# Award No. 18967
# Docket No. MW-19106

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**Clement P. Cull, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when, without prior notice to the General Chairman as required by Article IV of the May 17, 1968 National Agreement, it assigned the work of cleaning cars at Yard Center to outside forces. (System File MW-6900).

(2) Trackmen S. Diaz and Pedro Rangel and/or their successors each be allowed eight (8) hours' pay at their respective straight time rate for each work day, beginning on March 1, 1969, that the violation referred to within Part (1) of this claim continues to exist.

(3) The Carrier shall also pay the claimants six percent (6%) interest per annum on the monetary allowances accruing from the initial claim date.

EMPLOYES' STATEMENT OF FACTS: The factual situation involved in this dispute is fully described within letters reading:

LETTER A

"April 23, 1969

Mr. H. Huffman, District Engineer
Chicago & Eastern Illinois Railroad Co.
646 Chicago Road
Chicago Heights, Illinois 60411

Dear Sir:

I am hereby protesting the termination of car cleaning work by members of Gang #210 and the assignment of such work to outside forces. The work of cleaning cars at Yard Center prior to March 1, 1969 was exclusively assigned to members of Gang #210. The undersigned has been in charge of this gang since 1933 and men under my supervision and jurisdiction have performed all of this car cleaning work prior to March 1, 1969. They also performed the same work prior to 1933 under the supervision of Section Foreman Joe Dascenzi.

(The statements referred to within the aforequoted letters "H" and "I" will be quoted within our "Position.")

Claim was timely and properly presented and handled by the Employes at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated May 15, 1953, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

**CARRIER'S STATEMENT OF FACTS:** There is attached as Carrier Exhibit "A" copy of letter addressed by the General Chairman to the District Engineer under date of April 23, 1969, filing claim in behalf of two track laborers, and/or their successors, for eight hours for each day on the premise the contracting of car cleaning work at Yard Center is a violation of the agreement. Yard Center, located at Dolton, Illinois, is Carrier's major yard and terminal in the Chicago area.

Attached as Carrier Exhibit "B" is copy of letter addressed by the District Engineer to the General Chairman under date of May 27, 1969, declining the claim for the reasons stated. One of the reasons stated is that the cleaning of cars has never been recognized as work falling within the exclusive jurisdiction of employes covered by the Maintenance of Way Agreement.

The General Chairman appealed decision of the District Engineer in letter dated June 19, 1969, copy of which is attached as Carrier Exhibit "C."

There is attached as Carrier Exhibit "D" copy of letter addressed to the General Chairman under date of August 15, 1969, declining the claim and pointing out, contrary to the allegations of the General Chairman, that the work of cleaning cars has never been performed exclusively by track department employes and that such work has never been recognized as falling within the exclusive jurisdiction of employes covered by the scope of the Maintenance of Way Agreement.

Attached as Carrier Exhibit "E" is copy of letter addressed to the General Chairman under date of June 30, 1969, confirming discussion in conference and reiterating statement that the work of cleaning cars has never been recognized as work falling within the exclusive jurisdiction of track department employes.

There is in effect between the parties hereto an Agreement, identified as Schedule No. 3, effective May 15, 1953.

(Exhibits not reproduced.)

**OPINION OF BOARD:** It is undisputed that Carrier assigned the work of cleaning cars at Yard Center to outside forces. Carrier defends this action by stating that such work was not reserved exclusively for the Petitioner. It is further admitted that such assignment to outside forces was made without written notice to the Organization as provided in Aricle IV of the May 17, 1968 National Agreement. Carrier contends that such notice was not required at it had not conferred exclusive jurisdiction of the work to Petitioner.

The Organization in its claim does not rely on its Scope Rule referring merely to Article IV. Article IV reads in relevant part as follows: "In the

event a carrier plans to contract out work within the scope of the applicable schedule agreement * * *."

It has been held in Award 18305 and followed in subsequent awards of this Division that the exclusivity concept is irrelevant in Article IV cases. We affirm Award 18305 herein as we did in Awards 18687 and 18714, and others.

Moreover, the record clearly reveals that the work in issue, cleaning cars, has been historically, traditionally and exclusively performed by Employes.

Thus the record shows a statement from the man in charge of the gang that it has performed this work since 1931. In its response Carrier, while admitting that track laborers did the work "from time to time" stated that it was at the same time being performed by "other crafts and individuals" and never performed exclusively by track department employes. There is nothing in the record to show that the "crafts or individuals" were employed by Carrier nor is there any evidence that Carrier had collective agreements which awarded this work to them under such agreements nor were the crafts ever named. The statement that the work had been done exclusively by Gang #210 for many years remained unrefuted. It was prima facie evidence of a historical custom and practice and the burden of coming forward with evidence to refute it shifted to the Carrier. Refutation of it required more than a mere generalized denial.

The same specific, competent and probative evidence was urged on Carrier at each succeeding step of the handling on the property but it was never rebutted. During the course of the handling on the property the Organization sent Carrier 8 signed questionnaires received from trackmen throughout the system. All stated that Maintenance of Way employes cleaned cars at their locations to the exclusion of others. The points covered by the questionnaire were located in Milford, Mitchell, Hoopeston, St. Elmo, Vincennes, Princeton, Mt. Vernon and Wansford. The record contains no refutation of the statements appearing in the questionnaires.

The Carrier in its submission received by this Board on January 28, 1971, as well as adhering to its previous assertion that the work was not exclusively reserved to Employes, lists four instances, one dating back to 1929, where it had contracted with outside forces for car cleaning. It also submitted a copy of a contract with one of these companies. Petitioner opposes receipt of the contract as new evidence not urged on Petitioner during the handling on the property. The Board agrees that such evidence is not admissible.

Having rejected as evidence the contract proffered in January 1971 we must consider the remaining three instances. None of these were urged upon Petitioner during handling on the property and it had no opportunity to refute them or to discontinue its claim if it was convinced of their applicability. In this regard, it should be noted that deviations from the norm do not constitute a practice.

The information urged on us by Carrier would put this Board in the position of relitigating the case at this level. That is not the Board's function. The Act contemplates full, frank and candid discussion and disclosure of relevant information during handling on the property as the best way to dispose of disputes at that level. This was not present here.

On the basis of the foregoing, and in the circumstances of this case, we find Petitioner has carried its burden and established exclusivity under its Scope Rule.

The vice in this case is the failure to notify and to discuss before subcontracting the work. We have found a violation on that issue. There remains for consideration claim (2) and (3) which seek straight time pay and interest for two claimants.

The failure to notify and discuss did not have an adverse effect on the bargaining unit in so far as the record shows. Whether there was a loss is a matter of fact. The record shows there were no lay-offs and no diminution in hours of work. On the contrary the individuals were regularly employed.

The parties did not provide for penalties for violation of Article IV where there was no loss of earnings nor does any other section of the agreement. Obviously, had the use of such outside forces resulted in loss an award of back pay to compensate for the loss would be made. In this connection the contract provides under Rule 34(d) that employes discharged in violation of the agreement will be "reimbursed for any loss of compensation." If back pay was awarded herein such a person therefore would be treated differently that the claimants who suffered no loss of pay.

There is building a respectable body of law and awards dealing with lost opportunities for employment. The law is still unsettled, however. the historic role of this Board has been to resolve disputes arising out of agreements. There is nothing in the agreement requiring payment of the monetary claims either as to Claim (2) and (3). Accordingly, they will be denied. (Award 18305 and others).

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 Employes involved in this dispute are respectively Carrier and Employes 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 violated.

AWARD

Claim sustained to the extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January 1972.

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