

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33938
Docket No. MW-32395
00-3-95-3-252**

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
(Burlington Northern Railroad

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Bridge and Building Subdepartment work (inspecting and classifying Company owned buildings) at Grand Forks, North Dakota on October 26, 27 and 28, 1993 (System File T-D-710-H/MWB 94-02-07H).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out said work as required in the Note to Rule 55.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Inspector R. K. Hamel shall be allowed twenty-four (24) hours' pay at his straight time rate.”**

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.

Sometime prior to claim dates, as part of a strategic "5-Year Plan," Carrier management entered into a contract engaging Commercial Restoration Services ("Contractor") to prepare a report with recommendations concerning Carrier-owned buildings throughout its system. On three days in late October 1993, as part of its system-wide analysis and evaluation, agents of the Contractor made on-site inspections, measurements and evaluations of certain Carrier-owned buildings located at Grand Forks, North Dakota. It is not disputed that the Carrier did not give the BMW General Chairman advance written notification prior to contracting for the performance of that work.

In this claim, the Claimant asserts entitlement to the performance of that work under the Scope Rule of the BMW Agreement and the General Chairman asserts an independent violation of the contracting-out notification requirements of the Note to Rule 55. At all times pertinent, the Claimant was employed at Grand Forks, North Dakota, in the classification of Bridge and Building Inspector. Rule 55, Classification of Work describes the work of the Claimant's classification in Section A (2), as follows:

"Bridge and Building Inspector

An employee responsible for inspecting buildings and bridges and other structures."

Authoritative precedent between these same parties holds that, standing alone, the Classification of Work Rule does not reserve work exclusively to employees of a given class or serve as a Scope Rule. See Third Division Award 24281 and Public Law Board No. 4104, Award 13. The general nature of Rule 1, the operative Scope Rule, requires proof of reservation of disputed work by clear and convincing evidence of system-wide performance, to the practical exclusion of others. See Public Law Board No. 2206, Awards 8 and 58. By dint of such authoritative on property precedent, including PLB 4768 Awards 2, 10, 12, 13, 15, 16, 17, 22, 26, 29, and 47, we must conclude that, under this Agreement, the customary performance requirement also resonates in the language of the Note to Rule 55:

“NOTE to Rule 55: The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employees in the Maintenance of Way and Structures Department:

Employees included within the scope of this Agreement - in the Maintenance of Way and Structures Department, including employees in former GN and SP&S Roadway Equipment Repair Shops and welding employees - perform work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service, and work performed by employees of named Repair Shops.

By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event that the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto, except in 'emergency time requirements' cases. 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 representative 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.

Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible."

The record in this case shows a "battle of affidavits" containing countervailing assertions between the Claimant and various Bridge and Building Department supervisors. At best, the evidence on this record shows no more than a "mixed practice," leaving unresolved the critical evidentiary issue of whether the particular work performed by the Contractor was reserved to Agreement-covered employees by a past practice of customary performance. Based on the forgoing, we conclude that the Organization failed to prove a violation of the Scope Rule or the Note to Rule 55.

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 22nd day of February, 2000.