicated in its correspondence that it paid \$25.00 to the lawn service for each date the lawn was mowed; that the mowing took less than an hour each time; and further, that the claim date of August 24 is erroneous as the lawn service did not perform work on this date. The Organization did not refute these points, we note.

It is hereby ordered, therefore, that Claimants Cislo and Watters be compensated in an amount commensurate with the hours expended by the lawn service. They will each be allowed 4 1/2 hours of pay at the Trackman's straight-time rate.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.