Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30675
Docket No. MW-28547
95-3-88-3-368

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
(
(Grand Trunk Western Railroad Company (former
(Detroit, Toledo and Ironton Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, without benefit of mutual agreement between the Chief Engineer and the General Chairman, it assigned outside forces to perform grading work at Flat Rock Yard on June 15 and 16, 1987 and on July 6, 1987 (Carrier's Files 8365-1-231 and 8365-1-235).

(2) As a consequence of the violations referred to within Part (1) hereof, First Class Machine Operator R. Miller shall be allowed seventeen (17) hours at his straight time rate of pay and two (2) hours at his time and one-half overtime 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 instant case involves two claims filed on behalf of a Trackman with Machine Operator seniority assigned to Flat Rock, Michigan. The incident precipitating the first claim took place on June 15 and 16, 1987, when Carrier leased a small bulldozer and engaged Sedlock and Francisco Company to perform work on the tracks

inside the Car Repair Shop at the Flat Rock yard. The second claim arose on July 6, 1987, when Carrier hired A.B.C. Paving to grade the service roads in the Flat Rock yard, using a power road grader.

The Organization maintains that the disputed work has historically been performed by the Carrier's Track Sub-department forces in accordance with Rules 1, 7, and 8, which provide as follows:

"**RULE 1--SCOPE**
(Effective 4-1-55)

This agreement shall govern rates of pay, hours of service and working conditions of employees occupying all positions below the rank of supervisor in the Maintenance of Way and Structures Department listed in Memorandum of Understanding No. 1, which, with such amendments as may be made from time to time, is made part of this agreement. This agreement shall also cover similar positions which may be established."

* * *

RULE 7--SENIORITY LIMITS

The seniority rights of employees are confined to the sub-department in which employed; namely, Track-Sub-Department or Bridge and Building Sub-Department."

RULE 8--SENIORITY
(Effective 4-1-55)

* * *

(d) The classifications in each sub-department are as follows:

* * *

TRACK SUB-DEPARTMENT
* * *

Group II

Machine Operator -- First Class
(Note -- A separate roster will be maintained for each of the following types of equipment.)

Power Ballasters or Multiple Tampers
Gasoline Crawler Crane or Burro Crane
Bulldozer
Jordan Spreader
Power Track Adzer
Kershaw Ballast Regulator
R.M.C. Tie Master
R.M.C. Spike Master

Machine Operator -- Second Class
Trackman"

The Organization argues that the foregoing Rules plainly establish that Machine Operators are required to perform all work connected with grading and the operation of the equipment to be used in the performance of such work. Moreover, the Organization contends that there is a firmly established practice, going back at least 13 years, which supports its assertion that the disputed work has traditionally been performed by track forces. Finally, it is argued that the February 28, 1955 Letter of Understanding specifies that work ordinarily considered Maintenance of Way work will be performed by Carrier forces when practicable, and that when it is necessary to contract out any such work, it shall be by mutual agreement between the parties. In this case, the Organization points out, Carrier contracted out the disputed work without notice or agreement of the parties.

Carrier defended by arguing that the equipment used to perform the work in question is not ordinarily used by track forces. Carrier also pointed out that there is no Power Roadgrader Operator classification in the Agreement, nor any other Rules which reserve grading work to the Organization or prohibit the Carrier from contracting out the disputed work. Therefore, the Organization cannot claim the work done in this instance for its employees. Furthermore, the Carrier contends that Third Division Award 25564 addressed precisely the same issues and, under the doctrine of res judicata, the Board is precluded from again adjudicating the same issues of fact and contract interpretation which were decided in that prior Award.

A careful review of the record in its entirety convinces us that the Organization has not proven that it was entitled to perform the work in question. Although we disagree with Carrier to the extent that it argues that Third Division Award 25564 is binding upon us, since in our view the factual circumstances in the two cases differ, we do agree with the general principles enunciated therein and find them applicable in this case as well. It is the Organization's burden of establishing that the work at

issue was Claimant's to perform either under the express coverage of the Scope Rule, or under an exclusive reservation of work rule, or by virtue of a well-established past practice. Also see, Third Division Awards 15943, 17943, 18243. We note that the Scope Rule relied upon here is general in nature and does not expressly refer to the work at issue. Moreover, we do not agree that Rules 7 or 8 specifically guarantee to the Claimant the right to perform the work claimed in this matter. These Rules are very unlike the specific, detailed work classification rules which spell out the duties to be performed by a particular craft or classification and which have been cited in prior cases as creating an express right to perform certain work.

That being the case, the Organization is required to provide a demonstration of work performance by custom, practice or tradition in order to sustain a contracting out violation. Here the Claimant submitted a letter which, in our view, fails to meet the Organization's evidentiary burden. Claimant cited a few instances of related work, but from this we are unable to conclude that there existed an unequivocal, clearly enunciated and readily ascertainable practice which was firmly established and accepted by both parties. Given the absence of probative evidence by the Organization on these essential points, we have no alternative but to conclude that the record does not support its claim.

Finally, with regard to the Organization's contention that Carrier was required to give advance notice of its intent to contract out, we conclude that the February 28, 1955 Letter of Understanding concerns the contracting of work that is ordinarily performed by Carrier's forces. As indicated herein, we are not persuaded from the proofs on this record that the work at issue has ordinarily been performed by Carrier forces. Since no violation of the Agreement has been proven, this claim must be denied.

AWARD

Claim denied.

O R D E R

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 31st day of January 1995.