Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37998
Docket No. MW-36695
06-3-01-3-174

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
(
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Starks Contracting) to perform Maintenance of Way and Structures Department work (operate equipment and truck to load and haul material and debris from Carrier property to city landfill) in the vicinity of Cedar Rapids, Iowa beginning on December 13, 1999 and continuing through January 7, 2000 (System File 4RM-9125T/1224993 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants W. E. Strunk, W. O. Harrington and R. T. Hoffman shall now each be compensated for one hundred sixty (160) hours' pay at their applicable 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.

In reviewing the record before us, we confined our analysis to only those matters of evidence and/or argument that were advanced by the parties during their handling of the dispute on the property.

The Carrier raised, as a threshold matter, a jurisdictional issue over the alleged notice violation asserted in paragraph 2 of the Statement of Claim. It contends that the paragraph presents a different issue from that handled on the property. After careful review of the record in this respect, we must agree with the Carrier's contention. Both the Organization's initial claim dated February 2 and its appeal dated May 23, 2000 assert only a failure to provide notice. However, in its March 13, 2001 letter following the conferencing of the claim, the Organization acknowledged that notice had been served and further acknowledged that ". . . the requisite conference was conducted." Nowhere in that letter nor in any previous Organization letters was there an allegation that the Carrier failed to ". . . make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b)." Accordingly, we are compelled to find that paragraph 2 of the Statement of Claim addresses an issue that is substantially different from the issue that was handled on the property. It is well settled that when there is a substantial variance between the issues handled by the parties on the property and those advanced to the Board, the faulty aspect of the claim must be dismissed. See Third Division Award 37480, involving these same parties, and Awards cited therein. Therefore, the allegations of notice violation are dismissed.

The principal issue remaining for analysis is that of Scope Rule coverage. In this regard, the Organization relies primarily upon the language of Rule 1(b) which reads, in pertinent part, as follows:

> "(b) Employes included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property."

It is undisputed that the debris in question was gathered by Carrier forces and deposited some time previously at the location from which the contractor hauled it to the city landfill. How long it had remained there before being hauled away is not revealed in the record. The Organization claimed covered employees had customarily performed the disputed work. The Carrier, to the contrary, asserted that it had ". . . customarily and traditionally utilized outside forces to perform . . ." the disputed work. In addition, the Carrier specifically asserted that the work was not covered by the scope of the Agreement.

Whether the debris was hauled from a dump site, as the Carrier labeled it, or it was removed from a temporary debris staging area, as the Organization characterized it, our review of the applicable Scope Rule language does not reveal any text that explicitly addresses the hauling of debris from such an intermediate location to a public landfill. This raises the question whether the depositing of the debris at the intermediate location breaks any connection between the later hauling to a landfill and the earlier construction or dismantling work that generated the debris that might have been covered by the Scope Rule.

It was the Organization's burden of proof to show that the debris removal was reserved by the Scope Rule. In the absence of specific reservation language, this required the Organization to prove that covered employees have customarily performed such work in the past. The Organization offered one employee statement in an attempt to establish this fact. Our review shows it to be insufficient in two important respects. First, the statement refers to past performance by two other employees. Thus, it does not reflect first-hand knowledge. Secondly, however, a single statement does not demonstrate the regularity, consistency, and

predominance of past performance that is necessary to establish scope coverage through past customary performance.

Given that the record fails to establish scope coverage of the disputed work, we find that the Agreement was not violated. Therefore, this aspect of the claim is 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 25th day of October 2006.