Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28803
Docket No. MW-27579
91-3-87-3-12

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Elgin, Joliet and Eastern Railway Company

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

(1) The Agreement was violated when the Carrier assigned outside forces to remove the approaches to the Liberty Street grade crossing at Eola, Illinois on October 7, 1985 (System File BJ-15-85/UM-42-85).

(2) The Carrier also violated Rule 6(c) (Article IV of the May 17, 1968 National Agreement) when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, B&B Foreman J. Valek, Carpenters R. Lass, O. Mannarelli, J. Chaney and Crane Operator G. Haggerty shall each be allowed eight (8) hours of pay at their respective rates."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

This case involves the subcontracting of certain work in connection with the repair of a grade crossing at Eola, Illinois. The Claimants all hold seniority in the Bridge and Building Sub-Department of the Maintenance of Way Department. The work was performed by an outside contractor, Crown Trygg Blacktopping, to remove the blacktop approaches to the Liberty Street grade crossing in preparation for its renovation by the Maintenance of Way Department. According to the uncontested assertions of Organization, the outside contractors spent a total of forty (40) man-hours performing the work in question.

The Organization contends that work of this sort has customarily, traditionally and historically been performed by Bridge and Building Sub-Department employees. In addition, the Organization contends that the work is reserved to employees in the department under the provisions of Rule 2(a), which reads:

"Rule 2 - Bridge and Building Sub-Department

(a) All work of construction, maintenance, repair or dismantling of building, bridges, including tie renewals on open deck bridges, tunnels, wharves, docks, coal chutes, smoke stacks and other structures built of brick, tile, concrete, stone, wood or steel, cinder pit cranes, turntables and platforms, highway crossings and walks but not the dismantling and replacing of highway crossings and in connection with resurfacing of tracks, signs and similar structures, as well as all appurtenances thereto, loading, unloading and handling all kinds of bridge and building material, shall be bridge and building work." (Emphasis added).

According to the Organization, the Carrier violated Article IV of the May 17, 1968 Agreement. That article requires the Carrier to notify the Organization's General Chairman in advance of any contracting out of "work within the scope of the applicable schedule agreement," and to meet with the General Chairman, or his representatives, to discuss the contracting transaction, if a meeting is requested. The Carrier did not give advance notice to the Organization in this case.

The Carrier argues, however, that the work in question is not reserved to the employees represented by the Organization and therefore there was no need for the Carrier to provide advance notice of subcontracting. It is clear from the record that the employees did not have exclusive rights to the work in question. The Carrier presented ample evidence to this Board that it had subcontracted out both the removal and the replacement of blacktop at highway approaches in connection with grade crossings or renewals. The Carrier also contends that the Organization occasionally contested the subcontracting of resurfacing in the past, but never the removal of blacktop. The Organization did not refute this charge, but contends that this evidence was never presented on the property. The Board concludes that the Carrier adequately incorporated this information on the property by reference to other pending cases on this same issue. See Third Division Award 27650, dealing with same parties and general issue.

The Organization contends, however, that it need not establish exclusive jurisdiction over work which clearly falls under the language of the scope provision of the Agreement. The scope language here refers to "highway crossings," and the work at issue here involved the public "approach" to a highway crossing. The land involved here is owned by the State of Illinois, not the Carrier, and it is the State which ultimately paid for the removal of the blacktop and resurfacing. Under these circumstances the Board concludes that the scope language of the Agreement is not so clear that it alone establishes the Organization's exclusive rights to the work in question.

On the other hand, the work would not have been necessary except for the action of the Carrier, and the Carrier assumed responsibility for seeing that the work was performed. Furthermore, the removal of blacktop from highway approaches could reasonably fall under the language relating to "highway crossings" in the Agreement. In this sense, this language differs from the very general work jurisdiction language cited in Third Division Awards 24508 and 25370, cited by the Carrier.

From this evidence, the Board concludes that although the Organization does not have exclusive rights to the work in question, it has demonstrated that it has the right to notice before the work is subcontracted. This position is supported by this Board's recent decision in Third Division Award 27650, involving the same Parties, Agreement and issue.

In that case, it was established that the employees represented by the Organization had performed the work in the past. Here, the Organization did not present evidence supporting this assertion. However, the Carrier did not dispute the claim on the property. Under these circumstances and because of the language of the Scope Rule and based on Award 27650, the Board concludes that the Organization has established a legitimate claim to the work so that the notice clause is triggered.

The Carrier argues that because the Organization has permitted other contractors to perform the work for a number of years without objection, its claim in this case is barred by laches. The Board concludes that whether one uses the term laches, or estoppel, the Organization cannot now claim a violation of the Agreement without first putting the Carrier on notice that it now intends to require advance notice in these cases. This is the position taken by this Board in Third Division Award 27650 involving subcontracting of blacktopping at railroad crossings, and there is no reason why the same logic should not apply here. Although it is not entirely clear from that decision whether the work in question involved removal or resurfacing of blacktop, the Board sees no reason why the same rationale would not apply to both activities.

Under these circumstances the Board is limited to directing the Carrier to provide notice in the future when contemplating subcontracting of this type of work. All other relief requested in the claim is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of May 1991.