NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29547
Docket No. MW-29922
93-3-91-3-295

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employes
(
(Soo Line Railroad Company (former
(Chicago, Milwaukee, St. Paul and
(Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside contractor (Valley Excavating) to perform track maintenance work at the Mankato Street grade crossing on October 30, 31, November 1, 2, 3, 6, 7, 8, 9 and 10, 1989 (System File C #50-89/800--46-B-364 CMP).

(2) The Agreement was further violated when the Carrier assigned the same outside contractor (Valley Excavating) to perform track maintenance work (smoothing the roadbed and moving ties) between Mile Post 314.6 and Mile Post 314.8 at Minnesota City on November 14, 1989.

(3) The Carrier also violated the Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out the work mentioned in Parts (1) and (2) above as required by Rule 1.

(4) As a consequence of the violations in Parts (1) and (2) and/or (3) above, Mr. D. L. Johnson shall be allowed eighty-eight (88) hours of pay at the 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 employe 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.

The underlying facts in this case are not in dispute. Between October 30 and November 10, 1989, outside forces were used to assist Carrier employees in the rehabilitation of the Mankato Street crossing in Winona, Minnesota, and on November 14, 1989, outside forces were used to assist Carrier employees in roadbed maintenance work at Minnesota City. In these instances the Carrier contracted with the firm of Valley Excavating for heavy equipment, including a tractor, Bobcat, front-end loader and dump truck, along with an operator, asserting that it did not have the equipment readily available for use.

The Organization alleges that this work has customarily and traditionally been assigned to and performed by members of the Organization and that Carrier, without giving advance notice as required by the Agreement, allowed the work to be performed by the outside forces. The Carrier, on the other hand, contends that this is work which has historically been performed by other than Maintenance of Way Employees, and is not work which is exclusively reserved to them under the Agreement.

The following Rule is pertinent to a resolution of this dispute:

"Rule 1 Scope

The rules contained herein shall govern the hours of service, working conditions, and rates of pay of the employes in the Maintenance of Way and Structures Department represented by the Brotherhood of Maintenance of Way Employees but do not apply to supervisory forces above the rank of foreman. These rules do not apply to employes covered by other agreements."

Note to Rule 1 in the December 11, 1981 Letter of Agreement

"NOTE: In the event Carrier plans to contract out work within the scope of this agreement, the Carrier shall notify the General Chairman 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.

> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said subcontracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Carrier may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.
>
> Nothing in this note shall affect the existing rights 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."

While the Carrier argues first that it would not in any event be required to furnish advance notice because the Organization has not demonstrated its exclusive rights to the work in question, this contention has been consistently rejected by the Board in a long line of cases. In Third Division Award 28622, the Board stated:

> "Whether or not Carrier ultimately prevails on the merits of the dispute, it is our conclusion that it may not make a predetermination on the subject by ignoring the notice requirement when there is a valid or colorable disagreement as to whether the employees customarily performed the work at issue. That was our conclusion in Award 28619, as well as Third Division Awards 26174 and 23578."

It is likewise well-settled that the exclusivity test, while appropriate for certain other disputes, is not applicable to contracting out cases (See, for example, Third Division Award 24280). The record in this case, according to the assertions of the parties and the lack of rebuttal thereto, demonstrates a mixed practice on this property with respect to the work in question. It has apparently been performed by members subject to the Agreement in the past but has also apparently been contracted out by the Carrier in the past; neither party presented any evidence of record on the property to buttress their assertions on this point, nor was any rebuttal evidence offered. Thus, while the work could, based on the record before us, be contracted out under the provisions of the Note to Rule 1, the Carrier is required to give notice before doing so.

While we conclude that Carrier is thus in violation of the Agreement, the record demonstrates that several years of what Carrier asserts was similar subcontracting for heavy equipment went unchallenged by the Organization. As stated in 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 28849 and 28733) in that the Organization has slept on its rights. We are thus limited to directing that the Carrier provide notice in the future.

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 9th day of March 1993.