

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35438
Docket No. MW-34311
01-3-97-3-901**

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
(Grand Trunk Western 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 to perform work of retiring the New Haven Passing Track from Mile Posts 33.3 to 31.5 and the #2 Elevator Track on the Mt. Clements Subdivision from March 19 through April 2, 1996 (Carrier's File 8365-1-545).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out the work in accordance with Article IV of the May 17, 1968 National Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman D. Bassler, furloughed Machine Operators R. M. Premo, C. H. Bowens, J. R. Campbell, Trackmen J. Ortiz, M. Sandlin and J. Wade shall each receive ten (10) hours of pay at their respective straight time rates for each date the contractor worked from March 19 through April 2, 1996 plus all credits and benefits.”**

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 threshold issue that must first be resolved in this case, and which was properly raised on the property, is whether the work in question falls within the scope of the Agreement for purposes of notice and/or performance. In developing their record on the property, the parties incorporated several earlier letters pertaining to similar work on the same Mt. Clements Subdivision.

It is well settled that scope coverage must be sufficiently established before the Carrier is required to provide notice of its work plans involving outsiders and before it is restricted from hiring outsiders to perform work. When scope coverage is in dispute, as it is here, the Organization must shoulder the burden of proof to establish its position.

Neither the record of handling on the property nor the parties' Submissions provide us with the actual text of the applicable Scope Rule. We are forced to conclude, therefore, that the Scope Rule does not explicitly reserve the work in question to employees covered by the Agreement. In the absence of such explicit reservation language, the Organization must establish scope coverage by providing proof of actual past performance of the disputed work by the covered employees. For entitlement to notice, that proof need only consist of at least one instance of past performance of the disputed work by the covered employees. For all other scope purposes, the level of proof required must show that the work in question has been historically, customarily and traditionally performed by the covered employees.

On this record, the Carrier asserted that historically track retirement work has been performed by other than covered employees. It also provided specific examples of such retirement work during the years 1989 through 1995 without objection by the Organization.

The Organization failed to cite even one specific example where covered employees have performed removal of materials from retired track. At most, the Organization asserted that covered employees have “. . . built and maintained . . .” track.

Because scope coverage has not been established on this record for any purpose, we must deny the claim without reaching any of the other issues raised by the parties.

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 26th day of April, 2001.