

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26016
Docket Number MW-25819

Charlotte Gold, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Peoria and Pekin Union Railway Company

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

(1) The Carrier violated the Agreement when it assigned track dismantling and grading work at 'B' yard to outside forces on October 12 and 13 (System File T-3 3596/TC 79-82).

(2) The Carrier also violated Rule 40 when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) Because of the aforesaid violations, Machine Operator R. Meyers shall be allowed twelve (12) hours of pay at his applicable rate and Machine Operators O. Hughes and R. Ritchie shall each be allowed six hours of pay at their respective applicable rates."

OPINION OF BOARD: On October 12 and 13, 1982, Carrier assigned outside forces to perform track dismantling and grading work on two tracks. The Organization filed a Claim alleging that Carrier had violated the Agreement by making this assignment and by failing to give the General Chairman advance written notice of its intention to contract out. The Organization seeks twelve hours of pay for Machine Operator R. Meyers at his applicable rate and six hours of pay for Machine Operators O. Hughes and R. Ritchie at their respective applicable rates.

In its presentation to this Board, the Organization argues that tie removal work is an integral part of maintaining the right-of-way and therefore it accrued to Track Sub-department forces. The Organization had no knowledge of prior subcontracting of this work and Carrier failed to present evidence that a practice existed. The work of operating machines and driving trucks is within the scope of the Agreement and if Carrier did not have the proper equipment, it should have leased or rented it.

Carrier maintains that the Scope Rule cited by the Organization is general and contains no job descriptions or guarantees of assignment to specific tasks. A practice of contracting out this work has existed since 1971, with the full knowledge of local personnel, and no exception was taken. Carrier does not believe that it was necessary to notify the Organization of its intention to subcontract, since this work has not been performed exclusively by Maintenance of Way Employees.

Among the applicable Rules are the following:

"Rule 1

SCOPE

The rules contained herein shall govern the hours of service, working conditions, and rates of pay of all employees in the several sub-departments of the Maintenance of Way and Structures Department.

Rule 39

CLASSIFICATION OF WORK

(e) An employee assigned to the operation of roadway equipment, such as crawler cranes, burro cranes, caterpillar tractors, clam shells, or similar machines, shall be classified as a roadway machine or equipment operator.

(f) An employee assigned to the operation of machines, such as grinder machines, power wrenches, power drills, power jacks, weed sprayers, mowing machines, grading machines, motor cars, and similar machines, shall be classified as a machine operator

(i) All work covered by the scope of this agreement shall be performed by employees covered therein, except that certain jobs may be contracted to outside parties which the Railway is unable to perform because of lack of proper equipment, insufficient or qualified forces.

Rule 51

RATES OF PAY

The following rates of pay cover established positions in the Maintenance of Way and Structures Department:

Section Foreman, Per Month..... \$994.27

	Per Hour
Assistant Section Foreman.....	\$ 5.37
Welder.....	5.81
Truck Driver.....	5.37
Grinder Machine, Power Wrenches, Power Drills, Power Jacks, Weed Sprayer, Mowing Machine, <u>Grading Machine</u> and Motor Car Operators, Welder Helpers and Cutting Torch	

Operators.....	5.37
Track Laborers and Lampmen.....	4.98
Plumber and Pipe Fitter.....	6.01
Carpenter.....	5.68
Structural Welder.....	6.01
Painter.....	5.68
Crawler Cranes, Burro Cranes, Caterpillar Tractors and Clam	
Shell Operators.....	5.68
B&B. Mechanic.....	5.68

When and as other positions are established,
appropriate rates will be agreed upon and included
in this schedule.

Rule 40

CONTRACTING OUT WORK

(a) In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

(b) If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

(c) Nothing in Rule 40 shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

The Board is in agreement with Carrier that Rules 1, 39, and 51 are general in nature and contain no guarantees of certain tasks, but, by the same token, we believe that they indicate that the work of operating such equipment as Caterpillar Tractors and Grading Machines on the Railroad fall within the scope of Maintenance of Way Employees.

By our reading of the Agreement, we must conclude that when Carrier planned to contract out work within the scope of that Agreement, it was required by Rule 40, Contracting Out Work, to notify the General Chairman of its intent. We are not persuaded by Carrier's argument that it need not provide such notification if it feels that the work in question has not been performed exclusively by Maintenance of Way Employees.

We find no mention of exclusivity in Rule 40 and in general find support for our position in Third Division Award 23354, wherein the Board stated that "For Carrier to ignore this requirement and move ahead with a subcontract because it either thinks that the work to be performed by the outsider is not work exclusively reserved to covered employees or claims it does not have the proper equipment is unacceptable." Thus, whether Carrier has the proper equipment to perform the task; whether the work in question has been performed by Petitioner by custom, practice, and tradition; or whether the work has been performed exclusively by Petitioner are all questions that go to the merits of Carrier's position on subcontracting and are separate from the procedural issue of notification. In the instant case, Carrier violated the Agreement when it failed to provide proper notification.

As to the merits of Carrier's position, we agree with Carrier that it is empowered to contract out when it lacks the proper equipment to complete a task. Rule 39, Classification of Work, clearly so provides in Section (i). We are also mindful, however, of the Letter of Agreement of December 11, 1981, signed by Charles I. Hopkins, Jr., wherein he indicated that Carriers would make a good-faith effort to reduce subcontracting and increase the use of Maintenance of Way forces "to the extent practicable, including the procurement of rental equipment. . . ." In the present instance, we find no indication of such a good faith effort.

Carrier's justification for subcontracting based on past practice is less than compelling, given a lack of supporting evidence for its argument and its reliance on the alleged acquiescence of local personnel. At the same time, the Organization raises valid questions concerning the question of exclusivity as it relates to the subcontracting out of work.

In the final analysis, while Carrier may have had a basis for subcontracting given a lack of equipment, we find that it did violate the Agreement by failing to provide proper notification to the General Chairman of its intent to contract out. As furloughed employees, Claimants are entitled to the compensation claimed at their respective straight time rates.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

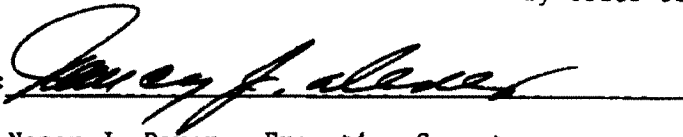
That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:

A handwritten signature in cursive script, appearing to read "Nancy J. Dever", is written over a horizontal line.

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1986.