Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37046
Docket No. MW-36017
04-3-00-3-120

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Tom G. Greenauer Construction Co.) to perform construction of a water drainage system in Rochester Yard, New York on June 8, 9, 10, 11 and 12, 1998 (System Docket MW-5438).

(2) The Carrier further violated the Agreement when it failed to provide a proper advance notice of its intent to contract out the Maintenance of Way work described in Part (1) hereof.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Vehicle Operators R. J. Hawrelak, D. M. Myrick, Class 2 Machine Operators W. J. Kemp, W. C. Murphy, Foreman R. M. Winter, Trackmen R. W. Cullen and R. V. Hodom shall each be compensated for fifty (50) hours' pay at their respective straight time rates 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.

Without prior notice to the Organization, the Carrier contracted out the construction of a water drainage system in Rochester Yard, New York. The specific work performed by the contractor as described by the Organization was the installation of water drainage lines between and parallel to the tracks in the receiving yard and road railer tracks and installation of distribution boxes to connect the various lines in Rochester Yard. The work required the contractor to use two dump trucks, two Machine Operators (backhoe and front-end loader), a Foreman and two Laborers.

In its letter of September 21, 1998, the Carrier defended the claim by asserting ". . . that the BMWE Organization does not have exclusive right to this type of work in accordance with the Scope Rule of the CRC/BMWE Agreement." The Carrier took a similar position in its January 4, 1999 letter by stating ". . . that such work is not specifically reserved to BMWE-represented employees under the BMWE Scope, and the Organization has not established that such work has been performed by the BMWE-represented employees in the past." In its letter of May 24, 1999, the Carrier stated that ". . . the work does not accrue to BMWE-represented employees under the BMWE Scope [and i]t has been settled by prior tribunals that drainage and the cleaning of culverts is not BMWE Scope-covered work."

The Scope Rule provides that the Carrier must give prior notice to and, if requested, meet with the Organization "[i]n the event the Company plans to contract out work within the scope of this Agreement. . . ." The Scope Rule covers ". . . work generally recognized as Maintenance of Way work, such as . . . construction, repair, and maintenance of water facilities. . . ." Rule 1 of the Agreement lists the operation of front-end loaders and backhoes as work covered by the Agreement. Further, Rule 1 encompasses the operation of vehicles, which we find includes dump trucks. In its March 1, 1999 letter, the Organization states that

". . . BMWE personnel are more than capable of performing these tasks, which they have customarily and regularly performed for many years." Therefore, the kind of work involved in this dispute - installation of water drainage lines and distribution boxes to connect the various lines through the use of front-end loaders, backhoes, and dump trucks - is work "within the scope of this Agreement." The Carrier was therefore obligated under the Scope Rule to give the Organization prior notice concerning the contracting out of the work. The Carrier did not do so. The Carrier, therefore, violated the Agreement.

The Carrier's argument that the Organization must show that Maintenance of Way employees exclusively performed the work in contracting out disputes is not persuasive and has long been rejected. See Third Division Award 30944:

> ". . . The Carrier's argument that the Organization has not shown that the covered employees performed the work on an "exclusive" basis does not dispose of this matter. On its face, Article 36 does not specifically provide that the disputed work must be exclusively performed by the employees. Rather, Article 36 addresses "work within the scope of the applicable schedule agreement. . . ."

See also, Third Division Award 28513 (quoting Third Division Award 23560):

> "Article IV of the May 17, 1968, Agreement requires that Carrier notify the General Chairman when it plans to contract out work within the scope of the applicable Schedule Agreement.
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> Article IV requires that Carrier notify the General Chairman when such work is contracted out. Carrier's position that it must notify the General Chairman of subcontracting only when the work in question is exclusively reserved to the Organization by contract is not appropriate. That is not what Article IV says."

Further, see Third Division Awards 27012 and 27636:

> "The Board finds that the Carrier's insistence on an exclusivity test is not well founded. Such may be the critical point in other disputes,

such as determining which class or craft of the Carrier's employees may be entitled to perform certain work. Here, however, a different test is applied. The Carrier is obligated to make notification where work to be contracted out is 'within the scope' of the Organization's Agreement. . . ."

Therefore, the Carrier's exclusivity argument is without merit.

The Carrier's argument that the Organization has not shown that it has performed the precise work at issue also does not change the result. Putting aside the Organization's assertion in its March 1, 1999 letter that ". . . BMWE personnel are more than capable of performing these tasks, which they have customarily and regularly performed for many years," clearly, as we have found, the general nature of the work (installation of water drainage lines and distribution boxes to connect the various lines through the use of front end loaders, backhoes and dump trucks) is work "within the scope of this Agreement" therefore triggering the Carrier's notice and conference obligations. See Third Division Award 27185 ("We do not, however, find it necessary to explore the question of exclusivity as we are herewith concerned with work that could be within the scope and Carrier's uncontested failure to serve notice" [Emphasis added]). Whether the covered employees actually performed the precise work in the past is therefore irrelevant. The type of work in dispute is work "within the scope of this Agreement." That is as far as our inquiry can go.

The Carrier's cited authority is not on point. Third Division Award 31821 involved a project that ". . . was unique and required specialized skills and equipment . . . unlike any other machinery on the Carrier's system." Similarly, Third Division Award 30088 involved ". . . specialized equipment . . . [which the Carrier] was unable to lease . . . without being required to also use the equipment owner's operators." There is no evidence that the project involved in this matter was of such character that BMWE-represented employees could not perform the tasks or that such specialized equipment was involved. In this case, the contractor used dump trucks, a backhoe, and a front-end loader. That is the kind of equipment that the covered employees routinely use. In Third Division Award 27629, the Board denied the subcontracting claim because there was ". . . no evidence that the type of work herein disputed was ever performed by the employees." But again, here, the "type of work" was use of dump trucks, a backhoe, and a front end loader, which covered employees routinely use. In Third Division Award 27626, the evidence showed that the work had been ". . . historically

performed by outside contractors . . ." which was not shown to be the circumstances in this case. Further, in Award 27626, the Carrier argued that the Organization had to show ". . . an exclusive right to the work involved," which caused the Board to ". . . concur with Carrier's position." Lack of exclusivity was also the basis for denying the claim in Third Division Award 13161. But, as shown above, exclusivity is not the test. Finally, in Public Law Board No. 3530, Award 108, that Board found, in part, ". . . that the work involved was historically contracted out." This record has no similar showing. As found above, installation of water drainage lines and distribution boxes to connect the various lines through the use of front end loaders, backhoes, and dump trucks is work "within the scope of this Agreement." Notice of the Carrier's contracting out that work was therefore required.

With respect to the remedy, in these kinds of disputes, make whole remedies are granted to employees for lost work opportunities even though those employees may have been working. See Third Division Awards 32335, 31594 and 30944. The Claimants shall therefore be made whole for those lost opportunities as requested in the claim for the amount of work performed by the contractor.

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 22nd day of June 2004.