Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37069
Docket No. MW-36785
04-3-01-3-320

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, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Terry's Trucking Company) to perform Maintenance of Way machine operator work (haul track machinery for the steel gang) from Pontiac, Michigan to Vicksburg, Michigan on March 1, 2, and 3, 2000 (Carrier's File 8365-1-721).

(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) as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Class II Machine Operators T. Johnson, R. Merrow, B. Rathbun and T. Hutchinson shall now each be compensated for thirty (30) 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.

The basic facts are not in dispute. The Carrier did use an outside contractor to move certain track equipment on the dates alleged. It did not provide the General Chairman with any advance notice of its plan to do so. Nonetheless, the Carrier maintains that none of its actions, or inactions, violated the controlling Agreement provisions. In this regard, the Carrier maintains it was not required to give notice.

The parties' Scope Rule reads, in pertinent part, as follows:

> "These rules shall be the agreement between Grand Trunk Western Railroad Incorporated (the Company) and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employes, engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and roadbed, and work which, as of the effective date of this Agreement, was being performed by these employees, and shall govern the rates of pay, rules and working conditions of such employees. This paragraph shall neither expand nor contract the respective rights of the parties, nor infringe upon the contractual rights of other railroad crafts, in effect on the date of this agreement.
>
> In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any

event not less than fifteen (15) days prior thereto. 'Emergencies' applies to fires, floods, heavy snow and like circumstances." (Emphasis added)

It is undisputed that the effective date of the foregoing Scope Rule is May 18, 1998. It is also clear that the Scope Rule does not specifically reference the hauling of track machinery between work locations.

Both parties premised their respective positions on past as well as current performance of the work. Not surprisingly, these assertions were in sharp conflict. For its part, the Organization's assertions were not backed up with actual proof of performance by covered employees prior to the year 2001. This consisted of one statement by a Machine Operator supplied along with the Organization's June 14, 2001 appeal on the property.

For its part, the Carrier supplied some 45 example invoices from the years 1995, 1998, and 1999 to show that contractors were used to haul track machinery. The 1998 invoices were dated before as well as after May 18, 1998.

The Carrier maintains that the May 18, 1998 Scope Rule was effectively a "maintenance of the status quo" provision that froze the parties' rights as of that date. It notes that the Rule goes on to clarify that it did not expand or contract the respective rights of the parties in effect on that key date.

The Carrier also asserted that it had consistently contracted out the hauling of track machinery without notice to the General Chairman for many years prior to May 18, 1998. The invoices it supplied for the evidentiary record show that it was doing so in 1998 and for several years earlier without objection by the Organization. Thus, by past practice, the Carrier maintains that it had the right, as of May 18, 1998, to contract out such work without notice. Distilled to its essence, in its view, such work was not work within the scope of the Agreement for either notice or reservation of work purposes.

On this record, the Organization had the burden of proof to establish the validity of its claim. Given that scope coverage, for notice and reservation of work purposes, was squarely placed in issue by the parties' assertions, it was incumbent

upon the Organization to offer actual proof to support its claim. It did not provide any evidence of past performance around the key date of May 18, 1998 nor any date earlier than the year 2001.

As noted, the Carrier's evidence shows that outside contractors were consistently used to haul track machinery on or about May 18, 1998 as well as several years earlier. Moreover, the record is clear that the Organization neither required nor even requested notice of such contracting in that time frame. There is simply no competing proof to the contrary on either of these points. In addition, the Carrier provided evidence to show that the Organization had sought modifications to the Scope Rule, in subsequent bargaining, to reserve machinery hauling; it was unsuccessful in achieving these modifications.

Given the foregoing state of the evidence in this record, we conclude that the Carrier had the right, as of May 18, 1998, to contract out such machinery hauling and to do so without having to satisfy the notice requirement of the Scope Rule. Nothing in the Scope Rule has been changed to diminish that right since then.

Because of our finding regarding the Scope Rule, we need not address the remaining 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 22nd day of June 2004.