Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29033
THIRD DIVISION Docket No. MW-29082
91-3-89-3-522

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (Former Missouri Pacific Railroad Comopany)

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

(1) The Agreement was violated when the Carrier assigned outside forces to cut weeds and grass around the yard office in Atchison, Kansas on June 28, 1987 (Carrier's File 870998 MPR).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Trackman M. F. Petesch and Machine Operator D. E. Pruitt shall each be allowed eight (8) hours of pay at their respective time and one-half 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.

As the Claim indicates, the work in dispute consisted of mowing the lawn and trimming the weeds around the Carrier's Atchison, Kansas yard office in June 1987. While the Carrier initially denied the Claim contending, among other things, that no Claimant possessed sufficient fitness and ability to safely and efficiently operate the equipment in question, it later changed its posture in this regard to characterize the work as trivial in nature in the sense that it was similar to ordinary lawn and yard work.

No notice was served pursuant to the contracting out provisions found in Article IV of the May 17, 1968 National Agreement. While Carrier admits it did not serve notice, it maintains that its failure to notify was a mere technical violation through oversight. Carrier contends that it had the right, nevertheless, to assign the work as it did because it has a customary and historical practice of contracting out such work.

The parties have raised a number of issues and counter-issues in this matter. Based on our review of this extensive record and the many prior Awards cited by both sides, we see the outcome in this matter turning on two primary issues: First, whether the work performed is within the Scope of the Agreement, and, second, if the work is within the Scope, whether the Carrier has rights to contract out the work by virtue of an established past practice.

The Organization contends that the employees have customarily and historically performed the kind of work in dispute. Despite the presence of a "general" type Scope Rule in the Agreement, the Organization says its evidence of customary and historical performance establishes that the work is reserved to the employees for performance to the exclusion of outside contractors.

Carrier, quite to the opposite, argues that it has customarily and historically had such work performed by outside contractors. It says that, in the presence of a "general" Scope Rule, such as the parties have here, prior Awards of this Board require the Organization to show evidence of exclusive past performance of the disputed work to establish Scope coverage. Carrier provided an exhibit, on the property, listing instances of contracting out weed and brush cutting work over a 20 year period.

The pivotal issue in this dispute is whether the work performed was within the Scope of the Agreement. The Scope Rule involved is a "general" type of provision in that it does not specifically describe the work of the various job titles it lists. Prior Awards of this Board, too numerous to require citation, have consistently held that a general Scope Rule imposes a burden on the Organization to prove that the work in question has been customarily and historically performed by the employees before a finding may be made that the work was reserved to them.

The precise nature of the burden of proving customary and historical performance is the subject of vigorous dispute. This Board is keenly aware of the sharp divergence of prior Third Division Awards regarding the "Exclusivity Doctrine." A substantial number hold that a showing of exclusive performance by the employees, to the exclusion of all others, is the only evidence sufficient to warrant a finding of customary and historical performance. Another substantial body of prior Awards requires something less than exclusive performance. Our careful review of two recent Awards involving these same parties suggests that similar divergence exists on this property. We read Third Division Award 28654, a January, 1991 decision involving bridge work, as an endorsement of the requirement to show past performance to the exclusion of all others. Third Division Award 28849, on the other hand, a June, 1991 decision regarding grade crossing work, seems to reject the "Exclusivity Doctrine" and finds Scope coverage. However, the Award ultimately denies the Claim for other reasons.

As we explained more fully in a companion case, Award 29007, our review of the Agreement and prior Third Division Awards suggests that the Exclusivity Doctrine is not an appropriate test for Scope coverage vis-a-vis employees and outside contractors. We concluded there, and affirm that judgment here, that evidence demonstrating something less than strict exclusive performance is sufficient to establish Scope coverage.

The record before us contains substantial evidence to describe the past performance of the disputed work by the employees. The evidence consists of detailed employee statements, photographs of Carrier owned equipment used for the disputed work, citation of a work safety rule governing operation of the equipment, job vacancy bulletins for operating such equipment and work distribution records showing weekly performance of the disputed work. Of added significance, however, is the fact that Carrier's listing of contracting instances does not contain any entries prior to the year 1960. Even if we apply the Exclusivity Doctrine for the sake of discussion, this record establishes that the employees performed the work exclusively prior to 1960. After 1960, the record convinces us that the employees have continued to do the work with the requisite regularity, consistency and predominance necessary to establish customary and historical performance. We conclude, therefore, that the Organization has established that the disputed work is covered by the Scope Rule.

We next turn to consideration of Carrier's claim of rights to contract the disputed work pursuant to a past practice. It is axiomatic that the party asserting the practice has the burden of proving the requisite elements of its existence. In its Submission to this Board, Carrier included extensive discussion about the elements of past practice. After careful review of this record, we find that Carrier has failed to satisfy its burden of proof.

Carrier contends that it has customarily and historically used contractors to perform the disputed work without protest from the Organization, and it listed examples of such purported activity. The Organization, however, says it had no knowledge of such instances, and our review of the record reveals no affirmative evidence that the Organization was given actual notice of the listed instances. We are, therefore, forced to infer from the numbers that the Organization simply must have known and acquiesced in the contracting out. The listing shows instances over 20 years for an average of less than nine instances per year on its system and just over once per year in each of the states it operated. Given the nature of the work and the size of Carrier's extensive system in several states, we do not find these numbers to be preponderant evidence that the Organization had actual knowledge of the contracting out and did not protest it.

We also find significant the fact that Carrier's listing contains no instances of contracting out the disputed work after 1979, a period of some eight years prior to the instant dispute. Whether this is the actual case or not, this record must be viewed as a demonstration that the employees have performed 100 percent of the disputed work since 1979. Moreover, the record says they have performed all of the disputed work since the issuance of the December 11, 1981 National Letter of Agreement whereby this Carrier, and others, undertook good faith efforts to reduce the instances of contracting out Scope covered work. This apparent abandonment of contracting out for several years is, in this regard, incompatible with Carrier's contention that it has customarily and historically contracted out the disputed work.

As a result of the foregoing findings, Carrier must be found, on these facts, to have improperly contracted out the work.

Carrier asserts, and the Organization does not deny, that one of the Claimants was fully employed on the day in question. The record does not support a finding of a lost work opportunity as to that Claimant. The other Claimant, however, was on furlough at the time and did, in our judgment, suffer a lost opportunity. In accordance with prior precedent of this Board regarding the nonpayment of the punitive rate for time not actually worked, this Claimant should receive the appropriate straight-time rate of pay and otherwise be made whole for his loss.

In light of our Award in this matter, we do not reach the merits of the several procedural objections raised by the Organization to the Carrier's Submission.

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 28th day of October 1991.

CARRIER MEMBERS' DISSENT
TO
AWARD 29033, DOCKET MW-29082
(Referee Wallin)

One portion of the Majority decision requires dissent, for educational purposes if for no other reason.

The Majority alludes to the Carrier's evidence of contracting out as covering a period of 20 years but not listing any instances after 1979. The Board assumes that such post-1979 omission must be taken as a demonstration that members of the Organization performed 100 percent of the work after 1979, and that such "abandonment of contracting out for several years is, in this regard, incompatible with Carrier's contention that it has customarily and historically contracted out the disputed work."

While we believe the "factual" conclusion reached by the Majority from the Carrier's failure to document contracting out instances after 1979 is subject to question, if not bewilderment,* the Agreement construction conclusions are far more disturbing.

The Majority appears to view evidence of past practice as establishing an <u>independent</u> source of an Organization's

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* No less bewildering is the Majority's "factual" conclusion that employees must have performed 100 percent of the work prior to 1960 because the Carrier provided no instances of contracting out prior to 1960. The Carrier believed, logically, that a past practice of <u>20 years</u> would be sufficient. It did not believe, logically, that a past practice of all recorded time was required.

right to claim work, wholly apart from the Scope Rule of the Agreement. Such view is totally erroneous.

The issue of past practice is relevant only to determine the proper interpretation of an ambiguous Scope Rule. If the Scope Rule is general in nature or contains ambiguous language, past practice is examined in an effort to determine what the parties intended to include within the Scope Rule. If past practice establishes a mixed practice of contracting out particular work, the result of such finding deprives the Organization from claiming the work because past practice shows that such work was not intended to be included in the Scope Rule.

Turning back to our dispute, the Majority infers that if the dispute had arisen in 1979, it might have denied the Claim because of the Carrier's past practice during the preceding 20-year period. We suggest that in the absence of a change in the Scope Rule since 1979, it cannot be that the Scope Rule meant one thing at that time, and another a few years later. If the Majority would have denied the Claim in 1979, it should have denied the Claim now.

M. W. Fingerhut

P. V. Varga

R. L. Hicks

J. E. Yost

M. C. Lesnik