

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT 1048

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)	
	)	Case No. 160
and	)	
	)	Award No. 160
NORFOLK SOUTHERN RAILWAY COMPANY	)	

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. L. Kerby, Carrier Member
Hearing Date: May 1, 2009

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned contractors (Marlatt construction, B&T Trucking and RMP Trucking) to perform grading work between Mile Posts D327.8 and D330.2 on the new Sidney Siding Track on the Illinois Division starting on April 11, 2005 and continuing (Carrier's File MW-DECR-05-24-LM-193).
2. The Agreement was further violated when the Carrier failed to hold a good-faith conference in accordance with Appendix "F" and the December 11, 1981 Letter of Agreement.
3. As a consequence of the violations referred to in Parts 1 and/or 2 above, we request that the following Claimants E. Flannery, D. Adams, L. Swanagan, B. Estes, R. Frank, T. Taylor, R. Beabout, K. Cristman, C. Merrill, A. Stokes, V. Linder, J. Stansfield, P. Turner, J. Lawrence, L. Potter, L. Schwartz, and E. Mattes be paid at their appropriate overtime rates for all hours worked by these contractors divided equally between these employees."

FINDINGS:

Special Board of Adjustment No. 1048, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

This dispute concerns Carrier's use of outside contractors to perform roadbed construction on a 1.5 mile siding of the new Sidney Siding on the Illinois Division between MP D327.8 to D330 commencing on April 11, 2005. The Organization contends that all of the site work including grading, drainage and placing crushed stone sub-ballast in connection with the new track construction for the extension of the siding in Sidney, Illinois is literally the foundation of track construction work that has been performed by Carrier forces for decades. The record of the correspondence before the Board contains no examples when and/or where this roadbed construction was performed by Carrier employees.

Carrier, on the other hand, asserts that in this particular instance, because of the nature, extent and magnitude of this project, the work involved was not reserved to the members of the Organization by rule or past practice, does not fall within the scope of the Agreement, and has been historically and routinely performed by contractors without notice to the Organization in the past. Carrier offers the following examples of the work of this character and magnitude that has been contracted out without protest: UP connection in 1998-99; siding extension at Sardorous, Illinois in 1998; restoration of double track segment between Fairmont and Catlin, Illinois in 1999; siding extension at Attica, Indiana in 1998-99; new wye track construction at Decatur, Illinois in 2000; yard track expansion at Moraine, Ohio in 2001; bulk transfer facility in Willis Michigan in 1998; connecting track to UP in Sidney, Illinois in 1998; extending Sido Siding at Brunswick, Missouri in 1998; extending Sloan Siding in Sloan, Illinois in 1998; extending siding at Maxwell, Missouri in 1997; Yard Track expansion in Hazelwood, Missouri in 1994; and, construction of 15,558 feet of yard track in Berkley, Missouri in 1990.

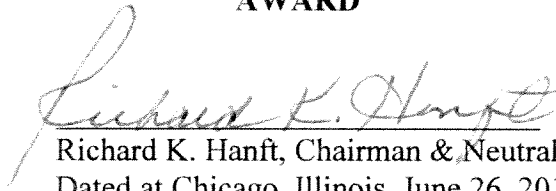
It is well established that the Organization has the burden to establish the basis of the claim. Based on the record of correspondence between the parties submitted to this Board we can find no demonstration by past practice of historical performance work of this magnitude and character with such regularity, consistency and predominance to constitute customary and traditional performance. While Carrier concedes that Carrier employees have performed some grading in connection with maintenance of right of way such as leveling at a limited location in connection with replacement of a particular track component such as a turnout or crossing panel, it cannot be disputed, given the examples cited, that contractors have been customarily and historically used to grade and construct roadbed for new track construction, work which is distinctly different than that performed by the employees alleged to be harmed by the contracting. Thus, we must find that the work that was performed by the contractors is beyond the scope of the Agreement and not reserved to Carrier employees by the Agreement.

Since the Organization did not carry its burden of proving that the work contracted out was within the scope of the Agreement, but was instead customarily performed by outside contractors without notice to the Organization, the Organization's claim that the Agreement was violated because a conference was not held must fail because it presumes that the work was within the scope of the Agreement. Having arrived at such different conclusion, compliance with the conferencing requirement becomes a moot point. The Carrier would be well-advised that while conferencing in this instance was not required because the anticipated work was not within the scope of the Agreement, that in the future when it serves notice on the Organization of its

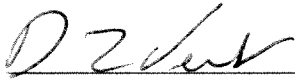
intent to perform work with outside contractors it should be prepared to fully comply with the intent of the rule.

Claim denied.

AWARD



Richard K. Hanft, Chairman & Neutral Member
Dated at Chicago, Illinois, June 26, 2010



D. L. Kerby
Carrier Member

Dated: 7/19/10



T. W. Kreke
Employee Member

Dated: July 19, 2010