Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37618
Docket No. MW-36598
05-3-01-3-103

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington
(Northern 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 (Hexom Earth Construction) to construct road bed from Mile Post 74.81 to Mile Post 75.23 for an extension of the White Earth Side Track at White Earth, North Dakota on June 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27 and 28, 1997. (System File T-D-1374-H/MWB 97-10-09AJ BNR).

(2) The Agreement was further violated when the Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces to the extent practicable, including the procurement of rental equipment and operation thereof by its employes as required by Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Group 2 Machine Operators R. A. Ponzer (grader), M. L. Eide (loader) D. D. Zodrow (crawler dozer), G. E. McDanald (scraper), M. V. Renner (scraper), A. M. Schwindt (crawler excavator), R. J. Viall (truck driver) and W. S. Genre (section foreman) shall each be compensated eighty (80) hours' pay at their respective straight time rates of pay

and eighty–eight (88) hours' pay at their respective time and one-half rates of pay. Claimants E. D. Sauer (truck driver), K. J. Strabbe (truck driver), L. J. Viall (truck driver), K. L. West (truck driver), G. D. Kudma (truck driver), J. L. Tracey (truck driver), R. L. Dean (truck driver), K. L. Berg (truck driver), H. W. Johnson (truck driver), J. D. Hamel (truck driver), D. L. Marmon (sectionman) and T. M. Nordloef (sectionman) shall each be compensated twenty-four (24) hours' pay at their respective straight time rates of pay and eighteen (18) hours' pay at their respective 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.

Claimants R. A. Ponzer, M. L. Eide, D. D. Zodrow, G. E. McDanald, M. V. Renner and A. M. Schwindt hold seniority as Group 2 Machine Operators within the Roadway Equipment Sub-department of the Maintenance of Way and Structures Department. Claimants R. J. Viall, E. D. Sauer, K. J. Strabbe, L. J. Viall, K. L. West, G. D. Kudman, J. L. Tracey, R. L. Dean, K. L. Berg, H. W. Johnson and J. D. Hamel hold seniority as Truck Drivers in the Bridge and Building (B&B) Sub-department of the Maintenance of Way and Structures Department. Claimant W. S. Genre holds seniority as a Section Foreman and Claimants D. L. Marmon and T. M. Nordloef hold seniority as Sectionmen in the Track Sub-department. All were regularly assigned and working as such in the vicinity of White Earth, North Dakota, on the date that the instant dispute arose.

On December 1, 1996, the Carrier provided Notice "as information" to the General Chairman of its plan to contract for the construction of roadbed from Mile Post 74.81 to Mile Post 75.23 for an extension of the Side Track at White Earth, North Dakota. On December 11, 1996, the General Chairman requested a conference to discuss the matter, during which the Carrier indicated that its notice was informational only.

The Organization contends that the Agreement was violated when the Carrier assigned Hexom Earth Construction to construct the aforementioned roadbed on June 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27 and 28, 1997. First, it claims that the Carrier did not act in good faith because at the time that the conference was held, the Carrier had already intended to contract out the relevant work. Therefore, the conference was futile. Second, the Organization claims that it was improper for the Carrier to contract out the above-mentioned work, which is work that is properly reserved to the Organization.

According to the Organization, the Carrier had customarily assigned work of this nature to BMWE-represented employees. The Organization further claims that this work is consistent with the Scope Rule. According to the Organization, the Claimants were fully qualified and capable of performing the designated work. The work done by Hexom Earth Construction is within the jurisdiction of the Organization and, therefore, the Claimants should have performed said work. The Organization argues that because the Claimants were denied the opportunity to perform the work, they should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the work contracted out was that of roadbed construction, which the Carrier contends does not belong to BMWE-represented employees under either the express language of the Scope Rule or any binding past practice. According to the Carrier, controlling precedent involving these very same parties and identical issues has upheld the Carrier's position. Further, as to the alleged violation of Rule 55, the Carrier asserts that while it is obligated to confer with the Organization if a conference is requested, it is nonetheless permitted to contract out the work.

We find that the Carrier gave proper notice to the Organization of the proposed contracting and that it acted within the confines of the Agreement. We find that the Agreement provides that a conference must take place within a set time period. Beyond that requirement, the Carrier is not precluded from contracting out.

In Third Division Award 37365, the Board held:

> ". . . the Board concludes that proper notice was timely served, and in accordance with the General Chairman's written request of May 3, 1999, the parties subsequently discussed this matter in conference. The Board holds that the notice was not deficient and provided a basis for the parties' discussion of the contracting situation referenced therein. Thus, there is no evidence that the Carrier failed to satisfy the notice and conference requirements, or that the Organization was not given a full opportunity to discuss the contracting work addressed. . . .
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> Further, in Award 20 of Public Law Board 4402, Referee Benn stated:
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> . . . The Organization misplaces the burden of demonstrating the existence of good faith or lack thereof. This is a contract dispute. As such, before the burden is shifted to the Carrier to demonstrate that its actions were in good faith, the initial burden is upon the Organization to make a showing that he Carrier acted in bad faith."

Thus, we find that the Notice was sufficient and was not issued in bad faith.

Next, we reach the issue of whether the work in question has been customarily and traditionally performed by BMWE-represented employees. In Special Board of Adjustment No. 1016, Award 150, the Board framed the scope issue as follows:

> "In disputes of this kind, the threshold question for our analysis is that of scope coverage. There are generally two means of

> establishing scope coverage. The first is by citing language in the applicable scope rule that reserves the work in dispute to the Organization represented employees. The second method is required when the language of the scope rule is general. In that event, the Organization must shoulder the burden of proof to show that the employees it represents have customarily, traditionally and historically performed the disputed work. It is well settled that exclusivity of past performance is not required in order to establish scope coverage vis-à-vis an outside contractor."

In the instant case, we carefully reviewed all evidence regarding whether the Organization proved that the work involved belongs to the Organization. First, we note that the work of constructing roadbed is not specifically identified in the Scope Rule.

We next turn to whether there is sufficient evidence for the Organization to have proven that it has customarily, traditionally and historically performed the disputed work. In the instant case, while the Organization presented some evidence to show that the work in question belonged to BMWE-represented employees, that evidence is insufficient for the Organization to meet its burden of proof. See Third Division Award 37365, as well as Public Law Board No. 4402, Awards 20 and 28.

Further, in Award 1 of Public Law Board No. 6537, the Board held as follows:

> "Claimants contend that they were improperly deprived of work opportunity to perform maintenance of way work operating various equipment during the construction of a siding extension at Palos, Alabama between Mile Posts 710.85 and 715.18. . . .
>
> This work was performed by outside contractor forces.
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> * * *
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> According to the Organization, 'The character of work involved here is that which has been historically, traditionally, and

customarily performed by the Carrier's Maintenance of Way employees throughout the Carrier's property. . . .'

The Carrier defended the propriety of its assignment, contending that the disputed work was not within the exclusive jurisdiction of the bargaining unit represented by the Organization, and that similar projects had often been outsourced to contractors in the past.

* * *

. . . the Board's evaluation of the propriety of the assignment of many aspects of this project to non-bargaining unit forces employed by outside contractors rests on the Board's determination that similar work has historically been performed on the Carrier's property by outside contractors on many occasions, thus precluding a finding of exclusivity of jurisdiction for the bargaining unit over the disputed work in the instant case. The Third Division of the NRAB has held similarly in Cases No. 36280, 36282, and 36283, among others. The holdings in these cases, especially as they involve the same parties as the instant case, afford valuable precedent for the finding herein.

Grading of road bed and compaction of substrate have not been routinely assigned to bargaining unit employees in all cases. Moreover, the portion of the work involving laying and installation of track, work traditionally within the expertise of the bargaining unit, was assigned to bargaining unit employees."

Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the work of constructing roadbed is either definitively encompassed within the plain language of the Scope Rule or that the Organization has been able to prove that this work has customarily and traditionally been performed by members of the Organization.

Thus, having determined that the notice was proper and that the work was not within the scope of the Agreement, we find that the Organization has not met its burden of proof and the claim is therefore 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 19th day of October 2005.

LABOR MEMBER'S DISSENT
TO
Award 37618, Docket MW-36598
Referee Bierig

The Majority erred in its findings in this Award and a Dissent is in order. The Majority erred in its interpretation of the Scope and notice provisions of the Agreement, based its findings on award precedent not applicable on this property and ignored the precedent that is applicable between these parties.

This case involved the Carrier's decision to contract out the construction of roadbed for the extension of a side track at White Earth, North Dakota on June 16 through 28, 1997. The Organization presented ample evidence during the on-property handling to show that such work is reserved to the employes covered by the collective bargaining agreement. As such, the Carrier was bound by the Note to Rule 55, the notice provisions of this Agreement, as follows:

> "NOTE to Rule 55: **The following is agreed to with respect to the contracting of construction**, maintenance or repair **work**, or dismantling work **customarily performed by employes in the Maintenance of Way and Structures Department:**
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> **Employes included within the scope of this Agreement**--in the Maintenance of Way and Structures Department, including employes in former GN and SP&S Roadway Equipment Repair Shops and welding employes--**perform work in connection with the construction** and maintenance or repairs of and in connection with the dismantling **of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service**, and work performed by employes of named Repair Shops.
>
> By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, **such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces**. In the event that the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization 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, except in 'emergency time requirements' cases. 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 representative 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."

A review of the above-cited Agreement language reveals that the parties agreed that all work customarily performed by the employes covered by the Agreement is reserved to them and the Carrier could not contract out any work unless it met the exceptions listed within the Note to Rule 55. Sounds pretty simple to me, however, the Majority went out of its way to apply precedent that had no application to this property. Instead, the Majority opted to cite three (3) awards in support of its decision to deny this case. Those awards are Third Division Award 37365, involving this Organization and the interpretation of the Union Pacific Agreement, Award 150 of Special Board of Adjustment No. 1016, involving this Organization and the interpretation of the former Conrail Agreement and Award 1 of Public Law Board No. 6537, involving this Organization and the interpretation of the St. Louis-San Francisco Agreement.

Noticeably absent in citation within the Award was the Board's previous findings of Award **36015** involving these same parties and a contracting dispute involving the construction of a road bed. This Award was presented to the Board during oral arguments. If the Majority had bothered to read Award **36015**, it could not have made the erroneous statement that:

> "Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the work of constructing roadbed is either definitively encompassed within the plain language of the Scope Rule or that the Organization has been able to prove that this work has customarily and traditionally been performed by members of the Organization."

Had the Majority in this instance taken the time to read Award **36015**, it would have been hard to come to the findings that it did. This is true because the Board held in Award **36015**, that:

> "First, the kind of work contracted to Saunders (hauling and establishing grades) is work that is 'within the scope of this Agreement' and is 'customarily

"'performed' by covered employees. The hauling and grading work described in this dispute is classic Maintenance of Way work.

Second, the Organization need not demonstrate that employees exclusively performed that work. See Third Division Award 32862 ('. . . exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims.'). See also, Public Law Board No. 4402, Award 21 and cases cited ('. . . the Organization need not demonstrate that the work performed by outside forces had previously been "exclusively" performed by the covered employees, but the Organization must show that work was "within the scope" of the Agreement and "customarily performed" by the employees.).

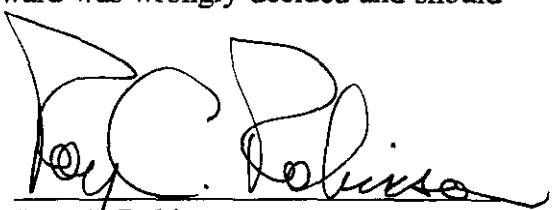
Third, under the Agreement language, '[i]n the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. . . .' [emphasis added]. Because the work falls 'within the scope of the Agreement' and is 'customarily performed' by those employees, the Carrier was obligated ('shall') to give notice. The Carrier did not do so.

Fourth, the Carrier's failure to give the Organization notice of its intent to contract the work frustrates the process of discussions contemplated by notification language. See Third Division Award 31280:

> 'The function of the notice is to allow the Organization the opportunity to convince the Carrier to not contract out the work. Therefore, that opportunity to convince the Carrier to not contract out the work was prevented by the Carrier's failure to give notice.'

Fifth, the Carrier's assertions that there was an emergency and that it was required by the City of Randall to perform the work do not change the finding of a violation of the Agreement. Beyond those assertions, the Carrier has not factually established the existence of an emergency or conditions that the Carrier did not have control of the work so as to permit the Carrier to avoid its notice obligations under the Agreement. Third Division Award 32862, supra ('The burden rests with the Carrier to demonstrate the existence of the emergency . . . nor are we persuaded that the Carrier did not have sufficient control over the project. . . .')."

A review of the findings of the Board as cited in the above-cited Award reveals that it is in stark contrast to the findings at issue here. The Board in this case should have attempted to show how the findings in this case were somehow different than the findings in Award **36015**. Of course the Majority in Award **37618** did not do so, much to the detriment of the well-established principle of this Board that precedent involving parties to a dispute should be followed. Because of the erroneous findings of Award **37618**, this award was wrongly decided and should not be followed.



Roy C. Robinson
Labor Member