Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39467
Docket No. MW-37513
08-3-NRAB-00003-020469
(02-3-469)

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
(
(Grand Trunk Railroad Incorporated

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (E&L Paving) to perform Maintenance of Way Machine operator work (operate dozer) at Mile Post 46.2 Randolph Street in Valparaiso, Indiana on April 2 and 3, 2001 (Carrier's File 8365-1-755)

(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 aforesaid work or make a good faith attempt to reach an understanding concerning said work as required by the Scope Rule and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Class II Machine Operator R. Merrow shall be compensated for nine and one-half (9.5) hours' pay at his respective straight time rate 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.

Claimant R. Merrow established and holds seniority as a Group 2 Machine Operator within the Track Department and at the time of the dispute was regularly assigned to operate a bulldozer that he transported throughout the Carrier's system with a lowboy tractor-trailer.

On January 22, 2001, the Carrier transmitted a notice to General Chairman P. Geller advising that it intended to contract out the work of asphalt paving of approximately 200 road crossings. The General Chairman responded in a letter dated January 29, 2001 advising that the Organization was opposed to all contracting out and requested that a meeting be held to discuss the issue.

The Organization contends that the Agreement was violated when the Carrier assigned E&L Paving the work of asphalt finishing in Valparaiso, Indiana, on April 2 and 3, 2001. First, it claims that the notice prepared by the Carrier was faulty in that it was overbroad, covering numerous situations and not just the one in question. Second, the Organization claims that it was improper for the Carrier to contract out the above-mentioned work, which is work that is properly reserved to the Organization.

According to the Organization, the Carrier had customarily assigned work of this nature to BMWE-represented employees. The Organization further claims that the work in question is consistent with the Scope Rule and the employees were fully qualified and capable of performing the designated work. The work done by E&L Paving is within the jurisdiction of the Organization and, therefore, the Claimant should have performed said work. The Organization argues that because the Claimant was denied the opportunity to perform the work, the Claimant 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 contracted out was that of asphalt finishing, which the Carrier contends does not belong to BMWE-represented employees under either the express language of the Scope Rule or any binding past practice. Further, as to the alleged notice violation, the Carrier contends that the notice was proper and consistent with past practice.

We find that the Carrier did give proper notice to the Organization of the proposed contracting and that the Carrier acted within the confines of the relevant Rule. Thus, we find that the notice was sufficient and was not issued in bad faith.

Next, we reach the issue of whether the work in question has been traditionally and customarily performed by BMWE-represented employees. In Special Board of Adjustment No. 1016, Award 150, that 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 carefully reviewed all evidence regarding whether the Organization has proven that the work involved belongs to BMWE-represented employees. First, we note that the work of asphalt finishing is not specifically identified in the Scope Rule.

We next turn to whether there is sufficient evidence for the Organization to have proven that BMWE-represented employees have customarily, traditionally, and historically performed the disputed work. In the instant case, while the Organization presented some evidence to show that the work in question belonged to BMWE-represented employees, 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, Awards 20 and 28; and Public Law Board No. 6537, Award 1.

Based on the evidence in this record as well as the above-cited precedent, we cannot find that the work of asphalt finishing 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 Agreement, 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 29th day of December 2008.