Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29018
THIRD DIVISION Docket No. MW-28383
91-3-88-3-155

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 construct a diesel tank in the East Los Angeles, California Yards beginning January 6, 1987 (System File M-555/870454G).

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

(2) As a consequence of the violations referred to in Parts (1) and/or (2) above, Bridge and Building Steel Erection employes R. F. Carter, T. F. Carter, B. W. Clark and R. L. Winn shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by the outside forces beginning January 6, 1987 and continuing until the violation was corrected."

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.

This Claim was precipitated on January 6, 1987, when Carrier assigned outside forces to perform tank construction work in the East Los Angeles, California, yards. According to the Organization, Carrier improperly subcontracted this work to Atlas Tank, Inc., through January 29, 1987. Work of this character has customarily and traditionally been assigned to B & B Subdepartment Steel Erection employees, the Organization contends, and is work contractually reserved to them under the Scope and Work Classification Rules set forth in Rules 1 and 8.

It is also alleged that Carrier failed to give the requisite advance notice prior to contracting out.

Carrier defends by arguing, first, that advance notice was given pursuant to Rule 52, without objection or request for a conference by the Organization. The on-property record, however, shows that the Carrier never addressed the notice issue on the property. Second, Carrier submits that it has customarily contracted out the fabrication and construction of large capacity fuel storage tanks, and pursuant to Rule 52, "work customarily performed by employes covered under the Agreement may be let to contractors and performed by contractors' forces." Carrier also points out that Paragraphs (b) and (d) of Rule 52, which differ from the national contracting out rules, are applicable in this case. They read as follows:

> "(b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."
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> "(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."

Carrier has also advanced several additional arguments before this Board which were never raised during the handling of this dispute on the property. We are precluded from addressing those issues, as they are deemed waived.

Having considered the record in its entirety, the Board finds that the crux of this case centers around whether the work in question was traditionally contracted out by the Carrier and whether it fell within the rubric of what Rule 52 calls a "prior and existing practice." According to the Carrier's information submitted on the property, field erected tanks for diesel fuel have been constructed by contractors at least six times between 1979 and 1986. The Organization refuted Carrier's claim of past practice, however, contending that employees have also performed similar work in the past, including the erection of tanks in Los Angeles, California, Seattle, Washington, and Albina, Hinkle and La Grande, Oregon.

There have been cases where this Board has found that Carrier had the right to contract the disputed work under Rule 52 where specific evidence of past practice had been clearly proven. (See, e.g., Third Division Awards 27010, 28443, 28610). The record in the instant case is not so clear. Carrier cites only six instances where similar work was contracted out; the record suggests that at least an equal number of projects were performed by employees. Under these circumstances, we cannot say that the evidence cited by Carrier was sufficient to satisfy the requirements of Rules 52(b) or 52(d).

It is our further finding, on the basis of the record before us, that the notice violation has been proven. The Organization raised this issue at several points during the handling of this case on the property, without rebuttal by the Carrier. Proofs offered for the first time before this Board by the Carrier cannot be considered. The Organization's unrefuted claim must stand.

With respect to the remedy, all Claimants were fully employed and suffered no loss of wages. Accordingly, while Paragraphs 1 and 2 of the Statement of Claim are sustained, the request for monetary damages in Paragraph 3 is hereby denied. See, Third Division Awards 27634, 26642, 26378, 26108.

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 28th day of October 1991.