Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27011
THIRD DIVISION Docket No. MW-26339
88-3-85-3-62

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(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 grading and related work in connection with extending the Kemmerer, Wyoming Yards September 20, 1983 through November 1, 1983 (System File 7-27-13-14-54/013-210-52).

(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, furloughed Equipment Operators J. T. Solt, C. A. Hintz, R. J. Lasslet, R. S. Hutchinson, J. H. Scott and R. D. Collins shall each be allowed pay at the Group 20 Roadway Equipment Operator's rate 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."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Beginning on September 20, 1983, the Carrier employed an outside construction company to perform grading and related work in connection with the extension of the Kemmerer, Wyoming Yards. The work consisted of transporting, grading and compacting dirt using Caterpillar scrapers, bulldogs, a backhoe and a grader. The Organization contends that the work in question is contractually reserved to Carrier's Roadway Equipment operators and that such work has customarily and historically been performed by these employes. At the same time, the Organization contends that Carrier failed to give the General Chairman advance written notice of its intent to contract out, a violation of Rule 52(a).

Rule 52(a) 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 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 requirement' 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." (Emphasis supplied)

Carrier frankly acknowledges that, through oversight, it failed to notify the Organization of its intent to subcontract, but argues that (1) the work at issue was not exclusively that of the equipment operators; (2) a well-established practice has existed for 35 years for using an outside force to perform this type of work; and (3) this claim should be dismissed in any event because it was not timely filed.

Addressing Carrier's last argument first, it is apparent from a careful review of the record evidence in its entirety that the question of timeliness was never cited by the Carrier during the handling of this dispute on the property. There are numerous Awards of this Division holding that procedural questions of this kind cannot be raised for the first time on appeal. Among them are Third Division Awards 1552, 2786, 3269, 5140, 6500, 6769, 8225, and 8807. The Carrier's timeliness objection therefore will not be considered as it is deemed waived.

With respect to the Carrier's remaining arguments, it is clear that the Carrier failed to provide proper notice to the General Chairman in violation of Rule 52(a). While there may be a valid disagreement as to whether the work at issue was customarily performed by the equipment operators, Carrier may not, as a general matter, put the cart before the horse and prejudge the issue by ignoring the notice requirement. 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 outside is not work exclusively reserved to covered employes or claims it does not have the proper equipment is unacceptable." Also see Third Division Awards 23578 and 26174.

While the Board believes that the work in question is covered by the Scope Rule for the purpose of advance notice, we are also of the view that the remedy requested herein would, under the unique circumstances of this case, be inappropriate. The Board takes note that the work at issue has apparently been contracted out for over 35 years and therefore falls within the provision of the Agreement which states that "nothing contained in this rule shall effect prior and existing rights and practices of either party in connection with contracting out." Thus, the claim would have to be denied on the merits and it is only on the notice violation that the Organization could prevail. Given the long period of time during which the Organization has acquiesced in the practice of contracting out the disputed work, however, it is the opinion of the Board that the Organization cannot now claim a violation of Rule 52 without first putting Carrier on notice that it believed advance notification was required in this particular instance. Accordingly, it is our judgment that the Board herein is limited to directing Carrier to provide notice in the future, just as in Third Divison Award 26301.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of April 1988.