NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29912
Docket No. MW-29679
93-3-91-3-21

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
(
(Southern Pacific Transportation Company
((Eastern Lines)

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

(1) The Agreement was violated when the Carrier used an outside concern (Conners Construction Company) to perform building demolition, dirt work, installation of drainage culverts and concrete forming and finishing at the Lake Charles, Louisiana Yard Office beginning on September 18, 1989 (System File MW-90-1/486-76-A SPE).

(2) As a consequence of the violation referred to in Part (1) hereof, B&B Foreman R. Young, Assistant B&B Foreman D. Harrod, B&B Carpenters K. Boney, K. Begneaud, G. Flanigan, Roadway Machine Operators H. Olivier, E. Meridith and M. D. Favorite shall each be allowed pay at their respective rates of pay for an amount equaling equal proportionate shares of the total number of man-hours expended by the outside concern."

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 employe 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.

This Claim protests the contracting of certain work associated with the removal and replacement of Carrier's yard office at its Lake Charles, Louisiana, facilities beginning September 19, 1989. The construction of an overpass by the State of Louisiana required the relocation of the yard office. The costs associated with the work were apparently 100 percent reimbursed to the Carrier by the State.

Requisite notice was served and a conference thereon was held.

The Claim targeted only the concrete, wooden form construction, and dirt work associated with the placement of drainage culverts and the foundations of the new metal building to be erected thereon. The Claim alleged, among other things, a Scope Rule violation in that the work in question had been customarily and historically performed by Carrier employees in the B&B and Machine Operator classifications.

Carrier raised few defenses on the property. Initially, it defended only on the basis of the full employment of the Claimants. In its second response to the Claim, it relied on the general nature of the Scope Rule while contending that the work was not exclusively reserved to the employees by Agreement or past performance. It reiterated full employment. In its third response, Carrier again raised exclusivity and full employment. In addition, it stated that the project was for the benefit of the State and not the Carrier.

The Organization produced several statements from employees attesting to their past performance of such work including the operation of the kind of equipment used by the contractor. As to the targeted work, the Carrier did not claim lack of manpower, skills, equipment availability or the like. Nor did it provide any evidence to establish that the State of Louisiana required the use of an outside contractor for the work. Finally, Carrier did not contend that the work was so integrated that the employees could not have performed the portion claimed.

In support of its exclusivity defense, the Carrier provided copies of some ten contracting notices for work performed during 1978-80. The Organization, while the matter was still on the property, challenged the Carrier's past practice evidence as having preexisted the December 11, 1981 National Mediation agreement. In essence, the Organization asserted that existing Agreements were changed and that the Carrier made commitments in that round of collective bargaining negotiations that were not in effect at the

time its contracting notices covered. Carrier did not challenge this assertion.

Significantly, the Organization argued that the following paragraph from the December 11, 1981 Letter of Agreement overcame any past practice or exclusivity defenses of the Carrier:

> "The carriers assure you [the President of the Organization] that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

In addition, the Organization noted that Carrier did not produce any evidence of contracting out similar work after 1981.

The Organization accuses the Carrier of bad faith as a result of its "...total disregard for the failure to live up to its contractual obligation to reduce the incidence of contracting out and assign its forces to work encompassed within the Scope of the Agreement to the extent practicable as envisaged by the December 11, 1981 Letter of Agreement." The Organization asserts the Carrier failed to make any effort whatsoever to assign its forces to the work.

The Carrier is correct in contending the effective Agreement contains a general Scope Rule clause. Scope Rule coverage under such a clause is ascertained by determining whether the employees have customarily, historically and traditionally performed the kind of work in dispute. One line of analysis requires that the employees have performed the work historically to the exclusion of all others.

This Board has previously concluded that the Exclusivity Doctrine is not an appropriate test for Scope Rule coverage vis-a-vis employees and outside contractors. See Third Division Awards 29007 and 29033 involving other parties. In the absence of a well established precedent between these parties to the contrary, which has not been demonstrated on the record before us, we affirm our previous reasoning and find that evidence demonstrating something less than strict exclusive performance is sufficient to establish Scope Rule coverage.

The Organization's employee statements attest to performance of the kind of work claimed here. Some of the statements cover a period of over 25 years. The Carrier's evidence consists of prior

contracting notices over a span of not quite two years with no examples shown after 1980. We note also that most of the notices involve track and roadbed projects. Three that involved placement of prefab buildings included other work, such as culvert placement, utilities installation and concrete work similar to the work in dispute here, all of which was performed by the employees. On the basis of such evidence, we find that the Organization has satisfied its burden of proof to establish Scope Rule coverage of the disputed work.

We also reject Carrier's contention that the work in question was not done for its benefit. While it is apparently true that the State paid for the work, the Carrier obtained a new yard office and parking lot along with drainage improvements to its property. Carrier's position on this point is not supported by the evidence.

In view of the foregoing findings, it follows that, on this record, Carrier must be found to have improperly contracted out the claimed work in violation of the Agreement. It remains to consider whether a damage award is appropriate.

The Organization has cited five on-property awards which it says stand for the precedent that payment of a monetary claim is warranted regardless of full employment. See Third Division Awards 24383, 25402, 26162, 26547, and 26770. Only one award, 25402, provided damages over a clear full employment defense. Another, 26547, awarded only the overtime hours claimed. Award 26770 noted that full employment was not raised as a defense. The other two did not discuss full employment. These cases, while being perhaps of some persuasive force, do not, in our view, reflect the clear line of precedent the Organization suggests they do.

There is no dispute that all named Claimants were fully employed at all relevant times. Carrier maintains that no backpay remedy would be appropriate even of the Claim was sustained on the merits. It cites five prior awards of this Board in support of its contention. See Third Division Awards 28943, 29033, 29034, 28889, and 29330.

Award 28889 was a technical seniority district infringement dispute where no loss to any Claimant was shown. The other Awards involved contracting out work where a genuine Scope Rule dispute existed over past performance of the work. Only furloughed employees received damage awards.

The Organization argues, in essence, that the December 11, 1981 Letter of Agreement represents a changed commitment on the part of the participating carriers in that they gave assurances, as of that date, that they would assert good faith efforts to reduce

the incidences of contracting out work and increase the use of employee forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees. That is, indeed, what one paragraph of the Letter of Agreement says.

The Organization argues that the Carrier acted in bad faith here when it took no effort whatsoever to use its own employees on the disputed work. Our review of the record fails to reveal any evidence that Carrier sought to avoid contracting the disputed work and use its employees instead. It provides no indication that Carrier undertook the requisite good faith efforts to which it was committed.

In the absence of unusual circumstances, such as flagrant or repeated violation of an agreement, the Board has followed the view that entitlement to a monetary claim is a separate issue requiring independent proof of loss. This view holds that loss does automatically flow from a finding of Agreement violation.

On the record before us, however, we are persuaded that circumstances exist which make a damage award appropriate. In addition to the Scope Rule violation found, it is clear that the Carrier did not undertake the required good faith efforts to perform the work with its own forces. Refusing to award damages would, in practical effect, condone the combination of Carrier's violation and its lack of good faith efforts. Accordingly, Carrier is directed to determine the number of hours worked by contractor personnel on the portions of the project targeted by the Claim and to compensate each Claimant for an amount equal to the proportionate shares of the total hours expended on the disputed work.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 9th day of November 1993.