Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37002
Docket No. MW-36521
04-3-00-3-766

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Grand Trunk Western Railroad Company, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Perrin Construction) to perform Maintenance of Way machine operator work (haul ballast) from Pontiac Yard to Flat Rock Yard on October 5, 12, 14, 19 and November 9, 1999 (Carrier's Files 8365-1-692 and 8365-1-703).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the work described in Part (1) above, as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Production Support Machine Operator G. Coleman shall be compensated for forty (40) hours' pay at his respective straight time rate of pay."

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 dispute involves the consolidation of two claims concerning the Carrier's use of a contractor to haul ballast in gravel hauler trucks from the Carrier's (GTW) Pontiac Yard to the Flat Rock Yard, a location within the territory of the Detroit, Toledo and Ironton (DT&I) Railroad. The Carrier, DT&I and the Detroit and Toledo Shore Line (D&TSL) operations have been consolidated into a single corporate entity owned by the Canadian National Railway (CN) but BMWE-represented employees continue to work under three separate Agreements with seniority territories defined by the former roads. It is undisputed that a Carrier employee loaded the contractor's gravel hauler truck at the Pontiac Yard and that the ballast was used by BMWE-represented employees to perform track maintenance work. These claims protest only the use of a contractor to haul the ballast between the two locations, and the Carrier's failure to give the Organization advance written notice of its intent to contract out this work.

The record contains evidence that there is a mixed practice of both BMWE-represented employees and contractors hauling ballast from the Carrier's Pontiac Yard to locations including the DT&I's Flat Rock Yard. The Carrier defended its failure to give notice and its contracting action on the basis that the work was not scope-covered, because it involved transporting material to a "foreign" territory, was not exclusively performed by BMWE-represented employees, all its equipment was being used and it was impractical to rent equipment for such a short period of time, and the Claimant was fully employed. The Carrier noted that its BMWE-represented employees only perform work on DT&I property by special agreement (Appendix O) which does not include hauling ballast or Truck Driver work. The Organization asserted that ballast was one of the main ingredients used by BMWE-represented employees to perform the track surfacing operation covered by Appendix O, and furnishing it to the job site is a necessary element incorporated into such work.

The Organization contends that this work has been held to be scope-covered in Third Division Award 35850 on this property, and that the Carrier's admitted noncompliance with its notice obligation violated the Agreement, requiring a monetary remedy, citing Third Division Awards 31658, 32107, 32338, 32560, 32699, 32711, 34981 and 35774. It posits that BMWE-represented employees customarily and historically perform this type of work and could have done so on these occasions.

The Carrier argues that there was no violation of the Scope Rule because hauling ballast from a location on GTW property to locations on other component railroads is not within the scope of its Agreement, nor has it been exclusively reserved to its BMWE-represented employees. It notes that Third Division Award 35850 involved both the loading and hauling of ballast solely on the Carrier's property, and is thus distinguishable from this case. The Carrier asserts that the Organization is attempting to expand the respective rights of the parties in effect on May 18, 1998 by claiming this work, because the Carrier is entitled to continue its established practice of contracting the hauling of ballast. The Carrier notes that the specific Agreement negotiated by the parties permitting use of certain equipment and positions on "foreign" property (Appendix O) does not encompass the work or positions in issue in these claims. The Carrier contends that the Organization failed to sustain its burden of proving that the work in issue is scope-covered, no notice was required, and the claims are excessive because the Claimant was fully employed, relying upon Third Division Awards 20920, 24853, 26676, 27040, 30675, 32214 and 35438.

A careful review of the record convinces the Board that the Organization met its initial burden of establishing that the hauling of ballast work between the Carrier's Pontiac Yard and locations outside of its territory such as DT&I's Flat Rock Yard is arguably covered by the Scope Rule, inasmuch as the record establishes a mixed practice of using both BMWE-represented employees and contractors to perform this work. As noted by the Board most recently on this property in Third Division Award 35850, the issue of exclusivity is not a proper defense in a contracting case. Thus, the burden shifts to the Carrier to establish why it was not required to comply with the notice provisions of the Scope Rule, and why its contracting was permissible in the circumstances of this case. While there may have been a valid basis for the Carrier to determine that it needed particular equipment unavailable to it for the amount of ballast hauling involved, or that it had prior rights to utilize a contractor in this case, the fact remains that it failed to

provide the Organization with the requisite advance notice of its intent to contract and an opportunity to discuss the possibility of having BMWE-represented employees perform the work in issue. As noted by the Board in Third Division Award 34981, this violation entitles the Claimant to monetary relief despite the Carrier's assertion that he was fully employed.

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 18th day of May 2004.