Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35769
Docket No. MW-34079
01-3-97-3-620

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
(Maryland and Pennsylvania 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 (Yellow Cab Company) to transport train and engine crews from York to Spring Grove and/or Spring Grove to York on September 22 and 29, 1996, instead of assigning System Foreman D. R. Allen to perform said work.

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with fifteen (15) days' advance written notice of its intention to contract out said work and failed to assert good-faith efforts to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as contemplated by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, System Foreman D. R. Allen shall be compensated for all hours expended by the Yellow Cab Company in transporting train and engine crews on September 22 and 29, 1996."

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.

This claim arose when the Carrier began using a taxi service to transport crews in connection with operating its Sunday coal trains. The substance of the claim, which was submitted in the Claimant's handwriting, is that the Claimant had performed this service for the past 13 years. The claimed past practice was supported via the signed statements of five other Carrier employees. Finally, the Organization asserted, in its October 15, 1996 appeal on the property, that the Claimant had exclusively performed the work for the 13-year period.

None of the Organization's foregoing assertions or evidence was refuted by the Carrier in its early responses on the property. Its position was wholly predicated on the lack of scope coverage. Accordingly, it conceded that it did not provide notice of its intent to begin using the taxi service. In its view, it was not required to do so.

In its final correspondence on the property, the Carrier asserted certain defenses for the first time. First, the Scope Rule, worded as it was, defined and limited scope coverage to the specific work examples listed after the words, ". . . such as. . . ." Because nothing relating to crew transportation was listed among the examples, the Scope Rule did not apply to such work. Second, the Carrier asserted that commercial taxis ". . . have been used and continue to be used by the Carrier to transport crews." Finally, the Carrier noted that it was not a participant in national bargaining. As a result, certain contentions raised by the Organization in its appeal did not apply.

The pertinent portion of the Scope Rule reads as follows:

> "B. These rules, subject to the exceptions herein, shall constitute the agreement between the Maryland and Pennsylvania Railroad Company hereinafter referred to as "Carrier," and its respective employees of the classifications herein set forth, represented by the Brotherhood of Maintenance of Way Employes, hereinafter referred to as "Brotherhood," engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repairs, and maintenance of bridges, culverts, buildings, and other structures, tracks, fences and roadbed or appurtenances thereto."

We do not agree with the Carrier that the wording of the Scope Rule clearly defines and limits its coverage to the specific work examples listed after the words, ". . . such as. . . ." Indeed, Third Division Award 29057 found similar language to be ambiguous and not limiting. There, as here, it is entirely plausible that the listed work functions are illustrative and not restrictive.

Given the ambiguity coupled with the absence of bargaining history evidence, it is proper to use past practice to ascertain what the parties intended when they extended scope coverage to ". . . work generally recognized as Maintenance of Way work. . . ."

On this record, it is readily apparent that the phrase includes what has been assigned to scope covered employees for 13 years to the exclusion of all outsiders.

Although the Carrier asserted, in its April 4, 1997 reply on the property, that commercial taxis had been used for crew transportation, this contention must be rejected. There was no proof of even a single instance where a taxi was used prior to the claim date. It is well settled that mere assertion, by itself, is not sufficient to rebut the Organization's evidence of exclusive past performance.

In the overall, therefore, we find the Carrier violated the Agreement when it failed to provide notice and when it contracted out the disputed work in the manner it did. These findings of violation, however, do not include any of the Organization's contentions that raise issues arising from national bargaining.

AWARD

Claim sustained.

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 24th day of October, 2001.

Carrier Members' Dissent
to Third Division Award
35769, Docket MW-34079

(Referee Wallin)

In the handling of the dispute on the property, the Carrier pointed out, with no dispute by the Organization, that the Scope Rule of the Agreement refers to specific work belonging to the Organization's craft which, by no stretch of language, would include the work of transporting train crews.

In addition, while the Organization points to Claimant transporting crews at this location, it does not dispute the Carrier's statement: "Commercial taxis have been used and continue to be used by the Carrier to transport crews." Indeed, the Organization has not argued, let alone submitted evidence, that anyone in the craft, other than Claimant, has ever transported crews at any Carrier location. It should be noted that the Scope Rule here is a position Scope Rule, not a position and work Scope Rule. In order to be valid as evidence of the intent of an ambiguous agreement the practice must be exclusive and systemwide.

The Carrier, on the property, explained the reason for its unusual use of the Claimant to transport train crews. The reason for Claimant's being assigned such duties came to an end and, accordingly, so did Claimant's assignment to such work.

The statements of employees submitted by the Organization, all of whom work at the specific location involved here, state nothing more than their preference to have Claimant perform the transportation because they believe it is faster and safer than transportation supplied by taxis. Such reasons can hardly require the result that the work is covered by the Agreement either with respect to the Scope Rule or the contracting rules of the Agreement.

The Majority decision cannot withstand the test of rationality and certainly cannot be considered precedent.

Martin W. Fingerhut

Martin W. Fingerhut

Michael C. Lesnik

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