Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28622
THIRD DIVISION Docket No. MW-28392
90-3-88-3-170

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
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(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 to widen the grade and build berms between Mile Posts 907 and 908 on the Wyoming Division beginning July 28, 1986 (System File M-493/870107).

(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) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Group 19 Roadway Equipment Operators I. R. Gilbert, D. Morgan, J. F. Gerrard, R. M. Angelo, R. L. Montoya, R. L. Wehrer and E. H. Wold shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces performing the work referred to in Part (1) above."

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.

The instant dispute was precipitated on July 28, 1986, when the Carrier contracted with the Neosho Construction Company of Gering, Wyoming, to widen the grade and build berms on the Wyoming Division between Mile Posts 907 and 908 near Altamont, Wyoming. The work continued through December 7, 1987. According to the Carrier, the work in question was necessary to alleviate a recurring track stabilization problem in that vicinity. Carrier maintains

that since the grading work which was performed involved the placement of materials and controlled moisture and compaction requirements which were beyond the scope of what Carrier forces had historically accomplished, it was determined that an outside contractor with sufficient experience in working with and around such areas would be utilized. In addition, during the handling of this dispute on the property, Carrier contended that the situation was of an emergency nature and required immediate corrective work.

The Organization contends that work of the character involved here is clearly encompassed within the scope of the Agreement and is reserved to the Carrier's Roadway Equipment Subdepartment employees under Rules 1, 2, 3, 4, and 10. Further, the Organization argues that the Carrier failed to provide the requisite advance written notice of its plans to contract out the work in question. Finally, the Organization submits that the Carrier's reliance on allegations of exclusivity and emergency as defenses is misplaced.

Carrier acknowledges that it failed to notify the Organization of its intent to subcontract, but argues that the work in question was not exclusively that of the employees in question and was not reserved to those employees either by express contract language or custom and practice. To the contrary, Carrier maintains that there is a well-established practice for using outside forces to perform the type of work at issue here and that its prior rights and practices are expressly maintained under Rule 52 of the Agreement. Finally, Carrier urges that certain correspondence dated September 25, 1989, from the General Chairman be considered as an admission by the Organization as to the correctness of the Carrier's position with regard to the issue of notice in cases such as this.

After consideration of this matter, it is our view that Third Division Award 28619, is dispositive of the instant case. Pursuant to Rule 52(a), the parties have agreed that "work customarily performed by employees" can be contracted out in certain enumerated circumstances provided that the required advance notice is provided. Whether or not Carrier ultimately prevails on the merits of the dispute, it is our conclusion that it may not make a predetermination on the subject by ignoring the notice requirement when there is a valid or colorable disagreement as to whether the employees customarily performed the work at issue. That was our conclusion in Award 28619, as well as Third Division Awards 26174 and 23578.

At the same time, there is compelling evidence that, given the long-standing practice by the Carrier of contracting out similar work, this Claim would have to be denied on the merits under Rule 52(b) and (c) and it is only on the notice provision that the Organization would prevail. Under these circumstances, as we have ruled in the past, we find that a pecuniary award would be inappropriate and instead direct Carrier to provide notice in the future in accordance with the provisions of the schedule Agreement.

As a final matter, it should be noted that our findings are based solely on evidence and argument presented by the parties during the handling of this dispute on the property. New material or evidence submitted to this Board cannot, and has not, been considered in rendering this award.

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.