PUBLIC LAW BOARD NO. 7101
CASE NO. 12

PARTIES TO THE DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(and
(
(Union Pacific 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 (Peterson Contractors, Inc.) to perform Maintenance of Way and Structures Department work (fencing, grading, sub-ballast placement and other incidental work in connection with the construction of additional yard tracks) on the Fairmont Subdivision at Mile Post 0.6 near Mason City, Iowa beginning on September 7, 2004 and continuing, instead of Seniority District T-2 employes J. Coolican, M. Kath, D. Bohl and R. Buol (system File 2RM-9606T/1410384 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance 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 Parts (1) and/or (2) above, Claimants J. Coolican, M. Kath, D. Bohl and R. Buol shall now each be compensated at their respective and applicable rates of pay for all straight time and overtime hours expended by the outside forces in the performance of the aforesaid work beginning September 7, 2004 and continuing.

The Carrier has declined this claim."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

Claimant J. P. Coolican has established and holds seniority in the Maintenance of Way and Structures Department in the Track Subdepartment on Seniority District T-2 as a foreman. Claimants M. C. Kath, D. L. Bohn and R. L. Buol have established and hold seniority in the Maintenance of Way and Structures Department in the Track Subdepartment on Seniority District T-2 as machine operators (M. O. Common). Claimants were assigned and working their respective positions on the dates involved in this dispute.

Beginning on September 7, 2004 and continuing, the Carrier allegedly assigned Peterson Contractors, Inc. (PCI) to perform alleged basic fundamental Maintenance of Way and Structures Department work in the yard at Mason City, Iowa on the Fairmont Subdivision near Mile Post 0.6. Specifically, the work entailed fencing, grading, sub-ballast placement and other incidental work in connection with the construction of additional yard tracks. The Contractor assigned one Foreman and three Machine Operators to this project, allegedly working 12 hours per day Monday through Thursday, and 8 hours on Friday. The employees were using a Track Hoe, 1-2 dozers and 1-2 trucks as needed. The operators used various pieces of equipment.

The Organization contends that the Agreement was violated when the Carrier assigned PCI the work of fencing, grading, sub-ballast placement and other incidental work in connection with the construction of additional yard tracks at Mason City, Iowa on the Fairmont Subdivision near Mile Post 0.6. 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 the Carrier's Maintenance of Way Employees. The Organization further claims that the work in question 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 performed by PCI falls within the jurisdiction of the Organization and therefore Claimants should have performed said work. The Organization argues that because Claimants were denied the opportunity to perform the relevant work, Claimants should be compensated for the lost work opportunities.

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 fencing, grading, sub-ballast placement and other incidental work in connection with the construction of additional yard tracks, 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. In addition, the Carrier argues that the Organization incorrectly asserted the instant Claim under the CNW BMWE Agreement whereas it should have been asserted under the UP BMWE Agreement. Because it was improperly asserted, the Carrier claims that the instant Claim should be voided.

We first note that at the Arbitration Hearing, the parties stipulated that the Notice issue was not in question. Therefore, we find that we need not reach that issue.

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 the question of whether the Organization has proven that the work involved belongs to the Organization. First, we note that the work of fencing, grading, sub-ballast placement and other incidental work in connection with the construction of additional yard tracks 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 belongs 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 (Goldstein),

Public Law Board No. 4402, Award No. 20, Case No. 20, Award No. 28, Case No. 28; Public Law Board 6537, Award No. 1.

Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the work of fencing, grading, sub-ballast placement and other incidental work in connection with the construction of additional yard tracks is 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.

The Claim is denied.

AWARD

Claim denied.

Steven Bierig

Digitally signed by Steven Bierig
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Date: 2010.06.14 13:26:12 -05'00'

Steven M. Bierig
Chairperson and Neutral Member

Dominic Ring
Carrier Member

Roy Robinson
Organization Member

Dated at Chicago, Illinois this 14th day of June 2010.