Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32433
Docket No. MW-31113
98-3-93-3-85

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen 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 (Mueller Sand and Gravel) to perform Maintenance of Way and Structures Department work (setting forms, tieing rebar, pouring and finishing concrete, removing forms, cleaning up debris, building foundations, building retaining walls, drainage systems and separator system) on the Kansas Division in Maryville, Kansas beginning October 21, 1991 and continuing (System File S-617/ 920127).

(2) The Agreement was further violated when the Carrier failed to timely furnish the General Chairman with a proper advance written notice of its intention to contract out said work or afford the General Chairman a meeting to discuss the work referred to in Part (1) above, prior to the contracting out of said work, as contemplated by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Kansas Division B&B Group 3 Carpenters R. J. Lister, D. J. Bejan and S. M. McMullen shall each be allowed compensation at their respective and applicable rates of pay for an '*** equal proportionate share of the man hours worked by the employees of the outside contracting force ***' beginning October 21, 1991 and continuing until the violation ceases."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

On September 17, 1991, Carrier sent the following notice to the General Chairman:

> "This is to advise of the Carrier's intent to solicit bids to cover construction of truckloading/ unloading pad with containment around the pump house, relocate truck loading station, construct concrete containment structure for lube oil and diesel fuel storage tanks with piping for drainage, construct sewer drain to oil/water separator, and remove concrete slab and air tank, at the Marysville Yard, Kansas.
>
> This work is being performed under that provision of the Agreement which states, 'Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out.'
>
> Serving of this 'Notice' is not to be construed as an indication that the work described necessarily falls within the 'scope' of your Agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWE.
>
> Additionally, I will be available to conference this Notice within the next 15 days in accordance with Rule 52 of the Agreement."

In his reply to the Notice, the General Chairman asserted that the work is "specifically identified and designated" as work which "accrues to Carrier's B&B Subdepartment under Rules 1 and 8 of the Agreement." The General Chairman further pointed to Rule 52 of the Agreement which dictates the five conditions under which Carrier may contract out "M of W work." The General Chairman noted that Carrier had not alluded to any of the five conditions, maintaining that there is "no valid basis" for the transaction. Finally, the General Chairman asserted that:

> "With respect to your comments contained in the last paragraph of your letter regarding the scope of our Agreement, past practice, etc., this appears to be the same rhetoric or a form thereof the Carrier has argued before which I contend is unfounded and meritless.
>
> * * *
>
> The Carrier has also contended that in the past there are literally thousands of Awards which have consistently recognized that in the face of a general Scope Rule the determination as to whether a particular type of work is or is not scope covered must turn on whether the employees have or have not as a matter of custom and tradition performed such work at locations throughout the system to the exclusion of all others. While this may or may not be true, one must remember the Scope of our Agreement is not general in nature but is, specific because of the exact language included in our Agreement like the examples, Rules 8, 9 and 10, given. Under such circumstances, the Carrier's contention, whether true or false, seems to be irrelevant."

On September 30, 1991, Carrier responded maintaining that:

> "This type work has traditionally been contracted by the Company. The Scope Rule in the labor contract is general in nature and does not set aside any work in connection with the notices at issue for exclusive performance by employees represented by the BMWE. The general Scope Rule combined with the Company's well-known and accepted past practice of subcontracting establish the absolute right of the Company to subcontract. It has long been accepted and recognized that Rule 52 applies only to

Scope covered work. There is simply no legitimate rule basis for an assertion that the work at issue cannot be contracted by the Company.

The rules which you have cited in your letters are classification of work rules which are totally independent of the Scope and contracting rules. Any question of whether or not the Company can subcontract work falls outside the realm of the classification work rules and in the end must rely on the Scope and contracting rules. Your argument that the Scope Rule is 'introductory' in nature and co-mingles with the classification of work rules to create a specific scope rule is completely unsupported. Under a general scope rule it is axiomatic that exclusivity in the performance of work is the appropriate test used to determine work ownership. Obviously, the BMWE cannot demonstrate exclusivity in the performance of the work at issue in these notices."

A conference was held on October 3, 1991, however, the matter remained unresolved. On November 15, 1991, the Organization submitted the above quoted claim.

At issue in this dispute is Carrier's right to subcontract work pursuant to the provisions of Rule 52 of the Agreement. A careful review of the evidence adduced on this record leads us to conclude that Carrier did not violate the Agreement when it contracted out the work which Mueller Sand and Gravel performed beginning October 21, 1991. At the outset, Carrier served notice of its intent to contract the work in dispute. Further, Carrier successfully established a past practice of subcontracting out work just such as that which is at issue. Finally, the Organization was unable to refute Carrier's assertion that it did not possess the "special" equipment necessary, nor did it have M of W forces available to perform said work. Based on the foregoing, this claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of January 1998.