

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31388  
Docket No. MW-30445  
96-3-92-3-195

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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 (Byland, Inc.) to perform Track Subdepartment work (cut brush, weeds and small trees) with the use of a small tractor-mower, gas-powered weed cutters and chain saws on the dates and at the locations listed below [omitted here]. (System File C #45-90/8-00027 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, Track Subdepartment employees L. Yahn, G. Bailey, R. Conger and D. Reed shall each be allowed an equal proportionate share of the two hundred eighty-nine and one-half (289.5) hours of pay at their respective straight time rates."

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 Carrier and the Organization individually determined to file this dispute with the Board. In each case, the other party completed Submissions. The two complete files are virtually identical. Obviously the Board need rule on only one of the completed files. The Carrier letter indicating its intention to file the matter with the Board preceded that of the Organization by approximately seven weeks. However, the Carrier somehow adopted what was to be the Organization's Statement of Claim. On this basis, the Board finds it more reasonable to review the matter based on the Organization's initiative. See Third Division Awards 31326 and 31327, involving the same parties, in which an identical procedural situation occurred.

This dispute involves the contracting to an outside firm of the cutting of brush, weeds and small trees along the right-of-way adjacent to various grade crossings. The Carrier did not provide advance notice of the contracting, as referenced under the NOTE to Rule 1, Scope, which reads as follows:

"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 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 the 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."

Before examining whether the Carrier violated the Agreement, as claimed by the Organization, through failure to provide advance notice and/or by contracting the work, several preliminary defenses set forth by the Carrier require resolution.

The Carrier argues that this type of work (clearing tracks) is not "exclusively" performed by Maintenance of Way forces and thus is not "within the scope of the Agreement." As a result, the Carrier contends that the advance notice provisions do not apply. In reference to contracting matters, the Board has repeatedly held that demonstration of "exclusivity" is not required by the Organization in its claim for specific work. Of course, if the Carrier can demonstrate that work is "exclusively" (i.e., totally, without exception) performed by outside forces or by other crafts or classes of employees, and there is no specific contractual assignment to the contrary, then the work can properly be found not to be "within the scope" of the claiming Organization. Here, there is no such demonstration. Rather, the Carrier states that it has contracted such work in the past, but offers no documentation in reference thereto, while the Organization points to numerous instances in which such work has been commonly considered a proper assignment for Maintenance of Way forces over many years.

Public Law Board No. 3530, Award 108, states this principle in succinct fashion:

"[T]he exclusivity doctrine is inapplicable to work to be performed by an outside contractor but rather is a concept that deals with the potential conflict of work performance as between different crafts."

The Carrier also states that "it was necessary to correct the [track] condition as quickly as possible" and that all Maintenance of Way forces were otherwise occupied. This does not, of course, show that notice to the General Chairman may be omitted or that some rearrangement of the work force could not have been made.

The Carrier also takes the position that the outside forces were contracted for by the Foreman, who is not only represented by the Organization, but is also the Local Chairman. In the absence of contrary information, the Board must conclude that this individual was acting in his position as a Foreman, representing the Carrier, and that his actions were not disapproved or disavowed by the Carrier. The Carrier does not deny that the Foreman was acting as its agent. Surely, a Local Chairman has no authority to commit the Carrier to anything, and it cannot be found that such was done in this instance -- for the purpose of "sandbagging" the Carrier or for any other devious purpose.

Finally, the Carrier also mentions that it could have the work done by a contractor at less expense than would be entailed in using its own forces. This appears to admit that Carrier forces were capable of performing the work, no doubt through previous experience therein. Beyond this, however, the Board must be concerned with the Agreement as written by the parties and not with whether compliance is more or less costly than non-compliance.

The Carrier draws attention to Third Division denial Award 30688, also involving brush cutting. In the circumstances reviewed in that Award, the Carrier gave advance notice and provided specific evidence as to contracting being done "frequently" in the past. This is clearly distinguishable from the dispute here under review, in which there was no advance notice and little documentation of previous practice.

The Board finds that the claim has merit, first because of the failure to provide advance notice. Beyond this, the reasons provided by the Carrier in defense of its action, as discussed above, simply are beside the central point. At best, the Carrier demonstrates a mixed practice as to track cleaning. As to whether, in this particular instance, it would have been preferable to employ outside forces, required advance notification to the General Chairman and discussion (if requested by him) may well have resolved this amicably.

#### AWARD

Claim sustained.

#### ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of February 1996.