Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28735
THIRD DIVISION Docket No. MW-28636
91-3-88-3-486

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The Carrier violated the Agreement when it assigned outside forces to perform asphalt work of the streets and tow paths in the wheel repair and store areas of the Hardy Street Yards beginning January 4, 1988 (System File MW-88-34/468-59-A).

(2) The Carrier also violated Article 36 when it did not give the General Chairman timely and proper advance written notice of its intention to contract said work.

(3) As a consequence of the violations referred to in Parts (1) and/-or (2) above, furloughed Machine Operators B. W. Arnold, D. W. Stansberry and Track Laborers D. Scott and L. R. Sosa shall each be allowed five hundred four (504) hours of pay at their respective straight time rates."

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.

On December 4, 1987, the Carrier gave notice to the Organization of its intent to contract out asphalt paving at the Hardy Street Yard Locomotive Plant. The Carrier explained asphalt paving requires equipment and experienced personnel which are only available through the contractors. On December 7, the Organization informed the Carrier it could not agree and a conference was held on December 9 to discuss the matter. The Organization charges that during that conference it was developed that the Carrier had committed itself to use outside forces before it gave the December 4, 1987,

Notice No. 48. The Organization accuses the Carrier of bad faith claiming the Carrier did not give proper notice to it about contracting out prior to assigning the work to outside forces. Moreover, the Organization asserts the work involved is encompassed within the scope of the Agreement and further contends this assertion was never challenged by the Carrier.

The Carrier defends its notice and action stating it has never denied the fact Organization members may have also performed the type of work in question, but insists they have not done so to the exclusion of all others. The Carrier argues the Organization by presenting this Claim is attempting to establish exclusivity by past practice and has not met its burden of proof. The Carrier contends Article 1, Scope, is general in nature. Accordingly, the Carrier maintains that in order for the Organization to prevail, it must prove the disputed work was exclusively and traditionally performed by employees on a system-wide basis. The Carrier views the record as failing to establish this fact.

The Board finds the Carrier's Claim that work within the scope means work reserved exclusively to the Organization by history, custom or tradition to be without Agreement support. We have consistently rejected the proposition that a Carrier is required to notify the Organization of its intent to contract out work only when the work in question is exclusively reserved to the Organization. The language of Article 36, Contracting Out, and like provisions was written to provide the General Chairman an opportunity to discuss the circumstances of a contemplated assignment of work to outside forces.

The record reveals that on December 7, 1987, the Organization wrote the Carrier refusing to agree to the use of outside forces. In addition, the Organization asserted the Carrier had committed itself to an outside contractor prior to serving Notice No. 48. The Organization also advised the Carrier it would request a copy of the contract at the conference scheduled for December 9, 1987. This request was not met. Subsequently, the Carrier has attempted to place that contract before this Board by attaching it to its submission. Clearly, this vital piece of evidence cannot be considered by the Board because it was not produced for the Organization during the on-the-property handling of this dispute. Accordingly, the Board is required to find that the Carrier did not rebut the Organization's allegation it entered into the contract prior to issuing its December 4, 1987, notice. Therefore, the evidence of record must be viewed as lacking any probative basis to rule the contract was not entered into before notice was issued.

In summation, Article 36 requires the Carrier to notify the General Chairman of plans to contract out work within the scope of the Agreement "... as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto." The Organization on December 9, 1987, advised the Carrier that the December 4, 1987, notice was not timely alleging the Carrier had already committed itself to a contractor and under such circumstances the Organization did not believe the Carrier could engage in serious good faith discussions. The implication of

these allegations is clear, yet the Carrier did not respond choosing to defend itself by claiming the notice was timely and that the work is not work which is exclusively reserved to the Organization. This latter defense is discussed above. Nonetheless, this Board is obliged to reemphasize it has consistently ruled that the phrase "within the scope of the applicable schedule agreement" cannot be expanded upon so as to support a Claim that it means contracting out of work reserved exclusively by history, custom or tradition (see Third Division Awards 18305, 19899, 23203, 24137.)

Lastly, the Carrier's Submission disputes the number of hours actually performed by the contractor asserting the hours are overstated by 1472. This position, along with supporting documents, is presented for the first time before this Board and must be rejected as evidence not developed in the on property handling of this case.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of March 1991.