Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37518
Docket No. MW-36985
05-3-01-3-558

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Terry's Trucking Co.) to perform Maintenance of Way machine operator work (haul track equipment) from Pontiac, Michigan to Flat Rock, Michigan on April 28, 2000 (Carrier's File 8365-1-732).

(2) The Agreement was violated when the Carrier assigned outside forces (Terry's Trucking Co.) to perform Maintenance of Way machine operator work (haul ballast regulator) from Pontiac, Michigan to South Bend, Indiana, on April 28, 2000 (Carrier's File 8365-1-729).

(3) The Agreement was violated when the Carrier assigned outside forces (Terry's Trucking Co.) to perform Maintenance of Way machine operator work (haul track equipment) from Pontiac, Michigan to Battle Creek, Michigan on May 5, 2000 (Carrier's File 8365-1-730).

(4) The Agreement was violated when the Carrier assigned outside forces (Terry's Trucking Co.) to perform Maintenance of Way machine operator work (haul track equipment) from Pontiac,

Michigan to Homewood, Illinois on May 9, 2000 (Carrier's File 8365-1-731).

(5) The Agreement was violated when the Carrier assigned outside forces (Terry's Trucking Co.) to perform Maintenance of Way machine operator work (haul track equipment) from Milwaukee Junction at Detroit, Michigan to Battle Creek, Michigan on September 29, 2000 (Carrier's File 8365-1-736).

(6) 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 Parts (1), (2), (3), (4) and (5) above, as required by the Scope Rule.

(7) As a consequence of the violations referred to in Parts (1) and/or (6) above, Class II Machine Operator D. Nelson shall now be '. . . compensated ten (10) hours, plus all credits and benefits due to the aforementioned violations which created a loss of work opportunity.'

(8) As a consequence of the violations referred to in Parts (2) and/or (6) above, Class II Machine Operator G. Coleman shall now be '. . . compensated ten (10) hours, plus all credits and benefits due to the aforementioned violations which created a loss of work opportunity.'

(9) As a consequence of the violations referred to in Parts (3) and/or (6) above, Class II Machine Operator G. Coleman shall now be '. . . compensated ten (10) hours, plus all credits and benefits due to the aforementioned violations which created a loss of work opportunity.'

(10) As a consequence of the violations referred to in Parts (4) and/or (6) above, Class II Machine Operator D. Nelson shall now be [compensated] '. . . for eight (8) hours straight time and four (4) hours overtime. *** plus all credits and benefits due to

the aforementioned violations which created a loss of work opportunity.'

(11) As a consequence of the violations referred to in Parts (5) and/or (6) above, Class II Machine Operator R. Merrow shall now be '. . . compensated eight (8) hours overtime, plus all credits and benefits due to the aforementioned violations which created a loss of work opportunity.'"

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.

This dispute concerns the Carrier's use of outside forces to transport certain equipment on the dates and circumstances set forth in the claim without prior notice to the Organization.

The Scope Rule from the May 18, 1998 Agreement reads, in relevant part, as follows:

"These rules shall be the agreement between Grand Trunk Western Railroad Incorporated (the Company) and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employes, engaged in work generally recognized as Maintenance of Way work, such as, inspection,

construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and roadbed, and work which as of the effective date of this Agreement, was being performed by these employees, and shall govern the rates of pay, rules and working conditions of such employees. This paragraph shall neither expand nor contract the respective rights of the parties, nor infringe upon the contractual rights of other railroad crafts, in effect on the date of this agreement.

In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. 'Emergencies' applies to fires, floods, heavy snow and like circumstances.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith."

The Carrier's position is set forth in its July 24, 2001 letter:

". . . Both prior to and after 1990, other than GTW/BMWE forces have consistently transported track machinery without complaint from your Organization. . . ."

In a similar dispute decided in Third Division Award 37069, the Board held:

"The Carrier maintains that the May 18, 1998 Scope Rule was effectively a 'maintenance of the status quo' provision that froze the

parties' rights as of that date. It notes that the Rule goes on to clarify that it did not expand or contract the respective rights of the parties in effect on that key date.

The Carrier also asserted that it had consistently contracted out the hauling of track machinery without notice to the General Chairman for many years prior to May 18, 1998. The invoices it supplied for the evidentiary record show that it was doing so in 1998 and for several years earlier without objection by the Organization. Thus, by past practice, the Carrier maintains that it had the right, as of May 18, 1998, to contract out such work without notice. Distilled to its essence, in its view, such work was not work within the scope of the Agreement for either notice or reservation of work purposes.

On this record, the Organization had the burden of proof to establish the validity of its claim. Given that scope coverage, for notice and reservation of work purposes, was squarely placed in issue by the parties' assertions, it was incumbent upon the Organization to offer actual proof to support its claim. It did not provide any evidence of past performance around the key date of May 18, 1998 nor any date earlier than the year 2001.

As noted, the Carrier's evidence shows that outside contractors were consistently used to haul track machinery on or about May 18, 1998 as well as several years earlier. Moreover, the record is clear that the Organization neither required nor even requested notice of such contracting in that time frame. There is simply no competing proof to the contrary on either of these points. In addition, the Carrier provided evidence to show that the Organization had sought modifications to the Scope Rule, in subsequent bargaining, to reserve machinery hauling; it was unsuccessful in achieving these modifications.

Given the foregoing state of the evidence in this record, we conclude that the Carrier had the right, as of May 18, 1998, to contract out such machinery hauling and to do so without having to satisfy the

notice requirement of the Scope Rule. Nothing in the Scope Rule has been changed to diminish that right since then."

Third Division Award 37069 is not palpably in error and must govern this dispute. The record in this case stands in the same state as the facts described in Third Division Award 37069. For purposes of stability, we are obligated to follow that Award.

The claim will therefore 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 24th day of May 2005.