

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30115
Docket No. MW-29616
94-3-90-3-591

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company (former Chicago, Milwaukee, St. Paul and 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 (Railroad Salvage Associated) to clean spilled grain and track materials from the tracks in the West Yard and Adams Yard in Milwaukee, Wisconsin on May 25, 26, 27, 28, 29, June 3, 4, 10, 11, 17, 18, 24 and 25, 1989 (System File C #21-89/800-46-B-340 CMP).
2. The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.
3. As a consequence of the violations in Parts (1) and/or (2) above, the Track Subdepartment employees listed below* shall each be allowed forty (40) hours of pay at their respective straight time rates.

*R.F. Willms
M.D. Diaz
J.D. Bingmon
W.L. Neal
L. Smith

D.C. Hoover
F. Harris
J.A. Davis
R.L. Jones

J.L. Hern
L. Vaughan
D.R. Hendricks
G.P. Morales"

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.

On 13 dates during May and June, 1989, Carrier utilized equipment and personnel of an outside contractor to perform certain clean-up work in Carrier's West Yard and Adams Yard in Milwaukee, Wisconsin. The work consisted of removal of spilled grain from yard track areas. Incidental to cleaning up the spilled grain, the contractor's employees also picked up and disposed of scrap metal which was lying on and about the yard areas from which the spilled grain was being removed.

By letter dated July 20, 1989, claims were filed by the Organization on behalf of thirteen named Claimants requesting payment of forty hours to each Claimant. The claims alleged that the work in question accrued to Maintenance of Way employees by custom, practice and tradition and therefore could not be assigned to an outside contractor except through the advance notice and negotiation processes set forth in Rule - SCOPE and APPENDIX I of the rules agreement.

Rule 1-SCOPE reads as follows:

"The rules contained herein shall govern the hours of service, working conditions, and rates of pay of the employees in the Maintenance of Way & Structures Department represented by the Brotherhood of Maintenance of Way Employees but do not apply to supervisory forces above the rank of foreman. These rules do not apply to employees covered by other agreements.

NOTE: In the event Carrier plans to contract out work within the scope of this agreement, the Carrier shall notify the General Chairman 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.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting,

and the Organization may file and progress claims in connection therewith.

Nothing in this Note shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and, if possible, reach an understanding in connection therewith. (See Appendix I.)"

Appendix I reads as follows:

"December 11, 1981

Mr. O.M. Berge
President
Brotherhood of Maintenance of Way Employees
1250 Woodward Avenue
Detroit, Michigan 48203

Dear Mr. Berge:

During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the carrier's forces.

The carriers expressed the position in these discussions that the existing rule in the May 17, 1968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carrier's right to contract out work in situations where warranted. The organization, however, believed it necessary to restrict such carriers' rights because of its concern that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

conversely, during our discussions of the carrier's proposals, you indicated a willingness to continue to explore ways and means of achieving a more efficient and economical utilization of the work force.

The parties believe that there are opportunities available to reduce the problems now arising over contacting of work. As a step, it is agreed that a Labor-Management Committee will be established. The Committee shall consist of six members to be appointed

within thirty days of the date of the December 11, 1981 National Agreement. Three members shall be appointed by the Brotherhood of Maintenance of Way Employees and three members by the National Carriers Conference Committee. The members of the Committee will be permitted to call upon other parties to participate in meetings or otherwise assist at any time.

The initial meeting of the Committee shall occur within sixty days of the date of the December 11, 1981 National Agreement. At that meeting, the parties will establish a regular meeting schedule so as to ensure that meetings will be held on a periodic basis.

The Committee shall retain authority to continue discussions on these subjects for the purpose of developing mutually acceptable recommendations that would permit greater work opportunities for maintenance of way employees as well as improve the carriers' productivity by providing more flexibility in the utilization of such employees.

The carriers assure you 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.

These parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

Notwithstanding any other provision of the December 11, 1981 National Agreement, the parties shall be free to serve notices concerning the matters herein at any time after January 1, 1984. However, such notices shall not become effective before July 1, 1984.

Please indicate your concurrence by affixing your signature in the space provided below.

Very truly yours,

(signed) Charles I. Hopkins, Jr.

I concur:

(signed) O.M. Berge"

The language in the NOTE contained in Rule 1-SCOPE is the same language as is found in the May 17, 1968 Agreement referenced in Appendix I.

The Organization argued throughout its handling of this case that the work contracted out was "contractually reserved to the Claimants and has customarily, historically and traditionally been performed by Maintenance of Way forces as outlined in Rule 1, Scope and Rule 4, Department Limits - - ". They contend that because Carrier did not give the advance notice to contract out work as set forth in the NOTE portion of Rule 1-Scope, Carrier was in violation of both the Scope Rule and the good-faith requirements as set forth in Appendix I. In support of these contentions, the Organization submitted a hand written statement from one of the Claimants stating that he had worked on this type of activity in 1988. The Organization also alleged that Carrier's Function Reporting Manual for its Engineering Department recognized this type of work as accruing to Maintenance of Way employees.

The Carrier, for its part, insisted that this type of clean-up work is not covered by the Scope Rule and has not, by custom, practice or tradition, been performed by Maintenance of Way Employees to the exclusion of all others. Therefore, Carrier contends, there was no requirement to give advance notice to the Organization and consequently there was no violation of Rule 1-Scope or Appendix I.

The Board has examined and studied the arguments and precedential citations advanced by the parties. We are convinced that Rule 1-Scope is a general scope rule which does not delineate specific duties which are reserved to Maintenance of Way employees. Neither does Rule 4 - Department Limits specify particular duties which accrue to Maintenance of Way employees. It is simply a listing of sub-departments, position titles and seniority limitations of such positions. As for the Organization's reliance on the Engineering Department's Function Reporting Manual, we would note that this document is not a negotiated rule and does not ascribe any particular duties to any particular group of employees. It is, as the stated purpose says, "The principal purpose of the system is to provide better operating information for each level of management." As for the statement from the one Claimant, we note with interest that during the summer of 1988 as recounted by the Claimant, the clean-up work was, in fact, performed by "an Alabama

contractor." If anything, this statement confirms Carrier's contention that this type of work has not by practice or tradition been customarily performed by Maintenance of Way employees.

Therefore, the Board is compelled to conclude from this record that the Organization has not demonstrated that the type of clean-up work here in dispute is reserved to Maintenance of Way employees by either Agreement Rule, custom, practice or tradition. Inasmuch as the Organization has not shown in this case record that the work contacted out belonged to Maintenance of Way employees, there was no violation of either the advance requirements of the NOTE to Rule 1 - Scope or the spirit and intent of Appendix I. The claim as outlined above is, therefore, denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 4th day of April 1994.