



Award No. 16640

Docket No. MW-17485

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
NORTHERN PACIFIC RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned the work of dismantling a 490 foot section of the east end of the freight house at Fifth Avenue West, Duluth, Minnesota, to forces outside the scope of its Agreement with the Brotherhood of Maintenance of Way Employees.

(2) (a) Machine Operator G. J. Radosevich be allowed pay at the Front End Loader Operator's rate for a number of hours equal to that consumed by outside forces in operating a front end loader.

(b) Machine Operators C. M. Carlson and V. W. Klingelhofer be allowed pay at the Crawler Tractor Operator's rate for an equal proportionate share of the total number of man hours consumed by outside forces in operating crawler tractors.

(c) Machine Operator W. H. Braynard be allowed pay at the Crane Operator's rate for a number of hours equal to that consumed by outside forces operating a crane.

EMPLOYEES' STATEMENT OF FACTS: The State of Minnesota had acquired that portion of land upon which the westerly 510 feet of the Carrier's freight house was situated at Fifth Avenue West, Duluth, Minnesota. A highway construction project required that this part of the freight house be abandoned and removed. The Carrier requested the General Chairman to approve the assignment of the work of dismantling this part of the freight house to a contractor. The General Chairman concurred with the Carrier's request and an agreement was reached as follows:

"May 6, 1966

Mr. C. O. Morehouse, General Chairman
Brotherhood of Maintenance of Way Employees
516 Northwestern Federal Building
Minneapolis, Minnesota 55403

J. G. Radosevich - Front End Loader	- \$500.82 per month
C. M. Carlson - Crawler Tractor Operator	- 500.82 per month
V. W. Klingelhofer - Crawler Tractor Operator	- 500.82 per month
W. H. Braynard - Crane Operator	- 536.94 per month

Claim has been presented in behalf of J. G. Radosevich for payment of the number of hours consumed by the contractor in operating a front end loader in demolishing and removing the easterly portion of the freight house at Fifth Avenue West; in behalf of C. M. Carlson and V. W. Klingelhofer for payment of their proportionate share of the number of hours consumed by the contractor in operating crawler tractors in demolishing and removing the debris from the easterly portion of the Fifth Avenue West freight house; and in behalf of W. H. Braynard for payment of the number of hours consumed by the contractor in operating a crane in the work of demolishing and removing the debris from the Fifth Avenue West freight house, which claims have been declined.

OPINION OF BOARD: The principal issue to be resolved in this case is whether or not Carrier, by engaging the services of an outside, independent Contractor for the express purpose of dismantling its' abandoned freight house, stands in violation of the Scope Rule of the Agreement as well as a Special Letter of Agreement entered into by the parties on September 12th, 1962, the provisions of which were to become effective December 1st, 1962.

The record indicates that because of extensive highway construction in the Duluth, Minnesota area, that States' Highway Department acquired a portion of land upon which the westerly, 510 feet of the Carrier's freight house was situated. The highway construction required that this part of the freight house be abandoned and removed. Carrier thereupon requested the General Chairman to approve the assignment of the work of dismantling this part of the freight house to an outside, independent Contractor. The General Chairman concurred and an agreement was made as follows:

"May 6, 1966

Mr. C. O. Morehouse, General Chairman
 Brotherhood of Maintenance of Way Employees
 516 Northwestern Federal Building
 Minneapolis, Minnesota 55403

Dear Sir:

The matter of removing a portion of the freight house at 5th Avenue West, Duluth, has been discussed in conference with you on a number of occasions, being last discussed in conference on May 5:

The westerly 510 feet of the freight house at 5th Avenue West, Duluth, will be removed.

The particular facts necessitating the removal of this portion of the freight house were thoroughly discussed in conference.

The matter of contracting the work of removing the westerly 510 feet of the freight house at 5th Avenue West was considered in our

conferences and because of the particular facts involved, as discussed in conference, the following is agreed to:

The work of demolishing and removing the westerly 510 feet of the freight house at 5th Avenue West, Duluth, may be let to contract and be performed by contractor's forces without laying a foundation for time claims by Maintenance of Way Department employees.

Maintenance of Way Department employees will make the necessary repairs to that portion of the freight house at 5th Avenue West remaining after the westerly 510 feet have been removed.

This understanding is entered into because of the particular facts involved and will not be construed as establishing a precedent to be referred to by either party in any other case that may arise.

Yours truly,

/s/ G. M. Hare
Chief of Labor
Relations

AGREED TO:

/s/ C. O. Morehouse
General Chairman

Brotherhood of Maintenance of Way Employees"

The Carrier had originally planned to retain the easterly portion of the freight house leasing it to the Universal Carloading Company. However, Universal later decided against the lease, whereupon Carrier made a managerial determination to abandon and demolish this portion of the freight house. Carrier approached the General Chairman to obtain an Agreement similar to the prior Agreement quoted INFRA, relative to having an independent Contractor perform the work of demolishment. The General Chairman summarily refused.

It is the dismantling and demolishing of this easterly portion of the freight house that is the subject of this dispute. The Organization advances the contention that Carrier consequently has violated the Scope Rule and the Special Letter of Agreement dated September 12, 1962. This is quoted below "in toto";

"St. Paul, Minnesota
September 12, 1962

Mr. C. O. Morehouse, General Chairman
Brotherhood of Maintenance of Way Employees
516 Northwestern Federal Building
Minneapolis, Minnesota

Dear Sir:

The following is agreed to with respect to the contracting of construction, maintenance of repair work, or dismantling work customarily performed by employees in the Maintenance of Way Department:

Employees included within the scope of the agreement effective December 1, 1962 between the Northern Pacific Railway and the Brotherhood of Maintenance of Way Employees perform work in the Bridge and Building Sub-department and in the Track Sub-department of the Maintenance of Way Department 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 Railway Company in the performance of common carrier service.

By agreement between the Management and the General Chairman, particular work in connection with the construction and maintenance or repair of or in connection with the dismantling of tracks, structures or facilities in the Maintenance of Way Department, as described in the preceding paragraph which is customarily performed by employees described therein, may be let to contractors and be performed by contractors' forces, provided that when special skills, special equipment or special material are required, or when work is such that the Railway 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 Carrier's forces, should the General Chairman not agree to contracting such work, the Railway Company may, nevertheless, let such work to contractors and the dispute may be processed as a grievance or claim.

Nothing herein contained shall be construed as restricting the right of the Railway Company to have work customarily performed by employees included within the scope of the said agreement effective December 1, 1962 performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible.

This letter agreement will become effective December 1, 1962 and will continue in effect until changed in accordance with the procedures prescribed in the Railway Labor Act, as amended.

Yours truly,

/s/ G. M. Hare
Chief of Labor
Relations

AGREED TO:

/s/ C. O. Morehouse
General Chairman
Brotherhood of Maintenance of Way Employees"

As we view the issue at hand, the determining factor in this case is whether the above cited Special Letter of Agreement has the effect of enlarging upon the Scope Rule of the basic Contract to such an extent that a sustaining order would be warranted.

The Scope Rule itself is broad and general, merely listing the classification of employees covered and not describing the work to be performed. With such a

Rule, Petitioner has the burden of proving that he has performed the work historically, customarily, and traditionally to the exclusion of others. This is a fundamental principle which defies the necessity for expatiation.

Directing our attention to the Special Letter of Agreement, and specifically to the first paragraph thereof, the work intended to be covered by that Agreement was that work "customarily" performed by employees. In other words, Petitioner is in the same posture as he was when faced with the Broad, General Scope Rule. He must show that he "customarily" performed the work, and in line with the doctrine of "exclusivity," he must further show that he has so performed to the exclusion of others. There is no evidence in this record to sustain this position. We will deny the Claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of October 1968.