

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32351
Docket No. MW-31918
97-3-94-3-241**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of he Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned or otherwise allowed outside forces (Liberty Fence Company) to dismantle and reinstall new reflectorized cross-buck signs and posts at various grade crossings on the Soo Line corridor between LaCrescent and New Port, Minnesota beginning September 3 through October 9, 1992 (System File C-38-92-C080-09/8-00107 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above:**
 - (A) the crew members of Hastings Section Crew #36F shall each be compensated at their respective rates for an equal proportionate share of the forty (40) man-hours expended by the outside forces working at the locations cited within the initial letter of claim during the period in question;**
 - (B) the crew members of Red Wing Section crew #36E shall each be compensated at their respective rates for an equal proportionate share of the fifty-six (56) man-hours expended by the outside forces working at the**

locations cited within the initial letter of claim during the period in question;

- (C) the crew members of Wabasha Section crew #36C shall each be compensated at their respective rates for an equal proportionate share of the fifty-two (52) man-hours expended by the outside forces working at the locations cited within the initial letter of claim during the period in question;
- (D) the crew members of Winona Section Crew #35L shall each be compensated at their respective rates for an equal proportionate share of the one hundred four (104) man-hours expended by the outside forces working at the locations cited within the initial letter of claim during the period in question;
- (E) the crew members of LaCrosse Section Crew #35J shall each be compensated at their respective rates for an equal proportionate share of the thirty-two (32) man-hours expended by the outside forces working at the locations cited within the initial letter of claim during the period 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 above stated claim is clear. The Organization alleges that the Carrier violated the Scope of the Agreement by permitting outside forces to remove old railroad crossing signs and install new reflectorized signs. It argues that the work is that of the employees and its assignment to an outside contractor was within the Carrier's control. The Organization continuously argued, as in its October 29, 1992 correspondence, that the work was historically, traditionally and customarily Maintenance of Way work since "the invention of the horseless carriage." It argued that the Carrier had removed the work without bargaining "in good faith" as required by Agreement.

The Carrier argued that the work herein disputed was not protected by Agreement. Specifically, that although the employees may have performed the work, they did not do so on an exclusive basis. Even further, while the employees did not have the exclusive right to perform the work, the Carrier noted that it was not the Carrier's work in dispute. It indicated in numerous correspondence that the state mandated the work which was not performed at the Carrier's request, under its direction or for its benefit. The Carrier stated that the work performed by Liberty Fence Company was ordered by the state in their attempt to have a single contractor perform all of the work. The work performed was part of an agreement between the Minnesota Department of Transportation and the contractor and did not involve the Carrier.

The burden of proof for the instant claim belongs to the employees. They must initially demonstrate that the work herein contested belongs to the employees and is encompassed by the Scope of the Agreement. Throughout this claim, the Carrier continued to assert that the work did not belong to the employees. In its initial declination of December 18, 1992, the Carrier stated that the work was not exclusively reserved. It continued to argue that although the employees may have performed similar work, it was not done on "an exclusive-wide basis". The Carrier consistently requested evidence that the work was Scope protected. In its final declination, the Carrier stated that the Organization had never responded with proof that the disputed work was historically, customarily and traditionally performed by Maintenance of Way forces. The Board must agree. We have carefully reviewed the Rules and record. We find no proof in any form that would constitute the requisite burden. Even the statements from employees do not attest to the instant work belonging to the craft or performed thereby. Nor do we find any dispute that similar work was performed by the Carrier in North Dakota in 1984. Accordingly, the claim must be denied.

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 13th day of November 1997.