Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38014
Docket No. MW-37175
06-3-02-3-156

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 (Rossi Company) to perform Maintenance of Way and Structures Department work (patch blacktop roadway) in the Global 1 Yard on September 27, 30, October 2, 3, 5, 6, 7 and 9, 2000 instead of Messrs. B. Drinkard, I. Torres, M. Corral, L. Pizano and R. Rendon (System File 9KB-6681T/1255902 CNW).

(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 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 violation referred to in Part (1) and/or (2) above, Claimants B. Drinkard, I. Torres, M. Corral, L. Pizano and R. Rendon shall now each be compensated at their respective straight time rates of pay for an equal and proportionate share of the two hundred eighty (280) man-hours' expended by the outside forces in the performance of the aforesaid work."

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 Organization's November 22, 2000 claim alleges that the Carrier, without notice of its intent to contract out, permitted outside contractors to patch the roadway in Global 1 Yard during the period from September 27 to October 9, 2000. It argues that this work belongs to BMWE-represented employees and the lack of notice and use of strangers to the Agreement constitutes a violation of the Scope Rule.

The Carrier denies that the work falls under the scope of the Agreement and, therefore, maintains that no notice was necessary. It further asserts that asphalt patching has never been performed by the Engineering Track Department in the Intermodal facilities of the Global 1 Yard since it was constructed in 1985.

This is not a situation of what the Carrier failed to do, but what the Organization must do to perfect its case. The Organization has the burden of proof. It must establish sufficient probative evidence to prove a violation. First and foremost it must cite explicit language reserving the work "patch blacktop roadway" in the Scope Rule of the Agreement. The Board finds nothing on the property where the Organization demonstrates Agreement language wherein BMWE-represented employees have the exclusive right to the subject work. Further, before notice is required, there must be some probative evidence presented that the work was historically, traditionally and customarily assigned to Maintenance of Way forces.

The only evidence provided by the Organization in an effort to carry its burden that this work belongs to BMWE-represented employees is a signed statement by 12

employees, five of whom are the Claimants; the other seven are from different departments and crafts. The statement asserts in pertinent part:

> "Since 1986, BMWE Workmen assigned to Global One have paved the driveway/access area to Global One Headquarters. On September 27, 2000, we, again, began paving the area. We were told to stop paving-that the quality of the job was unacceptable. At that time, non-union, non-Global One Workers were brought in to complete the task. Hence, the work we should have done was contracted out to others."

The Organization maintains that this stands as enough proof to establish a prima facie case.

The problem for the Board is that paving the driveway access area to the Headquarters provides little information relative to "patching blacktop roadway." The Carrier stated that:

> "This work occurred on the Intermodal yard – such work - the Organization does not have right to work at the Intermodal yard. Furthermore, contractors have always done such work since the Intermodal facility was built in 1985."

Additionally, the Carrier produced a statement from E. Benbow. His statement is directed toward asphalt patching and support the Carrier's position. It states:

> "Asphalt patching by Engineering Forces is not and has not been a part of Global 1 work performed. These large facilities have been addressed by contractors and this work has been contracted out in the past with no time claims. Engineering Track Department does not patch asphalt in the intermodal facilities. This has been the practice since [the] Facility was constructed in 1985."

The Board finds a lack of substantive proof to warrant the conclusion that this work was ever traditionally or customarily performed by BMWE-represented employees. Although asserting that this work was performed since 1986, the Organization did not prove its assertion after a clear rebuttal. Although asserting that "patching" belonged to BMWE-represented employees by Agreement, it neither

pointed to the language of the Agreement, nor went forward with any record to demonstrate five years performance of the disputed work.

The burden of proof that the work belongs to BMWE-represented employees has not been met. The Carrier rebutted the assertion noting that it was not exclusively reserved and the statement by Benbow that "asphalt patching . . . is not and has not" been performed was not overcome with evidence to the contrary. No claims were ever submitted. No signed statements from BMWE-represented employees performing this exact work were entered into the record. At best, some type of driveway/access paving to the area was performed.

The record is deficient in the evidence required to demonstrate by language or sufficient system-wide performance to shift the burden to the Carrier over notice. Initially, the work must be shown to belong to BMWE-represented employees before the Board will require notice from the Carrier. This, the Organization failed to do and, therefore, the claim must be 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.