Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32711
Docket No. MW-32157
98-3-94-3-581

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Grand Trunk Western Railroad Company (formerly
(The Detroit and Toledo Shore Line Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Toledo Lawn Care) to perform right of way mowing work around the Administration Building at Lang Yard, Mile Post 2, Toledo, Ohio on August 24, September 7, 13 and 20, 1993 (Carrier's File 8365-1-460 DTS).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plan to contract out the above-described right of way maintenance work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant O. Rose shall be allowed eight (8) hours' pay at his respective straight time rate, Claimant F. Hammac shall be allowed four (4) hours' pay at his respective straight time rate and Claimants B. Elmer and T. Neagley shall each be allowed two (2) hours' pay at their respective straight time 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 employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

The following facts are not in dispute. On August 24 and September 7, 13, and 20, 1993, Carrier used an outside contractor, Toledo Lawn Care, to mow the grass around the Administration Building at Lang Yard. Carrier did not give the General Chairman advanced notice of its intent to contract out this work. The determinative issue, over which the parties disagree, is whether this mowing was scope covered work. The Organization maintains that it is because mowing is specifically mentioned in Rule 52(b) of the Agreement. Carrier maintains that the Scope clause only covers mowing related to Carrier's right-of-way and does not extend to mowing around the Administration Building.

The issue is the subject of conflicting Awards. In Third Division Award 29878 (Referee Goldstein) the Board faced the identical issue involving the identical job, i.e., mowing around the Administration Building at Lang Yard. The parties took the identical positions. The Board wrote:

> "The initial dispute in this claim centers around whether the contracted out work at issue falls within the meaning of Article 52(b). Carrier contended that the mowing work referred to therein refers only to the maintenance of track area and therefore mowing around an office building would not be included. The Organization has argued that no 'bright line' can be or had been drawn parallel to the track structure beyond which work is no longer reserved to the employes; and that the building in question is located between two yard tracks within 25 feet distance on each side.
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> Since the Rule itself does not shed any light on the physical parameters of the track area and the work reserved therein to the

employes, evidence of past practice is helpful in determining the parties' intent.

In the instant case, Carrier has not refuted the statements proffered by employes during the handling of this dispute on the property regarding past practice except to say that the work has not been exclusively reserved to the Organization. However, this Board has consistently held that claims of exclusivity apply to work assignment or work jurisdiction disputes among crafts of the Carrier's own employes, and not to disputes involving outside contractors. Third Division Awards 13236; 25934. We find, therefore, that in this case the practice of the parties provides probative evidence in support of the Organization's case and that the Carrier violated the Agreement by failing to give prior notice and contracting out the work in question."

The next relevant Award to be issued was Third Division Award 31001 (Referee Marx) which involved the Elgin, Joliet and Eastern Railway Company, but comparable agreement language. The Board focused solely on contract language. It wrote:

"The Rule encompasses 'all work' which is in connection with the 'construction, maintenance or dismantling of roadway and track.' The Board has no basis to determine that this includes landscaping (mowing, garden work, etc.) fully removed from any 'roadway and track.'"

Thus, it appears that Awards 29878 and 31001 were decided on their facts. In Award 31001, there was no reason presented to the Board to determine that the mowing around the building in question was anything other than "fully removed" from the roadway and track. In Award 29878, the record indicated that the Lang Yard Administration Building was between two tracks within 25 feet distance on both sides and mowing around that area had previously been performed by Maintenance of Way employees.

The third relevant Award to be issued was Third Division Award 32018 (Referee Wallin) concerning this property. The Board was presented with claims over the contracting out of mowing around the Lang Yard Administration Building and the Edison Yard Office at Trenton, Michigan. The Board observed the conflicting results in Awards 29878 and 31001. With respect to Award 29878, he commented:

> "[A] careful reading of the decision reveals that the Board found Rule 52(b) to be unclear as to its coverage. As a result, the Board turned to evidence of past practice to clear up the ambiguity. The Board found that the Carrier had not refuted the statements about past performance proffered by employees during the handling of that matter on the property.
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> No such evidence is available in this record. After careful review of each of the four on-property records, we do not find any assertions that BMWE represented employees ever performed the disputed work. Nor are there any statements by employees describing past performance. In short, we have no evidence available in these four claim records to resolve the assertion deadlock over the factual issue concerning the scope coverage of the work."

With all due respect to Referee Wallin, we find that Award 32018 was only half correct. Where an issue has been decided on the property, the decision should be respected unless it is palpably wrong. Referee Wallin did not find Award 29878 to be palpably wrong. Instead, he distinguished it based on the factual records in the two cases. Such a distinction was proper with respect to the question of mowing around the Edison Yard Office. The issue of whether mowing around the Edison Yard Office was covered by Rule 52(b) was an issue of first impression. The Board in Award 32018 was presented with no evidence to suggest that the employees had ever performed that work. Consequently, the Board was correct in denying the claims with respect to the Edison Yard.

But the issue of mowing around the Lang Yard Administration Building had already been decided in Award 29878. There was no basis to distinguish the issue of whether mowing around the Lang Yard Administration Building was covered in Rule 52(b) presented in Award 32018 from the issue decided in Award 29878. Thus, the appropriate question for the Board in Award 32018 was not whether the Organization had duplicated the factual record that it had presented in Award 29878, but whether Carrier had carried its burden to show that Award 29878 was palpably wrong. There is nothing in Award 32018 to suggest that Carrier introduced any evidence suggesting that Award 29878 was palpably wrong, such as evidence that the employees had not performed the work in the past. Therefore, the Board should have followed Award 29878 with respect to the Lang Yard Administration Building.

The instant claim involves only the Lang Yard Administration Building. There is no evidence in the record to suggest that Award 29878's conclusion that past practice had the employees perform the work and that the work therefore was covered by the Agreement was palpably wrong. Accordingly, we find that Award 29878 controls the instant claim and that Carrier violated the Agreement.

The record does not reflect how many hours the contractor spent performing the work. Therefore, Carrier is directed to furnish a statement showing how many hours the contractor spent performing the work and to compensate the Claimants in a total amount equal to that number of hours at their respective straight time rates. Absent such a statement, the claim will be sustained as presented.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of August 1998.