Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29306
Docket No. MW-28207
92-3-87-3-785

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 outside forces were used to perform weed spraying work on the Nebraska and Wyoming Divisions on June 21, 22, 24, 25, 26, 27, 28, 29, 30, July 1 and 2, 1986 (System File M-423/860138).

(2) As a consequence of the aforesaid violation, Roadway Equipment Operator R. L. Wagner shall be allowed two hundred twenty (220) hours of pay at the Class A Roadway Equipment Operator's straight time rate."

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 March 10, 1986, Carrier advised the General Chairman of its intent to solicit bids and contract out weed spraying for 1986. Carrier contends that the advance notice was properly supplied pursuant to Rule 52(a) of the Agreement, which reads in pertinent part:

"RULE 52. CONTRACTING

(a) By agreement between the Company and the General Chairman work customarily performed by employes covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's

employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing 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, except in emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith."

(emphasis added)

The Organization responded on March 13, 1986, that the Carrier had employees "who could perform some of this work," and requested a conference. It again requested a conference on March 20, 1986. On March 24, 1986, Carrier suggested the dates of March 31 or April 1 for a conference. There is no evidence in the record that the Organization responded to Carrier's suggestion.

No conference was held. The work was performed in late June and early July, 1986, and the instant claim was filed on August 19, 1986.

The Organization alleges that the weed spraying work belonged to employees it represents and should have been given to them to perform. It further alleges that Carrier violated the Agreement when it failed to give the General Chairman an opportunity to discuss the work in question. Consequently, the Organization claims 222 hours pay for the Claimant at the straight time rate.

Carrier denies that it failed to conform with the notice and conference requirements set forth in Rule 52 of the Agreement or that the weed spraying work was exclusively reserved to employees represented by the Organization by custom or Agreement. It asserts that it does not have the necessary machinery to perform this work and, consequently, it has always been contracted out.

Addressing the notice issue first, careful review of the precedent Awards cited by the parties reveals one that is precisely on point. In Third Division Award 24888, Carrier notified the General Chairman of its intent to contract out certain painting work. The Organization objected and indicated that it would like to further discuss the issue. Carrier subsequently responded that it was "agreeable to discuss the matter with you any mutually convenient time." As in the instant case, there was no evidence that the Organization pursued the matter further, and that a claim was filed after the work was contracted out. In denying the claim, the Board concluded:

> "Clearly the intent of Rule 52 is to maintain a good working relationship between the parties by providing an opportunity for employees to convince the Carrier that outside contracted work is not required as the employees can legitimately provide such services within the scope of the agreement. The Board notes that it is mandatory under the provisions of Rule 52 that the Company notify the General Chairman in advance of the event and that the Company meet with the General Chairman (or their respective representatives) if such a request is made. It is the opinion of the board that the Carrier properly notified the General Chairman by letter dated April 27, 1979, affording a bonafide opportunity for conference. The Board further notes that the carrier did not deny or refuse any request for a conference and that the deferred work later performed at Carrier convenience did not therefore violate the agreement."

We find the foregoing reasoning applicable and persuasive. In this case, the Carrier served timely notice or its intent to contract out, and responded to the Organization's requests for a conference by offering several possible dates. As in Award 24888, supra, we find Carrier did not violate the Agreement because it afforded a bona fide opportunity for a conference.

Turning to the merits, we note there was considerable evidence presented by the Organization on the issue of prior practice. The evidence is to the effect that, at least prior to 1984, certain weed spraying work had been performed by employees as a matter of practice. Correspondence between the parties dating back to March 1983, indicates that Carrier operated spray trains and that, in the past, the positions of Weed Spray Operator and Weed Spray Operator Helper have been bulletined. Moreover, it is pointed out that Appendix K of the Agreement specifically identifies Position Code No. 506 as that of a "Chemical Weed Spray Operator."

The Carrier defended by asserting that it no longer possesses the necessary equipment to perform the work, that its rail spray cars have fallen into disuse and have been condemned. It argued that it has for several years utilized the services of outside contractors because:

"Federal and State laws regulating the use of herbicides have become much more restrictive the last few years. These laws now require that personnel applying herbicides are certified and licensed. The contractors specify the chemicals to be used and how spraying is to be done. Therefore, their employees must be knowledgeable in the use of herbicides and agricultural sciences.

The spray trains and hi-rail spray trucks used by Railroad contractors meet any reasonable definition for specialized equipment. This equipment is especially built for the use of the contractors and is not for sale or rent.

State and municipal agencies, in many instances, are now requiring the Railroad to control vegetation on our entire right-of-way. Our present program includes spraying the ballast section, under bridges, at road crossings, brush, wide spraying of selective herbicides and plant growth regulators. The spray cars the Railroad used to operate were designed to treat only the ballast section and would be totally inadequate for our present program."

Rule 52 provides that the Carrier may contract out work when certain specific circumstances are present. For example, where special equipment is not owned by the Carrier or where the work in question is such that Carrier is not adequately equipped to handle it, Carrier is permitted to assign the work to outside forces. In the instant case, we find sufficient evidence to warrant the conclusion that exceptional circumstances within the meaning of Rule 52 were present at the time of the instant dispute. (See, Third Division Award 26711). Accordingly, 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 24th day of July 1992.