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Excl does not apply

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31889
Docket No. MW-30443
96-3-92-3-193

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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 perform Maintenance of Way and Structures Department work (clean up debris, wood and spoiled grain) within the yard limits at Milwaukee, Wisconsin on March 29, 30, April 6, 7, 13, 14, 20, 21, 27, 28, May 4, 5, 11 and 12, 1991 (System File C-12-91-C080-03/8-00061 CMP).

(2) The Agreement was further violated when the Carrier failed 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, Maintenance of Way and Structures Department employees D. R. Hendricks, R. F. Willms, J. A. Davis, Sr., J. D. Bingmon, P. D. Zehel, G. P. Morales, M. D. Diaz, J. L. Hern, L. Vaughan, A. M. Kloth and D. C. Hoover shall each be compensated, for an equal proportionate share of the five hundred and twenty (520) hours at their respective straight time rate of pay and forty (40) hours at their respective time and one-half rate of pay for the time expended by the outside forces performing the work in question."

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 were given due notice of hearing thereon.

The Organization argues that the Carrier violated the Agreement by engaging a contractor in March-May 1991 to perform clean-up work involving removal of spilled grain and scrap material within the Carrier's Milwaukee Yard and by failing to provide notice of intention to have this work performed by a contractor rather than by Maintenance of Way forces.

Upon full examination of the record, this dispute appears to be virtually identical with a 1989 occurrence reviewed in Third Division Award 30115, involving the same parties. That Award concluded as follows:

"Therefore, the Board is compelled to conclude from this record that the Organization has not demonstrated that the type of cleanup 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 contracted 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."

Finding no significant differences in the 1989 occurrence and the incident here under review, the Board has no basis to reach a contrary conclusion.

The Board, however, must comment on the Carrier's extensive discussion in its Submission of the issue of exclusivity. This may well be appropriate in determining which class or craft of the Carrier's employees is entitled to certain work. As held in numerous Awards, however, an exclusivity test (as contrasted with custom, practice or tradition) is not applicable in cases involving restrictions on contracting to outside forces. It is worth noting that Award 30115, accepted as a valid precedent here, makes *no mention of a requirement of exclusivity*.

The Board also finds no substance in arguments raised here concerning the timeliness of responses within the claim handling procedure and notes that such is not raised in the Organization's Statement of Claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 4th day of March 1997.