Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28817
Docket No. MW-28569
91-3-88-3-394

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

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 the Carrier assigned outside forces (Durbano Metals Construction Company) to perform right-of-way cleaning work in the vicinity of Evanston, Wyoming from July 2 through August 25, 1987 (System File M-640/871083).

(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) As a consequence of the violations referred to in Parts (1) and/or (2) above, Roadway Equipment Operators E. H. Wold, I. R. Gilbert and Class C Material Truck Drivers D. L. Johnson, L. E. Gilbert and R. L. Montoya shall each be allowed three hundred twelve (312) hours of pay at their applicable straight time rates."

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 employes 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.

On March 24, 1987, the Carrier served notice on the Organization that it intended to dispose of scrap ties on the Western District through Mid-South Railway Service. The notice further advised the ties, once removed from the track structure, would become the property of Mid-South, which would then be responsible for their disposition. The Organization took exception to the Carrier's position, and a conference was held to discuss the matter. No agreement was reached between the parties.

Between July 6, 1987, and mid-August 1987, Carrier's Maintenance of Way forces removed ties from the track structure in the vicinity of Evanston, Wyoming. The material was then removed from the Carrier's property by Durbano Metals. The Organization claims the removal of the scrap ties was work reserved to employees covered by the Agreement. In addition, the Organization asserts the Carrier failed to serve notice of its intent to contract out the work in accordance with Rule 52. It does not consider the March 24, 1987, notice to be proper as it did not identify Durbano Metals as the contractor. Furthermore, the Organization contends the work was performed on the Eastern District and that the Western District is not a recognized territory under the Agreement.

First, without regard to whether or not it was required to do so, we do not agree the Carrier failed to serve notice. While the notice did contain erroneous information, there is no indication the Organization was unaware of the location where the work was to be performed. The identification of the contractor is immaterial as this information is not required under Rule 52. The intent of the notice requirement was satisfied in this case. Serving the notice, however, does not relieve the Carrier of all liability. The Rule provides that:

> "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."

Whether the work was improperly contracted out depends upon the nature of the work performed and on the relationship between the Carrier and Durbano Metals. With respect to the latter, the Carrier asserts Durbano purchased the material as it was removed from the track structure and was solely responsible for its disposition. If so, the work would cease to be within the scope of the Agreement once title to the material transfers. The Organization, however, argues Durbano was a contractor and not a purchaser. In support of its position, the Organization avers the Carrier paid Durbano seventy-five cents for each tie removed. The Carrier has never refuted this.

The Board notes the Carrier used the word "contractor" several times to describe Durbano in its correspondence during the course of the handling of this dispute on the property. In fact, it quoted a portion of its proposed agreement with the company which referred to it as "contractor." That portion listed a restriction placed upon the contractor with regard to disposal of the scrap. It required the contractor to furnish the Carrier with a list of all landfills used to dispose of scrap, providing the landfill name and location, copies of all landfill disposal tickets, and a copy of documentation which verified that crossties disposal is acceptable to EPA and state regulations. In addition to using the word "contractor," this condition contradicts the Carrier's assertion it had no interest in how Durbano disposed of the material once it was removed from the track structure. Significantly, the Carrier never furnished any documentation which would indicate a sale took place. On the basis of this evidence, we must conclude Durbano Metals was a contractor and not a purchaser.

The work complained of consisted of stacking and removing the material once it was removed from the track structure. Under Rule 9, this work belongs to employees covered by the Agreement. The Rule reads, in pertinent part, as follows:

> "Construction and maintenance of roadway and track, such as rail laying, tie renewals, ballasting, surfacing and lining track, fabrication of track panels, maintaining and renewing frogs, switches, railroad crossing, etc., repairing existing right of way fences, construction of new fences up to one continuous mile, ordinary individual repair of way, loading, unloading and handling of track material and other work incidental thereto shall be performed by forces in the Track Department."

Because this Rule is specific in stating that tie renewal, cleaning right of way and loading, unloading and handling of track material is to be performed by forces in the Track Department, we find the work to be exclusively reserved to employees within the scope of the Agreement. It is not necessary for the Organization to demonstrate it has been historically performed by covered employees to the exclusion of others where the rule clearly includes such work.

The Carrier notes, however, that Rule 52, unlike the May 17, 1968, National Agreement, contains a provision which provides as follows:

> "(b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection 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."

The Carrier argues this provision allows it to contract out such work because it had a prior right to do so. It has proven neither a prior right nor a prior practice. This burden of proof is on the Carrier, not the Organization. The fact that the Carrier may have contracted out such work without notice to or objection by the Organization after Rule 52 was written does not establish prior and existing rights and practices.

On the basis of the above, we find the Agreement was violated. This Board has in a considerable number of cases rejected the argument advanced by the Carrier that it should have no liability to Claimants who were fully employed at the time of the contracting out. See Third Division Awards 19899, 24137 and 25968. The fact that one Claimant left the service of the Carrier subsequent to the dates of claim has no bearing on the validity of the claim on his behalf in the absence of anything to indicate he waived any rights to the claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1991.

CARRIER MEMBERS' DISSENT
TO
AWARD 28817, DOCKET MW-28569
(Referee McAllister)

The Majority's fundamental interpretation of Rule 52 is in line with the numerous prior Awards which have considered the Rule. Thus, the Majority correctly concludes that notwithstanding its finding that the work involved was reserved exclusively to members of the Organization, it would have denied the Claim if the Carrier had demonstrated a past practice of contracting out such work. For other Awards interpreting Rule 52, see Third Division Awards 28850, 28789, 28623, 28622, 28619, 28610, 28443, 27011, 27010 and PLB No. 4219, Case 8.

Beyond the fundamental interpretation, however, the Majority commits two errors. First, the Majority errs when it finds the work in dispute is reserved exclusively to members of the Organization under Rule 9. The Majority mistakenly finds that Rule 9 of the Agreement is part of the Scope Rule of the Agreement. Of course, it is not. Rule 1 of the Agreement is the Scope Rule, and that Rule is entirely general in nature and does not even mention work assignment. The Majority apparently confuses Rule 1 of the Agreement with Rule 9 which is a classification of work rule. Rule 9 merely assigns work intracraft, i.e., it determines which subdepartment will do the work if it is assigned to the craft. The Rule has nothing to do with reserving work to the craft. Indeed, such conclusion

already has been reached on this property. Thus, in PLB No. 4219, Case 8, the Board found:

> "Obviously Rule 1, standing alone, is a 'general' scope rule. It does not even undertake to define what work is reserved to members of the organization.... To fill this gap the Organization invokes Rule 8 which classifies the duties allocated to the Bridge and Building Subdepartment. However, Rule 8 does not guarantee certain work to the Organization. Rule 8 is not a scope provision. Instead, its purpose is merely to describe what portion of the work belonging to the Organization is to be allocated to B&B forces. If the work described in Rule 8 is not otherwise reserved to the Organization, Rule 8 has no effect."

In so concluding, the Board was not breaking new ground. See Third Division Awards 27880, 27759, 22144, 21843, 18471, among others, which stand for the same proposition.

Unfortunately, the Majority's error in construing Rule 9 is not the only mistake. The Majority misconstrues the language of Rule 52(b) as confining evidence of past practice to the period antedating the Rule. In <u>every</u> Award construing Rule 52, including Award 28558 by the same Referee here, the Board has always considered relevant past practice to include all instances of contracting up to the date the Organization first objected. In no Award, including Award 28558, did the Board hold, or even intimate, that instances of contracting by the Carrier after Rule 52 "was written" could not be used to establish a past practice of contracting under Rule 52.

Every Award interpreting Rule 52 has determined the issue of past practice upon the evidence which demonstrated the manner in which the parties have acted during the period of their relationship, both before and after Rule 52 "was written." It is such practice that determines the parties rights under the Agreement. There is no rational basis, whatsoever, for a finding in this case that a consistent, continuing, and unobjected to practice which included 38 instances of contracting out similar work after Rule 52 "was written" is not evidence of the Carrier's right under the Rule.* (Parenthetically, we note that in the myriad of Board Awards dealing with work assignment, which turned on the issue of past practice, the Board has never refused to consider practice subsequent to the "writing" of the Scope Rule.)

Finally, on this second point, it is noteworthy that the Majority refers to Rule 52(b) and makes no mention of Rule 52(d). Rule 52(d) provides:

> "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."

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* Rule 52 has been in effect at least since 1973. The Majority thus finds almost 20 years of practice irrelevant.

Every Award, including Award 28558, has given equal weight to Rules 52(b) and (d) in determining the issue of Carrier's right to contract out work. Rule 52(d) does not contain any language that could possibly lead to a conclusion that past practice after the Rule became effective could not be considered.

We cannot fathom the reason the Majority made the errors it did but we are confident that they will be treated as anomalies for purpose of precedent.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost