

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34019
Docket No. MW-31583
00-3-93-3-587**

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned an outside contractor (Asplundh Railroad Division) to perform Maintenance of Way work (spraying weeds and vegetation) on the Kansas Division between Marysville, Kansas and Gibbon, Nebraska beginning July 11, 1992 and continuing (System File R-37/920506).**
- (2) As a result of the violation referred to in Part (1) above, Roadway Equipment Operator A. F. Szwaneck shall be allowed compensation, at the Group 21 Roadway Equipment Operator’s straight time rate, equal to the man-hours consumed by the outside forces beginning on July 11, 1992 and continuing.”**

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.

This case involves a claim by the Organization that the Carrier violated Rule 52 of the Agreement when it contracted with an outside concern to perform chemical weed spraying on the right-of-way on the Kansas Division between Marysville, Kansas, and Gibbon, Nebraska. Rule 52 reads as follows:

“Rule 52. Contracting

- (a) By agreement between the Company and the General Chairman work customarily performed by employees 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 employees, 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 HS 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.”

The Organization asserts that the Claimant is a qualified chemical weed spray car operator, an established classification in the Roadway Equipment Operator (“REO”)

class, and was available to perform the work in question. The disputed work, according to the Organization, is common, ordinary, weed spraying work contractually reserved to the Carrier's REO's under the Scope Rule. Moreover, the Organization argues that the notice/conference provisions of Rule 52 are not merely procedural, but are substantive. According to the Organization, therefore, the Carrier violated Rule 52 by failing to engage in good-faith conference discussions. Specifically, the Organization objects that the Carrier continued to contract out the disputed work in spite of its prior commitment to reduce the use of outside contractors and increase the use of Maintenance of Way employees.

Further, in response to the Carrier's defense that it does not possess the equipment required to perform the work at issue, the Organization asserts that the fact the Carrier improperly allowed its equipment to deteriorate to the point where it is unusable should not operate to remove the work from the Scope of the Agreement. Similarly, the Carrier cannot fairly argue it has no employees qualified to perform chemical weed spraying when it has not adequately trained and seasoned the work force. The Organization asserts that the Board is empowered to award the remedy requested, regardless of the Claimant's availability on the claim dates. Absent such affirmative relief, the Organization argues, the Carrier will suffer no penalty for its violations.

The Carrier, on the other hand, asserts that it fully complied with Rule 52 requirements. It argues that it provided timely notice to the Organization of its intent to contract out the work, and that a conference was held with the Organization prior to the commencement of the work.

Further, the Carrier maintains that more than 136 Awards involving these parties support its right to contract out numerous activities, including the spraying of weeds and vegetation. In fact, the Carrier directs the Board to Third Division Award 29306, wherein the Board ruled that the Carrier had the right to contract out such work.

After reviewing the record evidence, we have determined that the Organization's claim should be denied. Our review of the record demonstrates that this case involves the same issues and same Rule presented in Third Division Award 29306. In that case, the Board rejected the Organization's arguments that weed spraying belongs to employees it represents and that the Carrier failed to conform with the Notice and conference requirements of Rule 52. So, too, the Board dismissed the Organization's claim that the Carrier could not contract out where it had allowed its spray cars to fall

into disrepair. According to the Board, special circumstances permitting the Carrier to contract out the disputed work existed because herbicide application is highly regulated, thus requiring certified personnel and specialized equipment which the Carrier does not possess.

We find no basis in the record to deviate from the Board's reasoning in Award 29306. Accordingly, the claim must be 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 19th day of April, 2000.