

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 36625  
Docket No. MW-36249  
03-3-00-3-431**

**The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.**

**(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(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 (Rex Fabrication) to perform routine Maintenance of Way and Structures Department work (turntable repair) at Hinkle, Oregon on March 30, 31 and April 7, 1999 instead of Northwestern District Steel Erection employees D. E. Larsen and S.E. Burgus (System File J-9952-79/1190664).**
- 2. The Agreement was violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 Letter of Understanding.**
- 3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. E. Larsen and S. E. Burgus shall now each be compensated for an equal proportionate share of the total number of man-hours, straight time and overtime hours, expended by the outside forces in the performance of the aforesaid work on March 30, 31 and April 7, 1999, at their respective applicable rates of pay."**

**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 December 2, 1997, the Carrier issued Service Order No. 7385, which set forth the following:

"This is a 15-day notice of our intent to solicit proposals and/or bids to contract the following work:

Location: Ogden, Utah to Hermiston, Oregon

Specific work: Removing, refurbishing, and transporting a turntable from existing site in Ogden, Utah to destination site at the Railroad's Hinkle Yard near Hermiston, Oregon.

Serving of this 'notice' is not to be construed as an indication that the work described above 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 BMW.

In the event that you desire a conference in connection with this notice, all follow up contacts should be made with Wayne Naro in the Labor Relations Department."

In his reply to the Carrier's December 2 Notice, the General Chairman asserted that:

**"Initially, it is the Organization's contention that the notice, as presented, is procedurally inadequate and/or defective, in part, as it is quite vague and inconsistent with the specific requirements of Rule 52 and the December 11, 1981 Letter of Understanding. Absent from the notice is the basic information such as the work's scheduled commencement date, the work's scheduled ending date, the exact location and a complete description of all work to be performed by outside forces.**

**Secondly, this work has customarily been assigned to and performed by the employees of the Carrier's Maintenance of Way Department. Additionally, this work is specifically reserved to said employees under the terms of our Agreement.**

**For this conference, I would appreciate you having the following available:**

- 1. Full description of the work to be contracted.**
- 2. Scheduled commencement date/ending date.**
- 3. Exact location(s) involved.**
- 4. Number of contractor employees to be used.**
- 5. Estimated number of hours/days/months/years to be consumed.**
- 6. Reasons for the contemplated transaction as referred to and required by Rule 52 and the 12-11-81 Letter of Agreement.**
- 7. An Engineering Department representative who has information concerning the contemplated transaction and authority to delegate the work involved or any portion thereof to MofW Department employees."**

**Subsequent to a conference during which the parties were unable to resolve the issues surrounding the contracting out, the Organization submitted a claim on behalf of Northwestern District Steel Erection employees alleging that the Carrier violated Rules 1, 2, 3, 4, 8, Section IV, 15, 19, 20, 22, 52 and the December 11, 1981**

Letter of Understanding when it assigned work accruing to the Claimants to Rex Fabrication.

The Carrier denied the claim premised upon the following: (1) the contracting notice was issued in a timely manner; (2) a conference with the General Chairman was properly held; (3) the Carrier contracted out the same type of work on prior occasions; and (4) there was no proven loss of work opportunity for the Claimants during the claim period.

**Rule 52 – Contracting - states, in pertinent part:**

- “(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 a 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 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.

- (d) Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employees covered by this Agreement to outside contractors."

The record demonstrates that Service Order No. 7385 was mailed to the Organization on December 2, 1997. The Order specified that the Carrier intended to contract for the "removing, refurbishing, and transporting a turntable from existing site in Ogden, Utah, to destination site at the Railroad's Hinkle Yard near Hermiston, Oregon." The Organization responded with a December 9 letter requesting a conference, which was subsequently held on December 23, 1997. Clearly then, it cannot be disputed that the notice (Service Order No. 7385) was sent well within the time limits of Rule 52 and the 15-day notice.

Turning to the merits of the dispute, the Organization cited the general "customarily performed" work Scope Rule in support of its position. In order to prevail, it was incumbent upon the Organization to demonstrate that the disputed work had been performed historically and customarily by the Claimants. In these circumstances, the Organization was unable to shoulder its burden of proof.

A review of the record reveals that the work in dispute did not involve "repairs" to an existing turntable, but rather the installation of a turntable. In that connection, the Organization did not dispute the Carrier's assertion that: "Claimants have never performed the work of installing turntables, nor do they possess the requisite knowledge to accomplish same."

Under the circumstances, we find no evidence establishing that the Agreement was violated, and therefore, this claim must be denied.

**AWARD**

**Claim denied.**

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**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 29th day of July 2003.**