Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37354
Docket No. MW-36988
05-3-01-3-578

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Herzog Contracting Corporation) to perform Maintenance of Way and Structures Department work (operate crawler type backhoe) to clean out right of way ditches between Mile Posts 452 and 466 on the Trenton Subdivision beginning on June 30, 2000 and continuing through July 21, 2000, instead of Machine Operator L. D. Taylor (System File 2RM-9179T/1246965 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant L. D. Taylor shall now be compensated for one hundred twenty (120) hours' pay at his applicable straight time rate 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.

The Carrier notified the General Chairman by letter dated April 10, 2000 of its intent to contract out work involving a "Specialized Ditching Mach. 4/25 until finished Trenton [subdivision] MP485.0 to MP64.0." Conference was held on April 20, 2000. This claim followed.

The Carrier's letter of April 10, 2000 complied with its notice obligations under Rule 1(b).

Rule 1(b) also provides, in pertinent part:

> "By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or time requirements must be met which are beyond the capabilities of the Company forces to meet."

The dispute is over a ditcher utilized by the contractor and not possessed by the Carrier. The Carrier described the ditcher as follows:

> ". . . The purpose of this ditcher was to pick up and remove mud and rocks thru cuts and areas that required the material to be loaded into cars for removal. This machine is a special design "prototype" machine that has open well cars and a specially designed digging machine that moves on the outer railings of the car. This machine is self-propelled and requires a duly qualified employee who is familiar with its design, capabilities, function operation, and handling. This machine is not similar to anything the Union Pacific has, or has access to for its own Machine Operators to operate. . . ."

Rule 1(b) provides that ". . . such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company. . . ." Notwithstanding the Organization's arguments that the Carrier had equipment that could do the work, the ditcher in question falls within the "special equipment" provision of Rule 1(b).

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 24th day of February 2005.

LABOR MEMBER'S DISSENT
TO
AWARD 37354, DOCKET MW-36988
(Referee Benn)

Because the Majority failed to correctly apply the clear terms of the Scope Rule a Dissent is appropriate. The Scope Rule of this Agreement has been consistently interpreted to reserve **all** work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the railroad to Maintenance of Way employes. Hence, the cleaning of ditches along the right of way is quintessential Maintenance of Way work. Moreover, evidence presented during the handling of this dispute on the property proved that the Track Department employes had performed this identical work using Carrier owned machinery and air dump cars in the past. This undisputed fact was never refuted by the Carrier during the handling of this dispute on the property.

So how did the Majority arrive at the ignominious result in this case? It was necessary to use one of the exceptions listed in Rule 1 to explain away its error. Those exceptions are special skills not possessed by the Carrier's employes, special equipment not owned by the Company, special material available only when applied or installed through a supplier, **are required,** or unless work is such that the Company is not adequately equipped to handle the work; or time requirements must be met which are beyond the capabilities of the Company's forces. In this case, the Majority hinged its decision to deny the claim based on the special equipment exception of Rule 1. Although the equipment owned by the Carrier was not **"identical"** to the equipment of

the outside contractor, which it alleged was a proto-type "special design" it nevertheless performed the "**identical**" work. In denying the claim, the Carrier has removed the work from the coverage of Rule 1 by virtue of a piece of equipment. This Board has consistently held that the contract covers the work not the machinery used to perform it. Because the Majority erred in its interpretation of the Scope Rule, Award 37354 is palpably erroneous and can have no value as precedent.

Respectfully submitted,

Roy C. Robinson
Labor Member