Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28850
THIRD DIVISION Docket No. MW-28641
91-3-88-3-498

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

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

(1) The Agreement was violated when the Carrier assigned outside forces to perform tunnel cleaning work, i.e., remove waste, mud, ties, ballast and subgrade from the tunnels located at Mile Post 546.50 near Hermosa, Wyoming on September 28, 29, 30 and October 1, 4, 5 and 6, 1987 (System File 5F-52-16/870940).

(2) The Agreement was further violated when the Carrier did not afford the General Chairman a meeting to discuss the work referred to in Part (1) as contemplated by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Eastern District Group 19 Roadway Equipment Operators I. R. Gilbert, J. F. Gerrard and C. D. Steuben shall each be allowed fifty six (56) hours of pay at their respective Class A Roadway Equipment Operator rate. In addition,

> '*** the insurance premiums of these furloughed Claimants must be paid as they would have been paid in accordance with the Current National Agreement, had the Carrier properly bulletined said positions of Roadway Equipment Operators and recalled and utilized said Claimants.'"

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.

By letter dated August 28, 1987, the Carrier served notice of its intent to contract out grading work at Hermosa Tunnel. After an exchange of correspondence, the Carrier utilized an outside construction force to accomplish the grading necessary before the Carrier's forces reinstalled track. The Organization submitted the instant Claim by letter of November 3, 1987, protesting Carrier's violation of Rules relating to the proper assignment of Scope covered work to the Roadway Equipment Subdepartment (Rules 1, 2, 3, 4, 10, 13, 15, 16, 19, 20, 21 and 22) and contracting out (Rule 52).

This Board has made a full and complete review of all Rules, Awards and arguments presented. Without commenting on each and every aspect of this extensive record, it is important to note several elements in our decision. Rule 52 has language which specifically obligates the Carrier to serve notice at least fifteen (15) days prior to contracting out. Our review indicates that the grading work was performed beginning on September 28, 1987. As such, there is no question at bar as to whether the Carrier served proper notice. The central questions are whether the disputed work belonged to the employees and whether Rule 52 was fully complied with by the Carrier.

A review of the Rules finds that grading is arguably Scope covered work. Rules 1, 2 and 3 implicitly include the disputed work. Rule 10 states:

> "(a) Work in connection with the operation... and servicing of roadway equipment...assigned to work in the Roadway Equipment Subdepartment shall be classified as work of Roadway Equipment Operators."

In all, the Rules do seem to include the work herein disputed.

As to whether Rule 52 was fully complied with, the Board notes that the Carrier defended its contracting action under Rule 52(a) which provides that:

> "work customarily performed by the employes... may be let to contractors and be performed by contractors forces. However, such work may only be contracted provided..., special equipment not owned by the Company...."

From its letter dated September 9, 1987, and throughout this dispute, the Carrier stated that the job required special double-engine scrapers which it did not own. It noted during correspondence that the equipment could not be leased without using outside forces to operate the equipment. As Rule 52(a) provides for the condition stipulated by the Carrier in advance of contracting out, no violation is found in this record. Substantial probative evidence was not provided by the Organization to show that the double-engine scrapers were not utilized. The Board finds no employees at the site who directly stipulate to that fact. Other evidence presented by the Organization is not proof to counter the Carrier's denial and evidence.

Additionally, in this record, the Carrier relies upon Rules 52(b) and (d) to argue that it was unnecessary to notify the General Chairman as the work did not belong to the employees by custom, tradition and practice. Rule 52 further states in pertinent part:

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

The burden of proof to support the Organization's position was not met in this record. There is no evidence by the Organization to demonstrate that the prior contracting out was not a practice on the property. The Carrier documented past practice "on the property since at least 1918." Our review of the Carrier's Exhibit documenting hundreds of cases; the full record provided by the Organization; and the Rules herein disputed, convincingly show a clear practice by the Carrier of contracting out grading work. It is not possible under the language, practice, and instant facts to sustain this Claim.

The Board lastly notes that it found no evidence that the Organization's requested meeting to discuss the contracting transaction was not agreed to by the Company or would not promptly have taken place. Rule 52(a) states that "if the General Chairman... requests a meeting,... the Company shall promptly meet with him...." The Carrier promptly agreed to meet by letter dated September 9, 1987. There is no record that the Organization suggested any "mutually convenient time" or that the Carrier avoided its contractual responsibilities and acted in bad faith. For the reasons stated, the Claim must be denied.

A W A R D

Claim denied.

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.