Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36903
Docket No. MW-36332
04-3-00-3-528

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Grand Trunk Western Railroad Company, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way machine operator work (operate grader) to grade right of ways and service roads in the Lansing Yard on June 6, 1999 (Carrier's File 8365-1-678).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the work described in Part (1) above as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, class 2 Machine Operator M. McVay shall be compensated for eight (8) hours' pay at his respective straight time rate 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.

The claim of the Organization is that the Carrier had an outside contractor operate a road grader, grading right-of-ways and service roads on June 6, 1999 in Lansing Yard. The Organization maintains that the work is scope protected and was performed by the Carrier without proper advance notice to the Organization.

The Carrier denies that any work was performed by a contractor on June 6, 1999. It further argues that the alleged work was not protected under the Scope Rule to the employees because it was not work which was exclusively performed. Because it was not scope protected, notice was not required.

During the progression of this claim, the Carrier asserted that its records indicated that no work was performed on June 6, 1999. It did however note that it found a paid invoice for grading work performed on June 3, 1999 and the instant claim was for the wrong date. Additionally, the Carrier's final response was argued as coming too late for consideration by the Board.

A careful review of the total record convinces the Board that the Carrier's final response must be considered. The Organization submitted a letter dated August 7, 2000 arguing that the date of June 6, 1999 was the correct date of the occurrence of an outside contractor doing grading and that it was Scope protected. It included a statement asserting that:

> "I, Dan Petrous, have witnessed BMWE MofW GTW Machine Operator B. Rathbun, W. H. Franklin, W. Johnson H. Rowell, Grade Right aways [sic] & Road on Railroad property. I have also done grading."

That letter was followed by the Organization's August 17, 2000 notice of intent to the Board. The Board stamped receipt of the notice of intent on August 18, 2000 and the record was thereby closed. However, the Carrier submitted a letter of response to the above statement and Organization letter of August 7, 2000 dated August 18, 2000. There is no dispute in subsequent correspondence over the postmark or date of the Carrier's letter being the same date of receipt by the Board of the notice. There is also no evidence in this dispute demonstrating that the Carrier would have received notification of the Organization's notice of intent prior to sending its response to the Organization's August 7, 2000 letter advancing new evidence and argument. Therefore, the record was not closed. The Carrier's letter is not untimely and will be considered. All subsequent letters will be considered improper.

As for the evidence and dispute at bar, we find no indisputable proof to support the Organization's position for two independent reasons. First, the Carrier denies any work performed on the date of June 6, 1999. This denial is immediate by the District Engineer and is unchanged throughout this claim. This denial continues long after the one employee's statement that, "On June 6, 1999, I witnessed one road grader grading side roads and service roads along side tracks in Lansing Yard." Even if we rejected the Carrier's June 3, 1999 date and invoice of June 4, 1999 thereof, and we most certainly do not deny its inclusion herein, we would not accept this as sufficient proof that work was performed on the date disputed. We cannot resolve a dispute on dates with this minimal and rebutted evidence and consider such as irreconcilable.

Secondly, it is the Organization's burden to establish that the work at issue was scope protected work. The Scope Rule before us does not list "rights-of-ways" or "service roads" as protected work. The classifications of Machine Operator include neither "road grader" nor "road grader operated grading rights of ways and service roads." Because it is not work included in the negotiated Agreement language, the Organization must prove that the work is traditionally and historically work performed by BMWE-represented employees. The statement from the employee does not say that he has operated a road grader to grade rights-of-ways and service roads. Nor does he state that this work was traditional or historical work performed throughout this property by BMWE-represented employees. His statement does not reach the level of persuasion necessary to prove

that this was work ordinarily performed by the BMWE-represented employees. Accordingly, we do not find the proof necessary that this was scope protected work.

Based upon our careful analysis, the Board must reject the claim. There is an insufficient factual base to conclude that scope protected work was performed on June 6, 1999 in this record.

## 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 25th day of February 2004.