NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25564

THIRD DIVISION

Docket Number MW-25388

Frances Penn, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Detroit, Toledo and Ironton Railroad Company

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

(1) The Carrier violated the Ageement when, without benefit of "mutual agreement between the Chief Engineer and the General Chairman" it assigned the work of disposing of scrap ties in the vicinity of Tremont City to outside forces beginning May 3, 1982 (Carrier's File 8365-1-144).

(b) As a consequence of the aforesaid violation, the following named furloughed employes shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in the performance of the work referred to in Part (1) hereof.

Abercrobie, William G.	Bonner, Perry A.
Back, Vaughn	Bunker, David H.
Barrie, II, James A.	Clark, William M.
Beekman, Donald C.	Cross, Douglas K.
Bellman, Kevin R.	Glinke, Willard G.
Graham, Kenneth E.	Pitchford, David K.
Gulliver, Jerry J.	Redman, Mark A.
Heidner, John W.	Reforno, Mark A.
Herhager, David M.	Rose, Randall A.
Hughes, Thomas G.	Simpson, Thomas S.
Hussey, Richard Mac	Smith, Bernard S.
Hutchinson, Mark A.	Valicenti, Perry L.
Kritzwiser, Greg A.	Wesley, Linard P.
Larnhart, Richard M.	Wright, Sr., Arthur C.
Martin, Michael G.	Young, David A.

OPINION OF BOARD: This claim was filed on behalf of 30 furloughed track employes asking that they be paid an equal proportionate share of the total number of man hours paid to an outside Contractor by the Carrier. The Contractor was hired by the Carrier to dispose of used ties by burying them along the right-of-way. The work was done near Tremont City, Ohio, from May 5, 1982 through May 14, 1982, by one bulldozer operator. The Organization maintains that the Carrier violated several agreements between the parties by contracting out this work without reaching an agreement with the Organization and that the employes named were entitled to the work and available and able to perform it. The Organization cites the following rules of the Agreement dated April 1, 1942, and revised April 4, 1955:

"RULE 1 - SCOPE

"This agreement shall govern rates of pay, hours of service and working conditions of employees occupying all positions below the rank of supervisor in the Maintenance of Way and Structures Department listed in Memorandum of Understanding No. 1, which, with such amendments as may be made from time to time, is made part of this agreement. This agreement shall also cover similar positions which may be established."

"RULE 8 - SENIORITY, Paragraph (d) Group II

"(Note--A separate roster will be maintained for each of the following types of equipment.)

Machine Operator - First Class
Power Ballaster or Multiple Tampers
Crawler Crane
Burro Crane
Bulldozer
Jordan Spreader
Power Track Adzer
Spot Tamper
Ballast Regulator
Tie Master
Spike Master
Highway Truck Crane
On-Track Power Track Line
Machine Operator-Second Class
Trackman"

The Organization cites a letter to the General Chairman of the Organization dated February 28, 1955, from C. C. Straub, Vice President, Secretary and Treasurer, which states:

"It was also agreed that any future work ordinarily considered maintenance of way work on the Detroit, Toledo and Ironton Railroad will be performed by our own forces when practicable, and that when it is necessary to contract any such work we will confer with the General Chairman and all such contract work shall be by mutual agreement between the Chief Engineer and the General Chairman."

The Organization also cites a Letter of Understanding dated April 27, 1973, between the parties which, according to the Organization, applies to all Carriers, and requires agreement from the Organization before contracting out. This Letter reads in part:

"The problem of the contracting out of maintenance of way work affords a good example of what we think may be possible. We understand that it is the position of the organization that work should be performed to a maximum degree by railroad employees and that contracting out should be held to the minimum consistent with operating and maintenance practicalities, and that the achievement of this goal should not be thwarted through unnecessary depletion of skilled forces, abolishment of facilites, lack of proper training programs, or any other avoidable developments which generate the impetus for contracting out that would otherwise be unnecessary. Although Article IV of the May 17, 1968 Agreement recites that nothing in the Article 'shall affect the rights of either party in connection with contracting out,' at the same time the article is directed toward promoting agreement between the parties when specific problems arise on a railroad. We agree to the establishment of a Standing Committee to address itself to these problems, in light of the position of the organization, so that the purpose of Article IV can be achieved. The Standing Committee will not supplant the disputes machinery provided by the Railway Labor Act but will have as its central purpose the avoidance and settlement of misunderstanding before they reach the dispute level. The Standing Committee may also, where appropriate, agree on basic principles that should underlie the interpretation and application of the contracting out provision and encourage the parties to follow such principles...

"If the foregoing is in conformity with your understanding of our discussions as to paragraph (d) of Article V of the current agreement and as to Article IV of the Agreement of May 17, 1968, please signify your approval hereunder."

The Organization says the Carrier must accept the conditions set forth in this letter because it agreed to accept the April 27, 1973, National Agreement which differs from the May 17, 1968 National Agreement. The Organization also contends that the Carrier had no need to contract the work out because it did not own a bulldozer; according to the Organization, it could have rented one. The Organization also says the Carrier cannot claim that none of its employes was qualified to operate a bulldozer because the Carrier never canvassed its forces to determine if a qualified operator was available. The Organization maintains that a back hoe machine would have been appropriate and could have been operated by an Organization employe.

The Carrier contends that the tie burying work in question is not work ordinarily performed by Carrier employes and that the same kind of work had been contracted out previously without notice to or agreement from the Organization. According to the Carrier, none of the rules or agreements relied on by the Organization restrict the tie burying work to the Organization or prohibit the Carrier from contracting out the bulldozer work. The Carrier maintains that no bulldozer seniority classification exists and that the Carrier is not required to establish one or use unqualified employes to operate a bulldozer. The Carrier argues that the use of a back hoe machine would not have been practical or economical. Finally the Carrier states that the Memorandum of Understanding attached to the September 4, 1979 Agreement does not become effective until the parties adopt a single working agreement covering employes of the three (3) Carriers. Since no such agreement has been adopted, the Carrier argues, the agreement is not in effect. The April 27, 1973 letter is also not applicable because the National Agreement of May 17, 1968 does not apply to the DT&I Railroad, since the Organization chose to retain its present contracting out Letters of Understanding with the DT&I Railroad.

After a careful review of the entire record, the Board finds that the Organization has failed to produce any evidence to support its contention that the use of a bulldozer to bury tie butts is work that is ordinarily performed by Organization employes. The record clearly shows that no bulldozer classification exists, and there is nothing in the applicable agreements which requires the Carrier to establish one. Therefore, the Organization cannot claim the work done in this instance for its employes. Furthermore, the Board rejects the Organization's claim that the Memorandum dated September 7, 1979, regarding the contracting of Maintenance of Way work is applicable. This Memorandum, is not applicable. It is an attachment to the September 4, 1979 Agreement and which is not in effect because no single working agreement was agreed to by the parties. The Board also concludes that the April 27, 1973 Letter of Agreement is not applicable because the May 17, 1968 National Agreement does not apply to the DT&I Railroad. For the reasons stated, the Board concludes that the Agreements which are in effect have not been violated.

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 has not been violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of July 1985.