Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28849
THIRD DIVISION Docket No. MW-28629
91-3-88-3-464

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

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

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 track work and grade crossing renewal work in the St. Louis Terminal beginning June 8, 1987 (Carrier's File 870997).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman 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, Foreman D. M. Campo and Trackmen W. R. Deetz, J. A. Crosley, R. E. Fulton, Sr., B. J. Wood and J. H. Porter shall each be allowed pay at their respective rates for eight (8) hours each calendar day, seven (7) days a week, beginning June 8, 1987 and continuing so long as Contractor Oberkramer Contracting, Inc. performs track work and grade crossing renewal work in the St. Louis Terminal and that the Claimants' seniority rights shall be extended for two (2) more years."

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.

In the instant case, the Carrier used an outside contractor to perform track and grade crossing renewal work in the St. Louis Terminal. The Organization argues that the work beginning June 8, 1987, was initiated without the advance written notice required by Article IV of the May 17, 1968 National Agreement.

From its initial August 6, 1987, letter and throughout the progression of this Claim on the property, the Organization has alleged a loss of work opportunity because of Carrier's Agreement violations. The Organization has argued that the work was covered by the Scope of the Agreement (Rule 1), should have been performed by Claimants who held the appropriate seniority (Rule 2) and should have been Bulletined (per Rule 11). In addition, as the December 11, 1981 Letter of Agreement proposed to reduce subcontracting, the Carrier was clearly not making a "good faith" effort to do so, as it had not notified the General Chairman (as required) to discuss the propriety of utilizing an outside firm rather than the employees.

The Carrier has maintained that the track work and grade crossing renewal work had been performed by outside contractors for many years. The Carrier further argued that it has "customarily and traditionally" utilized an outside contractor without complaint. It refutes the Organization's contention that the work is exclusively reserved to the employees by the Scope of the Agreement. The Carrier further challenges the relief sought.

We have carefully and fully read this large and extensive record. We have also read the numerous Awards presented. This Board duly notes that Article IV states:

> "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."

The Carrier admits that it failed to serve notice, but argues that the work was not within the Scope of the Agreement and further, that contractors forces have historically and without protest performed the work herein disputed.

Embedded in this dispute, encompassed in Article IV, raised by the Carrier and understood by the parties is the Scope Rule. Whether the work performed was within the Scope of the Agreement is a central focus of this instant case. The Carrier has argued that the work was not exclusively that of the employees. The Organization argues that the work was Agreement protected work. The Carrier did not deny that the "majority of the Track Department employees still perform the above disputed work from day to day." We find that this disputed work belongs to the employees. Our full review of all issues relevant to this instant case and facts finds that the work is within the Scope of the Agreement.

There is considerable debate on the property and before this Board as to whether the work belonged exclusively to the employees. On the property the Carrier said that this work did not, while the Organization maintained it was its work to perform and the Carrier had or could have procured the needed equipment. Careful analysis indicates that the work herein disputed had been consistently performed by contractors for many years. While the Organization concedes it had been performed by outside contractors for four or five years and particularly increased when the Missouri Pacific Railroad (the governing Agreement herein) merged with the Union Pacific, there is substantial evidence to the contrary. The Carrier argued it had occurred for decades and provides evidence of support.

We find that the language of Article IV is clear and unambiguous. The Carrier must notify the General Chairman when it plans to contract out work within the Scope of the Agreement. A study of the Scope Rule convinces us that the work belongs to the employees. There may be a conflict between the parties as to whether the work is exclusively that of the employees. In this instance the Carrier did not give notice, nor did it dispute that the work was customarily performed by the employees (see Third Division Award 28654; Public Law Board 4402, Awards 21 and 22). The Carrier's defense is that it has followed a long historical practice of contracting out such work. We do not find probative evidence to substantiate that the Organization ever protested or took exception to the Carrier's subcontracting or lack of notification.

On these instant facts, we find that the Carrier has violated the Agreement by failure to notify the General Chairman. The record demonstrates thirty years of allegedly similar subcontracting involving backhoes and other equipment which was unchallenged by the Organization. As we stated in our Third Division Award 26792:

> "It appears to have been past practice on the property. We are not persuaded by the Organization's arguments to the contrary. The Board will sustain the claim, but without compensation. When the Carrier has for a number of years considered its actions valid due to acquiescence by the Organization, the Board must deny compensation."

We find these instant circumstances similar (see also Third Division Awards 26436, 27011, 26301). The Carrier is hereafter required to provide notice of plans to contract out. The record contains no evidence submitted by the Organization that the Carrier's actions were ever protested. As the Carrier had come to rely upon its procedure, it cannot now be held responsible for compensation. We deny that part of the Claim.

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 25th day of June 1991.