Award No. 11208

Docket No. MW-10342

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, beginning on or about December 1, 1956, it assigned rail grinding machine operator's work to the Speno Railroad Ballast Cleaning Company, Inc.

(2) The decision by Division Engineer Cosgrove, dated January 28, 1957, and the decision by Superintendent Stanford, dated February 13, 1957, were not in conformance with the requirements of Sections 1(a) and (c) of Article V of the August 21, 1954 Agreement.

(3) Because of the violations referred to in parts (1) and (2) of this Statement of Claim, the claim as presented by General Chairman Hull in a letter dated January 23, 1957, file Ill-2-T-7 be allowed as presented.

EMPLOYES' STATEMENT OF FACTS: The facts surrounding the presentation of this claim are substantially set forth in the letter of claim presentation *(referred to in Part (3) of Statement of Claim) which reads:*

"January 23, 1957

File: Ill-2-T-7

Mr. P. A. Cosgrove,
Division Engineer
Illinois Cenral Railroad,
Champaign, Illinois

Dear Sir:

Claim is presented as follows:

STATEMENT OF CLAIM:

1. That the carrier violated provisions of the effective agreement

of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to."

The Carrier fails to find where either of the letters constitutes a violation of Sections 1(a) or 1(c) of the August 21, 1954, Agreement. Both of these officers of the Carrier stated in their opinion there was no violation of the agreement, and consequently, the claim was declined. It is Carrier's position that the reason for declining any claim is based on the contract requirements, and if no basis exists, such reason is sufficient notice that Carrier was disallowing the claim. The position of the Employes is not well taken, and this portion of the claim must be denied as being without support in the August 21, 1954, Agreement.

Part (3) of the Employes' claim states:

"(3) Because of the violations referred to in parts (1) and (2) of this Statement of Claim, the claim as presented by General Chairman Hull in a letter dated January 23, 1957, File Ill-2-T-7 be allowed as presented."

Carrier has shown in its submission that the work performed by the Speno Railroad Company required special equipment which costs $500,000. There was no equipment of its kind on Carrier's property which could duplicate the work of this machine, and during the period this machine was in operation the claimants performed work for the Carrier. They have suffered no loss in earnings and are not entitled to the penalty they seek. For these reasons, part (3) of their claim must be denied.

All data in this submission have been presented to the Employes and made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts are not in dispute. In December, 1956, Carrier entered into a contract with the Frank Speno Company (herein referred to as "Contractor") to grind the running surface of rail on its Illinois Division by the use of rail grinding equipment owned by the Contractor and manned by its employes.

The rail-grinding equipment used is described (Carrier's Exhibit 1) as an "all-new nine-car train designed to grind the running surface of rail, out of face. As train moves along at 2 mph, 96 power-driven abrasive wheels, mounted on special truck assemblies beneath cars, grind out corrugations and other surface irregularities on both rails simultaneously. Built at a cost of around $500,000, the train is owned and operated by Speno and is made available to railroads on a contractural (sic) basis."

The claim arises from Petitioner's contention that the work performed by the Contractor was work belonging to Maintenance of Way employes under the Scope Rule of the Agreement, and, therefore, should not have been contracted out except by negotiation with the Organization representing the employes.

Petitioner has raised a procedural issue which must be considered before proceeding to the merits of the case. It alleges that the Carrier failed to comply with the provisions of Article V, 1.(a), of the National Agreement of

August 21, 1954, when two of Carrier's officials declined to allow the claim on the property by stating: (a) "It is my opinion that there was no violation to the Agreement . . .", and (b), "I have reviewed this case and find the work done by the Speno Grinding train was not in violation of the agreement."

Petitioner contends that these statements do not constitue valid reasons for declining the claim under those provisions of the national rule here quoted in pertinent part: "Should any claim . . . be disallowed, the Carrier shall . . . notify whoever filed the claim . . . in writing **of the reasons for such disallowance.**" (Emphasis ours.)

There is no merit in the contention. The quoted language does not require detailed or specified reasons for disallowance. See Awards 10416, 10368, 9835, 9615. A basic and valid reason for denying any claim is that the agreement was not violated because implicit in the statement is the opinion that the claim lacks support under the rules of the agreement.

Awards cited by Petitioner are not in point on this narrow issue. Certanily the national rule is violated if **no** reason for declination is given (Awards 10936, 10759, 10313, 9934, 9933, 9253, 9205; 2nd Div. Award 3312); or where **no decision** is rendered (Award 8412; 2nd Div. Award 2652); or for **failure to meet the time requirements** (Awards 10138, 9760; 2nd Div. Award 3637). None of these violations occurred here. Accordingly, the Board finds no violation of Article V, 1.(a), of the 1954 National Agreement.

The Board will consider the merits of this dispute in the light of certain principles governing the contracting out of work which have been promulgated and adhered to in numerous awards of this Division. They are clearly set out in Award 5563:

> "First, as a general rule the carrier may not contract out work covered by its collective bargaining agreements.
>
> Second, work may be contracted out when special skills, equipment or materials are required, or when the work is unusual or novel in character or involves a considerable undertaking. (See Awards 757, 2338, 2465, 3206, 4712, 4776, 5028, 5151 and 5304.)
>
> Third, the work contracted out is to be considered as a whole and may not be subdivided for the purposes of determining whether some of it could be performed by the employes of the carrier. (See Awards 3206, 4776, 4954 and 5304.)
>
> Fourth, the burden of proof is on the carrier to show by factual evidence that its decision to contract out work is justified under the circumstances. (See Awards 2338, 4671 and 5304.)"

When the foregoing principles are applied to the facts of this case, the conclusion that the agreement was not violated is clear. It is obvious that the Speno Grinding Machine (or train) is expensive, complicated and unique equipment designed and operated to accomplish a specific large-scale undertaking—in a continuous operation to surface grind old and new rail, to remove corrugations, burns and other irregularities, and to restore rail contours, over many miles of track. Equipment of this size and complexity requires special skills for its maintenance and operation. This Carrier had never owned or operated such equipment on its property. It cannot be successfully maintained that experience gained through the use of small surface and utility

grinding machines would qualify these employes to operate the Speno machine. It is not denied that the work involved in grinding welded rail ends, switch points, frogs, rail ends, etc., belong to employes under the agreement, and that covered work may not properly be contracted out (Awards 2701, 2050, 3423 and many others). Here, however, under the applicable principles set forth in Award 5563, "the work contracted out is to be considered as a whole and may not be sub-divided for the purpose of determining whether some of it could be performed by the employes . . ." When so considered, it cannot reasonably be held that the work done by the Speno machine was work belonging to the employes.

Award No. 4 of Special Board of Adjustment No. 285, (Brotherhood of Maintenance of Way Employes vs. Reading Company) is in accord with our findings here. There, under similar facts and in deciding an identical issue, it was held that contracting out the same work as is here involved was not violative of the agreement. Significantly, Award No. 4 was signed by the Employe Member of the Special Board.

In view of the foregoing, it is not necessary to give extensive consideration to Petitioner's attempt to analogize assignment of covered employes to the operation of a Speno Ballast Cleaning Machine with assignment to the Speno Grinding Machine. It suffices to say that the analogy is faulty. The ballast machine was leased to the Carrier for operation by it; Maintenance of Way Employes had operated a similar machine owned by Carrier and were qualified to operate the equipment; an agreement between the Brotherhood and the Carrier had been consummated whereby seniority rights and a classification of ballast cleaning crew were established. None of these factors is present in the instant case. In fact, it is asserted by Carrier and not expressly denied by the Petitioner, that the Contractor here refused to permit anyone but its own employes to operate the equipment.

Under the facts of this particular case and the established principles of this Board governing a Carrier's right to contract out work of the kind here involved, the Board finds no violation of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of March, 1963.