NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 30063
Docket No. MW-28967
94-3-89-3-385

The Third Division consisted of the regular members and in addition Referee Gil Vernon 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 clean the right-of-way (remove ties and debris) between Mile Posts 515 and 548 from May 2 through June 3, 1988 (System File S-40/ 880577).

2. The Agreement was further violated when the Carrier failed to timely and properly notify and confer with the General Chairman concerning its plans to assign said work to outside forces as required by Rule 52(a) and the December 11, 1981 Letter of Agreement.

"3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Equipment Operator I. R. Gilbert and Sectionmen J. L. Gallegos and J. R. Manzanares shall each be allowed pay at their respective rates for one hundred eighty-four (184) hours."

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.

This dispute arose when between May 2 and June 3, 1988, the Carrier contracted with an outside company, Herzog Construction, to

clean the right - of - way (remove ties and debris) between Mile Posts 515 and 548. The Organization contends that the Agreement was violated when the Carrier assigned this work to an outside contractor and that the Agreement was further violated by the Carrier's failure to give notice in accordance with Rule 52.

The Organization contends that the work at issue here is encompassed within the scope of the Agreement and clearly reserved to Maintenance of Way Sectionmen and Roadway Equipment Operators. (Rules 1,2,3,4,9,10). The Organization also argues that this work has customarily and traditionally been performed by maintenance of way forces.

The Organization argues that the Carrier violated Rule 52 when it assigned the work to an outside contractor without giving advance notice to the Organization. The December 11, 1981 Letter of Agreement provides that the "advance notices shall identify the work to be contracted and the reasons therefor." The Organization contends that the December 3 notice given by the Carrier gave no specifics about the work or the reasons for contracting out.

The Carrier argues that the scrap ties which were removed were sold to an outside company and therefore the work of removing them does not constitute "contracting out" of work. The Carrier argues further that even if the assignment of the removal did constitute contracting out, the Scope Rule is a general Scope Rule and to prove work ownership the Organization would have to show that it performed this work exclusively.

The Carrier argues that while the Organization may have performed the work at issue to some extent, it has not exclusively performed the work at issue. The Carrier has a long, and until recently, unchallenged practice of contracting such work. The Carrier has provided a list of such instances, which includes 43 incidents of contracting out similar work between 1953 and 1982.

Moreover, the Carrier argues, Rule 52(b) provides that nothing in it "shall affect prior and existing rights and practices of either party in connection with contracting" out the work in question.

The Carrier argues further that regardless of whether the work was reserved under the Scope Rule, because the Carrier has a past practice of contracting out the disputed work, rule 52(b) and (d) reserves its right to do so. The Board need not even address the Scope Rule or the Organization's arguments that it has customarily performed the work.

The Board must first consider whether the Carrier contracted with the outside company to sell the ties in question. If it did, then the cleaning and removal of the ties does not constitute contracting out and we need not consider any additional arguments. Third Division Awards 28488, 28489, 28615, 25276, 24280, 17804, 19826, are clear in this respect. In the handling of the dispute on the property, the Carrier asserted that it did sell the property. The Organization contended that it had received information that the Carrier had not sold the property and asked that the Carrier provide proof of this sale, as such proof would be easily under its control. The Carrier failed to provide such proof. The Board is faced with one assertion against another. We must also consider that the Carrier was specifically asked to submit evidence of the sale and such evidence would have been easily at its disposal. In view of this we decline to make a finding that a sale of the ties was effected.

We must next consider the Carrier's argument that its right to contract out the work in question was reserved under Rule 52(b) and (d). Rule 52(b) and (d) provide:

> "(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 of 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 out customarily performed by employes covered by this Agreement to outside contractors."

Several Awards support the Carrier's position and are dispositive of this case. See Third Division Awards 28622, 28619, 28610, 27011, 28558, 27010. In these cases, the Organization had argued that the Agreement was violated when the Carrier contracted out certain work which was covered by the Scope Rule, and historically, and customarily performed by members of the Organization. The Organization argued that the Carrier failed to give notice under Rule 52. In all these cases, the Carrier submitted instances where the disputed work was performed by outside contractors and the Board held that under Rule 52(b) and (d) the Carrier's right to contract out such work was preserved. The Board denied the claim in all these cases, regardless of whether the work was covered under the Scope Rule.

In particular, in Third Division Award 27010, decided on this property, the Board held,

> "Carrier further argues that the Organization has failed to fulfill its burden of proof in view of the past practice on the property. We agree. Carrier's Exhibit 14 sets forth 26 instances of contracting out of similar work over the past thirty years. Moreover, the Organization concedes that the work has been contracted out in the past. Under these circumstances, while the work involved is arguably covered by the Scope Rule, Carrier had the right to contract the work under Rule 52 of the Agreement...."

Similarly, in Third Division Award 28558, the Board held,

> "We need not address the issue of whether or not the work is covered by the Scope Rule or practice. Rather we are compelled to follow the principles in Third Division Awards 27010 and 27011, which both involve these parties. In each case, the Carrier established a history of contracting out the construction of right-of-way fences. This work, therefore, is subject to the exception provided in Rule 52(b) without regard to whether or not it is reserved exclusively to covered employees. The Agreement was not violated."

Based on these Awards, the Board need not review the parties' arguments as to the inclusiveness of the Scope Rules or the necessity of proof of exclusivity. The Carrier has established a long history of contracting out similar work. It has offered 43 instances of contracting out of similar work over a 30 year period. This suffices to conclude that the Carrier prevails on this issue.

We must still consider whether the Carrier was required to give notice in this instance and whether the notice given was adequate.

In several of these Awards cited above, the Board found that the Carrier violated the Rule 52 notice provision, but for this violation a pecuniary award was inappropriate. The appropriate remedy was to direct the Carrier to provide notice in the future.

In Third Division Award 28622, the Board held,

> "Pursuant to Rule 52(b), the parties have agreed that 'work customarily performed by employees' can be contracted out in certain enumerated circumstances provided that the required advance notice is provided.

> 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....
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> "At the same time, there is compelling evidence that, given the long-standing practice by the Carrier of contracting out similar work, this Claim would have to be denied on the merits under Rule 52(b) and (c) and it is only on the notice provision that the Organization would prevail. Under these circumstances, as we have ruled in the past, we find that a pecuniary award would be inappropriate and instead direct Carrier to provide notice in the future in accordance with the provisions of the schedule Agreement."

The Carrier has admitted that the Organization has performed this work to some extent. Because there was at least a colorable disagreement over whether the Carrier could contract out the work in question, the Carrier was required to give notice under Rule 52.

The Carrier did give notice on December 3 and a conference was held. The issue that must be decided then is whether Carrier gave adequate notice. Under 52 standing alone, it appears that the notice given was adequate. Rule 52 does not specify the type of information required in the notice. The Letter of Understanding, however, provides, "In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

The notice given by the carrier provided,

"This is to advise of the Carrier's solicitation of bids covering the picking up and disposal of railroad property of scrap ties generated from system tie and sledding operations. The successful bidder will become the owner of the property." This was enough information to enable the Organization to take a position as to whether it felt this was work which should or should not be contracted out. Moreover, a conference was held on December 16 which enabled the parties to discuss the matter. The Carrier did give proper notice.

In considering this claim, the Board has not considered any arguments or evidence which were not brought forth during the handling of the dispute on the property.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.