Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29472
Docket No. MW-29002
93-3-89-3-426

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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 the Carrier assigned outside forces to grind switch points, stock rails, connecting rails and switch frogs between Kansas City, Kansas and Joyce, Nebraska beginning June 6, 1988 (System File S-50/880418).

(2) The Carrier also violated Rule 52 when it failed to timely and properly notify and meet with the General Chairman concerning its intention to contract said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Roadway Power Tool Machine Operators G. A. Disney and D. E. Tarver shall each be allowed pay at their straight time rates for an equal proportionate share of the total man-hours consumed by the outside contractor performing the work identified in Part (1) above beginning June 6, 1988 and continuing until the violation was corrected."

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.

This is another in a series of disputes concerning the application of Rule 52 and related Rules to an instance of the Carrier's contracting work to outside forces. When the Carrier seeks to contract work under specific criteria, Rule 52 provides that the Carrier:

> "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 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 this 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."

In this instance, the Carrier notified the General Chairman by letter dated March 8, 1988, of its intention to contract "switch rail grinding" employing a specialized computer-operated grinding machine. On March 16, 1988, the General Chairman responded, advising of his objections and requesting a conference. On April 4, 1988, the Carrier responded by contending that Rule 52 was inapplicable but agreeing to meet in conference (without proposing a date for such). Under date of April 18, 1988, the General Chairman responded, again requesting a conference. By the General Chairman's letter of June 14, 1988, it was acknowledged that the parties agreed to confer on June 24, 1988, and did so. However, the proposed switch rail grinding had already commenced on June 6, 1988, apparently unbeknowst to the General Chairman.

Upon review of extensive argument concerning the Scope Rule and the question of "customarily performed" and exclusivity, the Board concludes that the work in question warranted implementation of the Rule 52 procedure, if only for the Carrier to defend its position as to the use of specialized equipment in contrast to other methods of rail grinding.

Given this conclusion, the Board finds that the Carrier failed to respond "promptly" to the General Chairman's request for a conference, particularly in view of the fact that it proceeded with the work well in advance of the conference which eventually occurred.

The Board finds, therefore, that the Claim has merit, in that the Carrier failed to meet its threshold obligation. There remains the question of remedy. The Organization contends that the Claimants were on furlough, while the Carrier states that they were under pay at the time the work was performed. Previous Awards have approached the remedy issue in such matters in varying ways, depending on circumstances. Here, the Board determines that the Carrier's initiation of the work prior to twice-requested conference is sufficient to warrant sustaining the Claim regardless of the Claimants' alleged assignment to other work; however, where Carrier records show that a Claimant had made himself unavailable for work on any of the claimed days, payment for such days is not required.

In its Submission, the Carrier alleges that the Organization failed to comply fully with the procedural requirements of Rule 49. Since there is no evidence that this issue was raised on the property, it needs no review by the Board.

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 21st day of January 1993.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 29472

DOCKET NO. MW-29002

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (Union Pacific Railroad Company

On January 21, 1993, the Board issued Award 29472. A portion of the Findings and the Award in this matter reads as follows:

> ". . . [t]he Board determines that the Carrier's initiation of the work prior to twice-requested conference is sufficient to warrant sustaining the Claim regardless of the Claimant's alleged assignment to other work; however, where Carrier records show that a Claimant has made himself unavailable for work on any of the claimed days, payment for such days is not required.
>
> AWARD
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> Claim sustained in accordance with the Findings."

The Statement of Claim calls for the following remedy for two Claimants:

> "[They] shall each be allowed pay at their straight time rates for an equal proportionate share of the total man-hours consumed by the outside contractor performing the work identified in Part (1) above beginning June 6, 1988 and continuing until the violation was corrected."

The parties have been unable to agree on the application of the monetary remedy as provided in the Findings and Award. As a result, the Organization has requested an

Interpretation from the Board. Submissions concerning the Interpretation have been reviewed by the Board, as has the entire file of the parties' Submissions provided to the Board prior to its issuance of Award 29472.

As to the one condition i.e., availability of a Claimant on a given day, the parties are not in dispute as to the disallowance of one day for one of the Claimants.

The Carrier argues that the Organization's request for an interpretation should be dismissed on two bases. The first is that the Organization is seeking "enforcement" of the Award, which should be undertaken in U.S. District Court and not by this Board. The second is that the Organization is attempting to "reopen the case for additional argumentation on the question of damages."

The Board finds no foundation for either of the Carrier's contentions. The Organization seeks neither enforcement nor "additional argumentation" as to appropriate remedy for Agreement violation. ("Damages" is not involved here.) The Claim seeks pay from June 6, 1988 "and continuing until the violation was corrected." The Award sustained this Claim. Obviously, a question as to duration of the violation period has arisen. An Interpretation by the Board is the appropriate next procedural step.

The Carrier contends that payment to the two Claimants of 18 days' pay and 19 days' pay, respectively, was "understood" and was paid. The Organization argues there was no such "understanding." From a thorough review of the original record and that submitted with the Interpretation request, the Board can find no support for the Carrier's position.

The Carrier now submits to the Board for the first time two pages of handwritten notes, which were apparently provided to the Organization during an exchange of correspondence in reference to determining appropriate remedy. While these notes may indicate the Carrier's position as to the limits of the remedy, they clearly do not show any concurrence by the Organization.

The Carrier also refers to page 41 of its original Submission, which includes the following sentence:

"Finally, the claim period is June 13, 1988 to approximately July 7, 1988 (see Company Exhibit 'V')."

The difficulty here is that the Carrier Submission received by the Board did not include an Exhibit "V." The Organization states that it also received no such exhibit. The contention as to dates apparently relies on an unfurnished exhibit; of necessity the Board can give this no weight.

The Organization's proposed remedy attempts to cover the period "until the violation was remedied." In a letter dated June 1, 1993, the General Chairman explains, on page 2, the basis for a remedy covering 88 days. As indicated by the Organization's calculations, the number of days is an approximation. The Carrier, however, offers no contradictory evidence as to the amount of "continuing" work involved, other than its 18- and 19-day assertions, discussed above. For purpose of closure, the Board finds the remedy calculated by the Organization satisfies Award 29472.

INTERPRETATION

Award 29472 provides a remedy as proposed by the Organization. The Claimants shall receive such pay, less pay for 18 days or 19 days, respectively, already received.

Referee Herbert L. Marx, Jr. who sat with the Division as a neutral member when Award 29472 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of November 1997.