Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32704
Docket No. MW-32316
98-3-95-3-150

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 (Haley Brothers Construction and A. L. Baker Construction Company) to perform Track Subdepartment work (road crossing rehabilitation at Fruitridge Avenue in Terre Haute, Indiana) beginning August 23 through September 17, 1993 (System File C-89-93-CO80-09/8-00153 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 referred to in Parts (1) and/or (2) above:

(a) Claimant J. W. Roach shall be compensated for all lost time and lost work opportunities as designated in Attachment #1-A to our initial letter of claim*.

(b) Claimant J. D. Wilcoxen shall be compensated for all lost time and lost work opportunities as designated in Attachment #2-A to our initial letter of claim*.

(c) Claimant E. W. Lemmons shall be compensated for all lost time and lost work opportunities as designated in Attachment #3-A to our initial letter of claim*."

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.

During the period from August 23 through September 17, 1993, Carrier retained two independent contractors to supplement its covered workforce in accomplishing major rehabilitation of a 120 foot section of road crossing with several tracks intersecting Fruitridge Avenue in Terre Haute, Indiana. The record suggests that in addition to the ten BMWE employees assigned to the project, the subcontractors supplied two back hoes, a heavy dump truck and three Operators to augment Carrier's regular equipment and forces. The work performed by the combined team consisted of removing timber, blacktop road surface, rail ties, ballast and sub-ballast; excavation and replacement of the sub-ballast; replacement of ties and rail; and the installation of technologically enhanced "star trek" cement panels.

On October 19, 1993 the Organization filed this claim seeking payment for lost time on behalf of the above three Claimants. All held seniority in covered positions within the Carrier's Maintenance of Way Department, and were working at lesser pay rates as extra Gang Laborers when the disputed work was performed. The claim alleged

violations of the Scope Rule and Appendix I of the Agreement by subcontracting and failing to provide prior notification of its plans to contract out work that had been historically reserved to employees within the Maintenance of Way craft.

By its letter dated December 14, 1993 from Division Manager D. J. Lyons and ensuing correspondence, Carrier denied the claim, asserting that the work in question was not exclusive to covered employees; that neither the Scope Rule nor Appendix I requires notification unless the work is exclusively reserved; that in any event this specific project had not been approved until August 11, 1993; that the contractors worked in conjunction with company forces; and that all Claimants were fully employed during the period in question, suffered no loss, and in any event were unavailable for the work in dispute.

Rule 1 - SCOPE reads as follows:

"Rule 1 - SCOPE

The rules contained herein shall govern the hours of service, working conditions, and rates of pay of the employes in the Maintenance of Way & Structures Department represented by the Brotherhood of Maintenance of Way Employes but do not apply to supervisory forces above the rank of foremen. These rules do not apply to employes 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 as is practicable and in any event not less than 15 days prior thereto.

* * *

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 of the Agreement, consisting of correspondence from the Carriers' bargaining arm to the then President of the Organization, reads in pertinent part:

"During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work. . . .

* * *

The carrier expressed the position in these discussions that the existing rule in the [National Agreement], properly applied, adequately safeguarded work opportunities for their employes 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.

* * *

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

* * *

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 employes."

Based upon its review of this ample record, the Board finds that although the Organization has failed to establish the essential elements of its claim, it sets forth a violation of the Agreement with respect to Carrier's notice obligations under Appendix I, as discussed below.

The Scope Rule in this instance is general in nature; it does not expressly reserve the work at issue to the Claimants. Our conclusion in that regard is forced by the above-quoted language of the Agreement, and echoes prior Awards in disputes involving these parties and these issues. See, e.g., Third Division Award 28574. We further find that the Organization has not demonstrated on this record the type of consistent and uniform past practice of exclusively performing major crossing rehabilitation that might arguably lend credence to its interpretation of the rule and give a contrary meaning to its plain terms. Indeed, its own correspondence with the Carrier, protesting the filing of 63 subcontracting grievances over the past ten years, while swatting aside the acquiescence defense, appears to undercut the exclusivity argument it now proffers. So too do vast tracts of the statements it sponsors from its members complaining about persistent work on the property by outsiders over the years, and asserting that the necessary skills for much of the work farmed out is available among the Carrier's workforce.

The qualifications or willingness of the Carrier's Track Sub-Department personnel to operate back hoes or drive dump trucks are obviously not at issue here. The question is whether the Scope Rule or Appendix I gives the BMWE the rights to exclusive performance. On that point, the Organization has failed to meet its burden in establishing that the work claimed is exclusively reserved to them by the Agreement or by past practice.

Does the Carrier's conduct here comply with Appendix I? We find it does not. The Carrier maintains that Appendix I has no application unless the Organization establishes it has exclusive right to the work claimed. But no such qualifications, limitations or refinements appear on the face of Appendix I, and numerous Third Division cases have rejected that assertion. Third Division Award 28622, for example, held:

> "... Whether or not Carrier ultimately prevails on the merits of the dispute, it is our conclusion that it may not make a predetermination on the subject by ignoring the notice requirement when there is a valid or

colorable disagreement as to whether the employees customarily performed the work at issue. That was our conclusion in Award 28619, as well as Third Division Awards 26174 and 23578."

Subcontracting the work in question, based on this record, did not violate the Agreement. But doing so without giving a timely notice to the Organization affording it an opportunity to be heard disturbs the letter and spirit of Appendix I, which imposes upon Carrier an obligation to make good faith efforts to reduce contracting out. The Carrier never joins that issue, never pleads objective factors such as emergency or other unusual circumstances for weighing by the Board in deciding whether its decision to bypass the Organization was warranted. Rather, it argues that "since the rule in question allows for the contracting anyway, even if a notice is not served, a decision [by the Board] cannot be based on the failure to give notice alone."[1]

Carrier knew, or should have known, it could not rest easy on that theory, having been down this path more than once. Third Division Award 29547, rendered a few years earlier, considered a very similar subcontracting incident in which Carrier assigned an outside excavation company to assist with rehabilitating a street crossing in Winona, Minnesota, and other work. In that instance, Carrier contracted for a tractor, Bobcat, front-end loader and dump truck, together with an Operator, and defended its action on precisely the same basis as asserted here. The Board found a violation, denied compensation, but "direct[ed] that the carrier provide notice in the future." In failing to comply with that Award or show cause why it could not, Carrier here acted at its peril. Accordingly, the Board finds that under the circumstances, the claims for backpay are justified. The Carrier is directed to review its records and compensate the Claimants on the basis of eight hours each at their then Laborers' rate for each day they

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[1] Although the Awards on whether exclusivity ought to play any role in analyzing subcontracting issues under Scope provisions appear badly split and the authority on that question unsettled, the notification required by Appendix I cannot logically hinge on whether the work to be farmed out is exclusively reserved to the class claiming it. If exclusivity must be established before notice is required, notice would never be given, because if the cases prove anything it is that the parties never agree on exclusivity. And secondly, if that is to be the test, how does the Organization ever have an opportunity to make a showing of exclusivity without being alerted to Carrier's plans. The notice must precede the showing; no other formulation can work.

were available on the dates cited in the claim during which the contractors performed work on Carrier's Fruitridge Avenue crossing.

AWARD

Claim sustained in accordance with the Findings.

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 19th day of August 1998.