Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28619
THIRD DIVISION Docket No. MW-26871
90-3-85-3-642

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company

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

(1) The Agreement was violated when outside forces were used to perform grading, dirt compacting and hauling work in connection with a line change near Fossil Butte, Wyoming beginning July 9, 1984 (System File M-59/013-210-52).

(2) The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plan to assign said work to outside forces.

(3) Because of the aforesaid violations, furloughed Group 20 Roadway Equipment Operators J. T. Solt, C. A. Hintz, R. J. Lasslet, R. A. Gilbert, L. D. Garrison, R. S. Hutchinson, J. H. Scott, R. D. Collins and C. A. Schwisow shall each be allowed pay at the Group 20 Roadway Equipment Operator's rate for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

According to the Organization, beginning July 9, 1984, Carrier contracted with Bannock Paving of Pocatello, Idaho, to perform grading and related work in connection with the construction of new trackage at Fossil Butte, Wyoming. The Organization claims that the work consisted of transporting, grading, and compacting dirt with the use of seven (7) 641 Caterpillar Scrapers, four (4) bulldozers and two (2) Caterpillar Grader Patrols. It is

the Organization's position that such work has customarily and historically been performed by the Carrier's Roadway Equipment Operators and is contractually reserved to them under the provisions of Rules 1, 2, 3, 4 and 10 of the Agreement. The Organization further maintains that Carrier violated the Agreement when it did not give the General Chairman prior written notification of its intent to assign the disputed work to outside forces.

Carrier argues that the work at issue is not exclusively reserved to members of the Organization; that Carrier, since at least 1950, has contracted out projects of similar size and magnitude; and that, in any event, approximately 85 per cent of the line change was constructed off Carrier's right-of-way.

Moreover, Carrier urges that the Organization, in correspondence dated September 25, 1989, referencing Case U-52-9096, admitted the correctness of the Carrier position and conceded that Carrier only had to give notice when there was a real possibility that the protested work would fall within the Organization's jurisdiction. Unfortunately, this is clearly new material which is precluded from consideration by this Board. The correspondence relied upon by the Carrier was written some five years after the inception of this dispute and pertains to a different case. Absent any showing that we are somehow authorized to consider this material, we must apply the well established rule that evidence or argument not raised during the handling of the case on the property cannot be considered de novo by the Board.

Carrier further refers us to several precedent Third Division Awards which we deem dispositive of the instant case. In Award 27011 we addressed the same question of whether Carrier violated the Agreement when it subcontracted out, without the requisite advance notice, the grading and related work at Kemmerer, Wyoming Yards in September through November 1983. In that Award we stated:

> "With respect to the Carrier's remaining arguments, it is clear that the Carrier failed to provide proper notice to the General Chairman in violation of Rule 52(a). While there may be a valid disagreement as to whether the work at issue was customarily performed by the equipment operators, Carrier may not, as a general matter, put the cart before the horse and prejudge the issue by ignoring the notice requirement. As noted in Third Division Award No. 23354, 'For Carrier to ignore this requirement and move ahead with a subcontract because it either thinks that the work to be performed by the outside is not work exclusively reserved to covered employes or claims it does not have the proper equipment is unacceptable.' Also see Third Division Awards 23578 and 26174.

> While the Board believes that the work in question is covered by the Scope Rule for the purpose of advance notice, we are also of the view that the remedy requested herein would, under the unique circumstances of this case, be inappropriate. The Board takes note that the work at issue has apparently been contracted out for over 35 years and therefore falls within the provision of the Agreement which states that 'nothing contained in this rule shall effect prior and existing rights and practices of either party in connection with contracting out.' Thus, the claim would have to be denied on the merits and it is only on the notice violation that the Organization could prevail. Given the long period of time during which the Organization has acquiesced in the practice of contracting out the disputed work, however, it is the opinion of the Board that the Organization cannot now claim a violation of Rule 52 without first putting Carrier on notice that it believed advance notification was required in this particular instance. Accordingly, it is our judgment that the Board herein is limited to directing Carrier to provide notice in the future, just as in Third Division Award 26301."

(Also see Third Division Awards 27010, 23560).

The Organization in the present case has urged the Board to reconsider its position. It argues that Carrier's Roadway Equipment Operators have customarily performed roadway equipment operator's work. Acknowledging that Carrier may have on occasion contracted out equipment operator's work, the Organization stresses that Carrier would not have established a Roadway Equipment Operator's class, purchased expensive operating equipment and negotiated specific rates of pay for operating such equipment if its forces were not customarily assigned to perform roadway equipment operating work. In support thereof, the Organization cites five instances in which moving and grading work similar to that contracted out in the instant case were performed by Carrier forces.

While we understand the Organization's interest in protecting the work jurisdiction of its members, we must ultimately conclude that its position is not well-founded in the instant case. Carrier directly refuted the Organization's claim that this work has customarily been performed by its own forces. It pointed out that two of the examples cited by the Organization were actually contracted out, while two were relatively small projects unlike the one at issue here. The fifth instance cited by the Organization involved emergency work performed by Carrier employees, Carrier insisted. The Organization offered no rebuttal on these particular points.

Significantly, Carrier has offered approximately 30 instances of contracting out of similar work over the past 30 years. Moreover, the Organization concedes that the work has been contracted out in the past. Under these circumstances, while the Carrier clearly failed to provide the proper notice under the Agreement, and we will sustain the claim to that extent, we conclude that the requested remedy is inappropos. Carrier convincingly showed the existence of a past practice and therefore had the right to rely on Rule 52 of the Agreement which provides in pertinent part:

> "(b) Nothing contained in this rule shall effect prior and existing rights and practices of either party in connection with contracting out.
>
> (c) Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employees covered by this Agreement to outside contractors."

Thus, this claim, as in Third Division Award 27011, would have to be denied on the merits, and it is only on the notice provision that the Organization would prevail. We therefore direct Carrier to provide notice in the future in accordance with the provisions of the schedule Agreement.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1990.