NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 30127
Docket No. MW-28493
94-3-88-3-312

The Third Division consisted of the regular members and in addition Referee Gil Vernon 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 Carrier violated the Agreement when it assigned outside forces to perform grade crossing installation work in the St. Louis Terminal beginning April 22, 1986 (Carrier's File 247-7449).

2. The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman D.M. Campo and Trackman W.R. Deetz, J.A. Crosley, R.E. Fulton, Sr., B.J. Wood and J.H. Porter shall each be allowed pay at their respective rates for eight (8) hours each work day, Monday through Friday, beginning April 22, 1986 and continuing for so long as Contractor Doyle Sales performs Maintenance of Way work in the St. Louis Terminal."

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.

The claim before the Board was initially filed on June 20, 1986. The District Engineer denied the claim on July 21, 1986, and in his letter he asserted that: "This type of work has been contracted out for a number of years without notice to the Union or protest from the Union and is not in violation of the National Agreement. This is not something that is new or that has not been handled in this manner in the St. Louis Terminal in preceding years." The letter did not identify any particular projects, dates or places to substantiate this assertion. The Director of Labor Relations declined the claim on October 27, 1986. Similar assertions to the use of outside contractors were made:

> "Contrary to your contentions otherwise, the Carrier has customarily and traditionally utilized contractor's forces to perform the type of work disputed in this case. Your contention that such work is reserved exclusively to employes covered by the BMWE is simply without substance."

Again, no substantiation was offered.

On December 17, 1986, the General Chairman provided written statements from approximately 19 different track foremen. In his letter the General Chairman indicated they were offered as rebuttal to the Carrier's contention that outside contractors have historically done crossing work. It was the Organization's position that Carrier forces have historically done the work and that it was only in recent years that contractors--without notice to the Organization--had started doing the work.

On January 8, 1987, the claim was listed for conference. It was discussed on January 20 and 21, 1987. The Carrier confirmed its declination on April 2, 1987, and again asserted without documentation that contractor forces had historically performed the work. On June 22, 1987, the Organization requested a nine-month extension of the time limits. The Organization wrote another letter on August 4, 1987, making reference to the written statements and rebutting Carrier's contentions that the Claimants were not qualified to perform the work. Subsequently, there were several agreements made to extend the time limits. Then on June 16, 1988, the Organization wrote the following letter:

> "This is in reference to the above numbered claims, which are claims in behalf of Messrs. D.M. Campo, et al, and R.E. Fulton, employes in the St. Louis Terminal, because contractors performed Maintenance of Way work.
>
> About three months ago, you indicated that you would consider some payment on these claims after research. We

have discussed these claims in formal conference as well as several times in telephone conference. Also, these claims are getting to be 'old' in that they date back to 1986.

Therefore, I am requesting that we agree to setting a definite date for extension of time limits on these two cases to and including August 10, 1988. If not settled by that date, we will file these two claims to the National Railroad Adjustment Board, Third Division.

If you concur, please sign below and return one copy to me."

The Carrier signed the letter.

On August 9, 1988, the Organization filed the case with the Board. Next, the Carrier sent a letter to the General Chairman dated August 10, 1988, which attached a list of projects along with dates and location where contractors have been utilized. On October 21, 1988, the Organization wrote the Carrier objecting to the August 10, 1988, letter because, according to the UPS postmark, it was not sent until August 11, 1988. Indeed, that is what the postmark indicates.

It is the conclusion of the Board that the information in the August 10 letter is untimely and cannot be considered. Information exchanged between the Parties after the case is filed with the Board cannot be considered as having been handled on the property. In this case, it is immaterial that the Organization "jumped the gun" in filing the case on August 9. Clearly the Carrier letter was not sent until after the time limit the Parties had agreed to had expired. Additionally, we exclude a list of projects of a similar, but more extensive, nature attached to the Carrier's submission.

Focusing attention on the evidence properly before us, we note both Parties have made assertions as to custom and practice. The Organization contends that its members have historically done the work. The Carrier asserts contractors have done the work. History, custom, and practice are critical in this case since the Scope Rule is general in nature and since the relevant Agreement requires advance notice for contracting of scope-covered projects. While both Parties have made assertions as to custom, only one has properly provided any evidence of documentation in support of their assertion, to wit, the Organization. Thus, the preponderance of the evidence before us supports the Organization's contention, for purposes of this case, that they have historically performed the work in question. The Board does recognize that the statements

from the Track Foremen acknowledge that recently contractors have been used. However, the Organization also contends this was without notice to them. Thus, under these circumstances, it is difficult to conclude there was a waiver of the notice requirement.

Given the unique evidence of this record, the work was scope covered and notice was required. Since the claim will be sustained on this basis, it is not necessary to consider arguments as to the merits of the contracting. There can be no question as to lost work opportunities since the Claimants were furloughed.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

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