NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26174

THIRD DIVISION Docket Number MW-25864

Charlotte Gold, Referee

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 outside forces were used to perform welding work on rail ends and frogs in the Nampa Yards beginning January 18, 1982 (System File 7-26-13-14-54).

2. The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plan to assign said work to outside forces.

3. Because of the aforesaid violations, Welder R. E. Ward and Welder Helper C. R. Pedersen shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

OPINION OF BOARD: On January 18, 1982, a two-man gang employed by an outside Contractor began welding work on rail ends and frogs in the Nampa Yards at Nampa, Idaho. The Organization contends that the work in question was contractually reserved to Carrier's Track Subdepartment Welders and Welder Helpers. As a consequence, Carrier violated the parties Agreement (specifically Rules 1, 2, 3, 4 and 9) when it assigned this work to an outside force. At the same time, Carrier failed to give the General Chairman advance written notice of its intent to contract out, a violation of Rule 52 (Contracting).

Rule 52 reads as follows:

"RULE 52. CONTRACTING

(a) By agreement between the Company and the General Chairman work customarily performed by employes 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 employes, 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 ade-

quately 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 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.

(b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connecting with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

(c) Nothing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than maintenance of way employes in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disasters.

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

Carrier acknowledges that, through oversight, it failed to notify the Organization of its intent to subcontract, but argues that (1) the work in question was not exclusively that of the employes in question, (2) a well-established practice has existed for 50 years for using an outside force, and (3) the Organization had filed a number of Claims before, but had let them die. Carrier maintains that prior rights and practices were unaffected as a result of its actions and that Claimants, who were fully employed during the Claim period, suffered no loss. Further, Carrier lacked the needed welding equipment necessary to establish an additional gang.

Whatever the merits of Carrier's position on its right to subcontract the work in question, its case falters at the outset because of its failure to provide proper notice to the General Chairman of not less than fifteen days prior to its taking action, as required by Rule 52(a). That Rule stipulates that such Notice is required where the work in question is "customarily performed by employes covered under this Agreement." While there may be a valid disagreement as to whether the work at issue was exclusively reserved to those employes, there can be no dispute that it was customarily performed by Claimants.

The opportunity to discuss subcontracting is an important one. Although Carrier may argue, for example, that its employes are now fully employed, it may be possible for the parties to consider a schedule for performing the work at a time when it is mutually convenient to do so. As noted in Third Division Award No. 23354, "For Carrier to ignore this requirement and move ahead with a subcontract because it either thinks that the work to be performed by the outsider is not work exclusively reserved to covered employes or claims it does not have the proper equipment is unacceptable."

At the same time, we are also persuaded by the decision in Award 23354, that compensation must be denied because all affected employes are fully employed and suffered no loss. This is a position that has long been applied in the industry and we find no basis for ruling to the contrary. (This is not to say, however, that there is no merit to the Organization's contention that flagrant and continued disregard of a Carrier's responsibility to provide proper notification should result in the sustaining of a monetary Claim. It is an argument that warrants attention and we will continue to consider it in the future.)

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of October 1986.

CARRIER MEMBERS' DISSENT
TO
AWARD 26174, DOCKET MW-25864
(Referee Gold)

While it may appear academic in this case, we do believe it appropriate to point out that where, as here, the Carrier has contracted out the work in dispute for approximately 50 years without the Organization bringing a single dispute to this Board alleging that such conduct violated any Agreement between the parties, the Carrier's failure to give notice is of such a technical nature that no violation should have been found. To suggest, as does the Majority, that a backpay remedy might have been appropriate if Claimants had not been fully employed, is to place too high a premium of form over substance.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost