Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35504
Docket No. MW-34695
01-3-98-3-345

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Louisville and
(Nashville 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 (Dillard Construction Company) to perform Track Subdepartment work of clearing trees, brush, moving and leveling dirt, applying approximately four inches (4") of sub ballast, digging ditches, laying culverts and applying fertilizer/grass seeds as needed between Mile Posts K-665.0 and 667.2 on the P&A Seniority District from March 5 through April 1, 1997 [System File 23(7)(97)/12(97-1712) LNR].

(2) As a consequence of the aforesaid violation, '. . . N. Trawick and W.E. Rogers should be allowed eight (8) hours straight each for each date of March 5 through April 1, 1997 and four (4) hours time and one half each for each date of March 5 through April 1, 1997 at the foreman's respective straight time and time and one half rates of pay. A. Martin, G. R. Smith, J. E. Dixon, C. W. Dixon, J. L. Tharp, M. W. Madden, C. McDonald and M. L. Kent should be allowed eight (8) hours straight time and four (4) hours time and one half each for each date of March 5 through April 1, 1997 at the machine operator's respective straight time and time and one half rates of pay.'"

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.

On March 4, 1997, the Carrier issued a Notice of Intent to contract out the preparation work necessary to install a passing siding at OOK-666, PD/P&A Subdivision, Avalon, Florida. In pertinent part, the Notice set forth the following:

> "The contractor (Dillard Construction Company) will utilize front-end loaders, motor graders, rollers and dump trucks; backhoes, tampers, regulators, spike drivers and anchor machines. Carrier does not have available, particularly with the start up of the System Production Teams, the necessary equipment to accomplish the work in a timely manner. Additionally, there are no furloughed employees on the Pensacola District, Track or Bridge and Building Subdepartments."

On that same day, the Parties discussed the Carrier's Notice, and although the Organization protested the Carrier's plan to contract out work "which members of the BMWE should be allowed to perform," the General Chairman agreed to waive the 15-day notification period. The grading work began the following day, March 5, 1997.

Before the project was completed, on March 19, 1997, the Organization filed an objection to the work being performed, contending that the Carrier was not in compliance with the December 11, 1981 Letter of Agreement. The Organization further contended that the Carrier was not acting in good faith, and should have hired new employees and/or rented equipment to allow the Claimants to perform the grading work.

Shortly thereafter, the Organization submitted the claim noted above, maintaining that Dillard Construction Company employees performed work that the BMWE was "contractually" entitled to. In support of that position, the Organization submitted a statement, signed by numerous BMWE - represented employees, all of whom contended that they had "always built new trackage."

The Carrier declined the claim, contending that (1) the Organization had not claimed work of this type in the past (2) the subject work did not historically accrue to Maintenance of Way employees and (3) the subject work was not covered under the Scope of the Agreement. The Carrier went on to reiterate that each of the Claimants was working a regular assignment and suffered no wage loss. Finally, the Carrier asserted that it had "rightfully initiated" the project under Rule 2(e) of the Agreement, and if the General Chairman had "objected so vehemently" to the project, he would not have waived the requisite 15 day notification period.

The Organization claims that the grading and roadbed preparation work performed by Dillard Construction Company rightfully accrues to the Claimants. For its part, the Carrier asserts the work does not accrue exclusively to this, or any other craft. In these circumstances, we must concur with the Carrier. The Scope Rule, which the Organization primarily relies upon, does not describe specific work accruing to BMWE forces, but rather sets forth the hours and working conditions of employees of the payroll classifications named therein. In fact, there is no Agreement Rule that affords BMWE - represented employees or any other class, exclusive rights to the primary duties in dispute.

In that connection, numerous Third Division Awards involving the same parties and similar circumstances have held that the Carrier may contract work if it does not possess the necessary equipment, or if it does not have adequate manpower. (See, for example, Third Division Awards 15011 and 16629.) It is not necessary for both conditions to be present in order for the Carrier to contract out projects such as the one in dispute.

On March 4, 1997, the Carrier properly notified the General Chairman of its intent to contract out the work in dispute. The record reveals that it is not work that accrues exclusively to Maintenance of Way employees, nor, in these specific circumstances, is it work that the Claimants "normally" perform. The Carrier did not

possess the special equipment necessary, nor the expertise to perform the work. Based on those facts, this claim is 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 21st day of June, 2001.

LABOR MEMBER'S DISSENT
TO
AWARD 35504, DOCKET MW-34695
(Referee Murphy)

The Majority faced a difficult task in this case because the record as it was developed on the property was less than clear. We are cognizant of the fact that the parties are to develop the record in a clear and concise manner to enable the neutral member to make a finding based on the handling on the property. Unquestionably, this record did not fall into that category.

Nevertheless, the Organization must raise an objection to two aspects of this award. First, the Majority embraced the exclusivity test in this case. This Board has consistently held that the Organization was not required to prove this work exclusively accrued to the employes. Evidence thereof is found in **Award 32160** involving these parties wherein the Board held that such a test was not a requirement of the Organization. **Award 32160** held:

> "The Carrier raises the argument of 'exclusivity'; that is, the Organization did not show that employees it represents have performed the work to the exclusion of all others. This argument has been shown repeatedly and convincingly to be non-determinative in contracting matters (appropriate as it may be in disputes between various crafts and classifications)."

In light of the above award, this Board has consistently held that such a standard simply was not a burden that the Organization was required to meet.

Second, the Majority's finding that Rule 2(e) somehow relieved the Carrier of assigning its employes to perform this work is clearly without merit. Rule 2(e) was modified by the adoption of the December 11, 1981 Letter of Agreement. Said Agreement put an added requirement on the Carrier to reduce the instances of outside contracting and increase the use of Maintenance of Way employes. The Majority's citation of Awards 15011 and 16629 in an attempt to justify its reasoning to apply Rule 2(e) is misplaced because those awards were rendered prior to the adoption of the December 11, 1981 Letter of Agreement. Inasmuch as the December 11, 1981 Letter of Agreement put an added requirement on the Carrier to reduce the use of outside contractors rendered those awards obsolete. Such a position has consistently been applied by this Board as evidenced by **Award 30977** wherein the Board held:

> "*** Whether 'specialized tools and equipment' were in fact necessary for these particular projects is a matter which Carrier could have and should have explored with the General Chairman in the good faith discussions required by Article IV and the December 11, 1981 Letter Agreement. ***"

The Organization argued on the property that work of the character involved in this dispute had been customarily and traditionally performed by the Carrier's Maintenance of Way employes and presented evidence thereof through statements of active employes. Inasmuch as the Carrier never refuted the statements, nor did it ever present evidence that it had contracted out this type of work in the past, gave the Organization a "colorable claim to the work." Award **30977**. However, the Board asserted that under a general Scope Rule, the Organization must show that it has performed this work historically and traditionally to the exclusion of all others. That test, if it has any validity at all, has been applied to class or craft disputes. See Third Division Award **32160**, cited supra.

Therefore, I dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member