NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 THIRD DIVISION Award No. 30088

Docket No. MW-30114

94-3-91-3-549

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

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

1. The Agreement was violated when the Carrier assigned or otherwise permitted outside forces (H. Stubner) to perform track maintenance work cleaning culverts and switches at Bolivar, Pennsylvania on the Pittsburgh Division beginning May 7, 1990, and continuing (System Docket MW-1369).

2. The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Vehicle Operator G.R. Bargerstock, Track Foreman J.A. Deluca and Trackman J.A. Thompson shall each be allowed eight (8) hours' pay at their respective straight time rates for each day the outside contractor performed the work beginning May 7, 1990, and as long as the violation continues."

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 employe 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.

Beginning on May 7, 1990, the Carrier engaged an outside contractor to clean culverts and switches at Bolivar, Pennsylvania, on the Carrier's Pittsburgh Division. This work was performed with a Hy-Rail Vacuum Truck that is owned by the contractor and was operated by the contractor's employees. The Organization asserts, and the Carrier does not deny, that no advance notice of the Carrier's intent to contract out this work was given to the Organization. Accordingly, the Organization claims this work was performed in violation of the Agreement's Scope Rule, which reads, in part:

> "In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. "Emergencies" applies to fires, floods, heavy snow and the like circumstances.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith."

The Carrier claims it was necessary to contract out this work because it did not own the specialized equipment required to perform this task. The Carrier also states it was unable to lease the equipment without being required to also use the equipment owner's operators. The Carrier further avers it has a history of contracting out such work.

We find the situation in this case similar to Third Division Award 29558 involving these same parties in which this Board held:

> "In this instance, the Carrier relies on long-established practice of contracting out this particular work. There is no clear prohibition to the Carrier's use of the special equipment, particularly in view of past practice in doing so. The Carrier also asserts that the Claimant,

who was otherwise fully employed at the time, was not qualified to operate such special equipment. Given these circumstances, the failure to provide advance notice is not sufficient to warrant the Claim.

Beyond and apart from the question of notice, the Organization has not established a clear Rule violation in these particular circumstances."

In the case herein, the Organization has not shown, either through a clear and unambiguous provision in the Scope Rule or through a system-wide history of the work being performed by covered employees to the exclusion of all others, that this work is within the scope of the Agreement. Accordingly, we find no violation of the Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 15th day of March 1994.

Docket 3
3rd Div.
4-4-94 Adopted.

LABOR MEMBER'S DISSENT
TO
THIRD DIVISION AWARD 30088, DOCKET MW-30114
(Referee McAllister)

This award is palpably erroneous and requires a dissent. The Majority reached its decision without benefit of evidence from the Carrier's on-property handling and then injected an issue which had been settled on this property years ago.

The Carrier defended against this claim by contending that specialized equipment was required and it had a past practice of contracting out this work. Notwithstanding that the Organization pointed out that the Carrier had a vehicle that could perform this work and that Maintenance of Way employes have customarily and historically performed this work, the Majority took at face value the Carrier's assertions that specialized equipment was required and it had a practice of contracting out this type of work. The record as developed on the property was void of any evidence of a past practice and the specialized equipment assertion boiled down to the size of the vehicle. Obviously, the Majority relied on assertion rather than evidence of probative value which renders this award palpably erroneous.

The Majority then goes on to compound its error when it held that the Organization must show that the work performed has exclusively been performed by its members to establish scope coverage. This issue has been before the NRAB for years and the consensus has been that "exclusivity" applies to class/craft

disputes (I believe that exclusivity should not apply in any type of case) and not to contracting out of work. The parties to this Agreement clearly understood that point as evidenced by the Addendum to Award 9 of Special Board of Adjustment No. 1016 which, in pertinent part, reads:

> "2. The partisan Board Members both stated the viewpoint that when the work in dispute is not explicitly mentioned in the text of the Scope Rule, the Organization, in order to prevail in said dispute, has the burden to show that the work was 'customarily and traditionally' performed by MW Employees. In view of these agreeing viewpoints it is appropriate to treat the proposed Award as meeting that standard, although a change in the Award is considered unnecessary; also, the parties can reliably regard said standard as applicable in their future submissions on contracting out disputes of the kind presented here."

This award is even more perplexing when consideration is given to this Referee's prior holding on this issue, i.e.:

> "This Board has consistently rejected the proposition that a Carrier must notify the General Chairman only when the work in question is exclusively reserved to the Organization. The language of Rule 41 and like provisions was written to provide the General Chairman an opportunity to discuss the circumstances of the contemplated assignment of work to outside contractors. In this matter, the Carrier has cited a number of Awards dealing with the jurisdictional right to a type of work. The exclusivity doctrine, however, applies when the issue involves a challenge to the Carrier's right to assign work to different crafts and/or classes of employees."

This Referee so held in Third Division Awards 26691, 26832, 28559, 28733 and 28735.

When consideration is given to the record as developed by the parties during the handling on the property and the "right field" finding on "exclusion", there can be no question but that this award is palpably erroneous.

I, therefore, dissent.

Respectfully submitted,

D. D. Bartholomay
Labor Member