

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33222
Docket No. MW-32112
99-3-94-3-507

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Houston Belt & Terminal Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned an outside contractor (W. T. Byler) to perform Maintenance of Way work (repaired crossing, cleaned out a ditch and installed rip rap for pollution control) at the Kirkpatrick Street crossing on June 28, 29, 30 and July 1, 1993 (System File H-4-93).
- (2) The Carrier also violated Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Agreement when it failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work and failed to make a ‘good-faith’ effort to reduce the incidence of subcontracting and to use its own forces to the extent practicable.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Machine Operator R. E. McKee shall be compensated at his appropriate rate of pay for all hours worked by the contractor on the dates in question.”

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.

On May 14, 1993, Carrier issued the following notice to the General Chairman:

"This notice is being served in accordance with the provisions of Article IV of the 1968 National Agreement concerning the HBT's intention to contract the use of various equipment under the Maintenance Contract with W. T. Byler.

The following equipment will be used periodically during the month of June to supplement the existing equipment and operations on the HBT:

Tandem Dump Truck
Grader
Track Hoe
Dozer
Tractor and Brushhog
Slope Mower
Backhoe

The HBT does not own equipment as listed above, nor do they have qualified personnel to operate same."

On May 17, 1993 Carrier met with the Organization in conference to discuss Carrier's Notice of Intent to contract the listed equipment. The General Chairman protested that the work being contracted out "belonged" to Maintenance of Way employees. Carrier countered the General Chairman's protest advising that the equipment noted supra had been "contracted out for over ten (10) years." The conference concluded with the understanding that Carrier would continue with the contracting as indicated in the May 14 notice and the Organization would grieve.

Commencing June 28, 1993, the disputed work began and on August 16, 1993 the Organization filed a claim reiterating its May 17 allegation that the work in dispute was "reserved" to Maintenance of Way employees on the HB&T. Further, if Carrier did not possess the necessary equipment, the General Chairman contended that it could be leased or rented. Finally, the General Chairman maintained that in addition to violating the Scope Rule, Carrier was in violation of the December 11, 1981 "letter of 'good faith' in which Carrier agreed to reduce subcontracting and to procure needed equipment and place Maintenance of Way Employees thereon to operate such equipment." In support of its position, the Organization provided Carrier with testimonials from several employees alleging that they had historically performed the work at issue.

Carrier denied the appeal, asserting that although Claimant may have operated a backhoe or Drott 45 in the past, he had not done so on an exclusive basis. In that connection, Carrier further asserted:

"Carrier has previously furnished you with evidence that contractors have performed this work for over ten (10) years on the HB&T, and such practice has been accepted by the Organization without objection. Attached is additional evidence which contains a sample of bills from various contractors for the years 1983, 1985, 1987, 1988, 1989 and you have already been furnished evidence from the years 1991 and 1992.

If any violation occurred, it occurred when the contractor began performing this work years ago and that is when the claim should have been filed. The agreement requires the claim to be filed within 60 days of the date of the occurrence and the Organization is clearly barred by the agreement from filing a claim at this late date."

The Scope Rule of the controlling Agreement states in pertinent part:

"Rule 1:

These rules govern the hours of service and working conditions of all employees, in the Maintenance of Way and Structures Department, not including supervisory forces above the rank of foreman. It is understood and agreed that this Agreement does not annul or conflict with existing Agreements in effect with other Organizations."

The Organization holds no Agreement with the HB&T which reserves the work in question to members of the BMW. The Scope Rule at issue is "general" in nature in that it does not list any specific work as being reserved for exclusive performance by employees represented by the Organization. Moreover, Carrier successfully supported the position that it has contracted this type of work to outside concerns for over ten years without the Organization's protest.

Numerous Awards of this Division have ruled that a Scope Rule of this nature does not per se grant exclusive ownership of the type of work which is in dispute. Reservation under such a Rule must be by longstanding custom, practice or tradition of performance to the practical exclusion of others. While Carrier did not deny that Claimant has operated a backhoe or Drott 45 in the past, it did establish that Claimant has not performed this work on an exclusive basis. On the uncontroverted facts of record, this claim lacks contractual support and must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of April 1999.