Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37674
Docket No. MW-36576
06-3-01-3-79

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington
(Northern 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 (Baltrich Construction) to construct roadbed from Mile Post 7.3 to Mile Post 7.64 for an extension of the Colgate siding track at Colgate, Montana, on May 5, 6, 7, 8, 9, 27, 30, 31 and June 1, 1997. (System File B-M-520-F/MWB 97-10-02 AA BNR)

(2) The Agreement was further violated when the Carrier failed to make a good-faith attempt to reach an understanding concerning the above-described work as required by Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, group 2 Machine Operators G. E. McDonald, R. E. Bronson, M. V. Renner, D. S. Kingstad, R. T. Sikveland and M. Vera shall each be compensated sixty-seven (67) hours' pay at their respective straight time rates of pay and sixteen (16) hours' pay at their respective time and one-half 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 Claimants have all established and hold seniority as Group 2 Machine Operators within the Roadway Equipment Sub-department of the Maintenance of Way and Structures Department. On the dates in question, the Claimants were regularly assigned and working as such on the Roadway Equipment District 4 in the vicinity of Colgate, Montana.

On December 12, 1996, the Carrier sent a notice to the General Chairman regarding its plan to contract the construction of roadbed from Mile Post 7.3 to Mile Post 7.64 for an extension of the Colgate siding track at Colgate, Montana. On December 17, 1996, the General Chairman requested a conference to discuss the matter. The conference was held on January 9, 1997, during which, the Carrier explained that the actual track construction on the extension (installation of ties, rails, etc.) would be performed by BMWE employees. However, on January 3, 1997, the Carrier had contracted with an outside contractor to construct the roadbed.

In the Carrier's letter of January 26, 1997, it was noted that an additional 700 feet of "upgrade" work beyond that originally identified in the December 10, 1996 contracting notice had been added to the project. The combined amount of work in this project totaled more than 9,000 feet.

Pursuant to that notice and subsequent discussions, the Organization contends that the Agreement was violated when the Carrier assigned Baltrich Construction to construct roadbed from Mile Post 7.3 to Mile Post 7.64 for an extension of the Colgate siding track at Colgate, Montana, on May 5, 6, 7, 8, 9, 27, 30, 31 and June 1, 1997. First, it claims that the Carrier did not provide proper notice to the General Chairman and thus did not act in good faith in that at the time of the conference, the Agreement with the contractor had already been reached; therefore, the conference was futile. Second, the Organization claims that it was improper for the Carrier to contract out the above-mentioned work. This is work that is properly reserved to the Organization.

The subject work consisted of the construction of roadbed from Mile Post 7.3 to Mile Post 7.4 for an extension of the Colgate siding track at Colgate, Montana. According to the Organization, the Carrier had customarily assigned work of this nature to be performed by the Carrier's Maintenance of Way employees. The Organization further claims that this work is consistent with the Scope Rule. According to the Organization, the Carrier's Maintenance of Way employees were fully qualified and capable of performing the designated work. The work done by Baltrich Construction is within the jurisdiction of the Organization and, therefore, the Claimants should have performed said work. Because the Claimants were denied the right to perform the relevant work, the Organization argues that the Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the work that was contracted out was that of roadbed construction, which the Carrier claims does not belong to the Carrier's BMWE-represented employees under either the express language of the Scope Rule or any binding past practice. According to the Carrier, controlling precedent involving these very same parties and identical issues has upheld the Carrier's position. Further, as to the alleged violation of Rule 55, the Carrier claims that while it is obligated to conference with the Organization, it is not precluded from reaching an agreement with the contractor prior to that conference.

First, as to the alleged Rule 55 violation, we find that the Carrier did give proper notice to the Organization of the proposed contracting. While the Organization has argued that the Carrier cannot reach an agreement with a

contractor prior to a conference, we must reject this contention. We find, rather, that the Carrier is not precluded from reaching an agreement with the contractor. We note that the applicable rule, the note to Rule 55, does not bar signing up a contractor prior to a conference held after the 15-day window expires. It requires only a 15-day notice that in this case, the Carrier gave on December 12, 1996. In this case, the conference was held and the agreement with the contractor executed after the expiration of the 15-day window.

In support of this position, Arbitrator Benn, in Public Law Board No. 4402, Award 20, held:

> ". . . We do not read that carefully drafted language [note to Rule 55] to mean that prior to entering into a contracting arrangement the Carrier is obligated to negotiate over the basis for its decision to contract out. . . . Therefore, the fact that the Carrier may have made prior commitments in this case to contract out before giving the notice to the Organization in and of itself does not require a sustaining award.
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> . . . The Organization misplaces the burden of demonstrating the existence of good faith or lack thereof. This is a contract dispute. As such, before the burden is shifted to the Carrier to demonstrate that its actions were in good faith, the initial burden is upon the Organization to make a showing that the Carrier acted in bad faith. . . ."

Thus, we find that the notice was sufficient and was not issued in bad faith.

Next, we reach the question of whether the work in question has been traditionally and customarily performed by the Organization. In Special Board of Adjustment No 1016, Award 150, the Board framed the scope issue as follows:

> "In disputes of this kind, the threshold question for our analysis is that of scope coverage. There are generally two means of establishing scope coverage. The first is by citing language in the applicable scope rule that reserves the work in disputes to the

> Organization represented employees. The second method is required when the language of the scope rule is general. In that event, the Organization must shoulder the burden of proof to show that the employees it represents have customarily, traditionally and historically performed the disputed work. It is well settled that exclusivity of past performance is not required in order to establish scope coverage vis-à-vis an outside contractor."

In the instant case, we have carefully reviewed all evidence regarding whether the Organization has proven that the work involved belongs to the Organization. First, we note that the work of constructing roadbed is not specifically identified in the Scope Rule.

We next turn to whether there is sufficient evidence for the Organization to have proven that it has customarily, traditionally and historically performed the disputed work. In the instant case, while the Organization has presented some evidence to show that the work in question belonged to the Organization, that evidence is insufficient for the Organization to meet its burden of proof. See Public Law Board No. 6537 above. See Also Third Division Award 37365, Public Law Board No. 4402, Award 20, Case 20 and Award 28, Case 28.

Further, in Award 1 of Public Law Board No. 6537, between the same parties, Referee Brent indicated as follows:

> "Claimants contend that they were improperly deprived of work opportunity to perform maintenance of way work operating various equipment during the construction of a siding extension at Palos, Alabama between Mile Posts 710.85 and 715.18. . . .
>
> This work was performed by outside contractor forces. . . . According to the Organization, "The character of work involved here is that which has been historically, traditionally, and customarily performed by the Carrier's Maintenance of Way employees throughout the Carrier's property. . . ."

> The Carrier defended the propriety of its assignment, contending that the disputed work was not within the exclusive jurisdiction of the bargaining unit represented by the Organization, and that similar projects had often been outsourced to contractors in the past. . . .
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> . . . the Board's evaluation of the propriety of the assignment of many aspects of this project to non-bargaining unit forces employed by outside contractors rests on the Board's determination that similar work has historically been performed on the Carrier's property by outside contractors on many occasions, thus precluding a finding of exclusivity of jurisdiction for the bargaining unit over the disputed work in the instant case. The Third Division of the NRAB has held similarly in Cases No. 36280, 36282, and 36283, among others. The holdings in these cases, especially as they involve the same parties as the instant case, afford valuable precedent for the finding herein.
>
> Grading of road bed and compaction of substrate have not been routinely assigned to bargaining unit employees in all cases. Moreover, the portion of the work involving laying and installation of track, work traditionally within the expertise of the bargaining unit, was assigned to bargaining unit employees."

Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the work of constructing roadbed is either definitively encompassed within the plain language of the Scope Rule or that the Organization has been able to prove that this work has historically and traditionally been performed by members of the Organization.

Thus, having determined that the notice was proper and that the work was not within the scope of the Organization, we find that the Organization has not met its burden of proof and the claim is, therefore, denied.

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

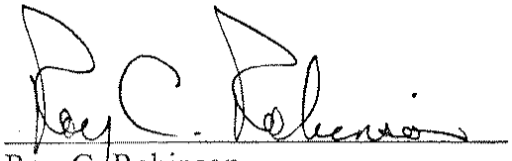
Dated at Chicago, Illinois, this 30th day of January 2006.

LABOR MEMBER'S DISSENT
TO
AWARD 37674, DOCKET MW-36576
(Referee Bierig)

The Majority was not content with erring in Docket MW-36598, Award 37618 and opted for a cameo appearance in this case. Rather than burdening the record with another lengthy Dissent, we invite attention to the Dissent filed by the Organization attached to Award 37618.

Inasmuch as the Majority premised its denial of this claim on the same misguided basis as was present in Award 37618, this award is erroneous and can have no precedential value.

Respectfully submitted,



Roy C. Robinson
Labor Member