Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37394
Docket No. MW-36936
05-3-01-3-579

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Lakehead Contractors) to perform Maintenance of Way work (operate backhoe to work with the undercutter and to excavate roadbed for installation of Geo Grid) on June 9, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 27, 28, 29, 30 and July 5, 6, 7, 12, 13 and 14, 2000 (Claim No. 24-00).

(2) The Carrier further violated the Agreement when it failed to properly notify and confer with the General Chairman concerning its intent to contract out the above-referenced work as required by Supplement No. 3.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the senior B-Operator from the Steelton Section shall now be compensated for all hours expended by the outside forces in the performance of the aforesaid work 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.

As the statement of claim alleges, this dispute involves issues of notice as well as the propriety of the Carrier's contracting of the track work in question. Contracting of work on this property is governed by Supplement No. 3, which reads as follows:

"SUPPLEMENT NO. 3
Contracting of Work

(a) The Railway Company will make every reasonable effort to perform all maintenance work in the Maintenance of Way and Structures Department with its own forces.

(b) Consistent with the skills available in the Bridge and Building Department and the equipment owned by the Company, the Railway Company will make every reasonable effort to hold to a minimum the amount of new construction work contracted.

(c) Except in emergency cases where the need for prompt action precludes following such procedure, whenever work is to be contracted, the Carrier shall so notify the General Chairman in writing, describe the work to be contracted, state the reason or reasons therefore, and afford the General Chairman the opportunity of discussing the matter in conference with Carrier representatives. In emergency cases, the Carrier will attempt to reach an understanding with the General Chairman in

conference, by telephone if necessary, and in each case confirm such conference in writing.

(d) It is further understood and agreed that the Company can continue in accordance with past practice the contracting of right-of-way cutting, weed spraying, ditching and grading."

It is undisputed that the Carrier issued a general notice of its intention to contract work by letter dated March 27, 2000. That notice included references to ". . . excavating . . ." and ". . . track undercutting with production undercutter." The parties held a conference on the contents of the notice on April 20, 2000. In his May 1, 2000 confirmation letter, the General Chairman wrote, in Item 11 of his letter, "The undercutter will be allowed providing they perform main line undercutting."

The instant dispute arises out of the Carrier's additional use of a large tracked-backhoe to remove excess ballast from the shoulders of the roadbed ahead of the undercutter to improve the speed and efficiency of the undercutter to minimize the closure of the mainline.

The threshold issue is whether the Carrier gave proper notice of its intent to contract the backhoe portion of the undercutting project. The record shows the parties to be at loggerheads on this point. The General Chairman maintains that the work was "excavation" that was not discussed in connection with the undercutting. The Carrier, quite to the contrary, maintains that the work included the installation of Geo Grid, which is a material used to improve the drainage and stability of the mainline roadbed. As such, the disputed work constituted permissible "ditching and grading" that is recognized by Supplement No. 3(d). In addition, the Carrier maintains that the backhoe work was discussed in conference with the General Chairman as a courtesy even though Supplement No. 3(d) did not require notice for the work.

Whether notice was required or not, the instant record presents us with an irreconcilable dispute of material fact. The Organization maintains that notice was not given, nor was the backhoe work discussed in connection with the undercutting. The Carrier asserts that notice was given and the backhoe work was discussed in

conference with the General Chairman. The appellate role of the Board provides us no effective means to resolve such disputes of material fact. Moreover, the March 27, 2000 notice letter did reference both "excavation" and "undercutting." Therefore, we must find that the Organization has not satisfied its burden of proof to establish a notice violation.

In dealing with the propriety of contracting the work in dispute, no Agreement provision has been cited that explicitly reserves the work to Carrier forces. Although the Organization's ex-parte Submission cited additional provisions, the on-property record alleged only that Rule 26(I) was violated by the Carrier's action. It is well-settled that new matters, whether they are new factual assertions or new contentions, may not be considered by the Board if they were not previously raised between the parties during the development of the record on the property. Nonetheless, we note that the parties' Agreement contains a general Scope Rule and Rule 26 is merely a classification of work Rule. The cited provisions do not provide any explicit language that reserves the work in dispute to Carrier forces.

When the applicable Scope Rule is general, as this one is, the Organization must establish scope coverage by providing probative evidence demonstrating that Carrier forces have historically, regularly, and customarily performed the work in dispute. This record provides no such evidence. Indeed, the Carrier's assertions that such work has been performed by contractors in the past was not effectively refuted by the Organization on the property. In addition, Supplement No. 3(d) recognizes that the parties' past practice of ditching and grading may be continued. Whether those terms are to be construed narrowly or broadly was not established on this record.

Given the state of the record, when taken together with the foregoing discussion, we do not find a violation of the Agreement to have been proven.

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 24th day of February 2005.