Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31169
Docket No. MW-30596
95-3-92-3-360

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company
((Eastern Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Fairmont Railway Motors) and a furloughed employe to perform switch and road crossing grinding work at El Paso, Texas and between Del Rio and San Antonio, Texas beginning January 29, 1991 and continuing (System File MW-91-60/500-75-A SPE).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance notice of its intention to contract out said work as required by Article 36.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operators G. Leos and D.G. Galindo and Welder W.S. Donald shall each be allowed pay at their respective rates of pay for an equal proportionate share of the total number of straight time and overtime hours spent by the outside forces and the junior furloughed employe in the performance of the work in question beginning January 29, 1991 and continuing."

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 waived right of appearance at hearing thereon.

At issue in the instant claim is the Carrier's use of an outside contractor (Fairmont) to perform switch and road crossing grinding work. There is no dispute that the Carrier did not serve notice of its intention to contract out said work.

In response to a Claim concerning the contracting of such work, the Carrier stated in its May 3, 1991 letter to the Organization:

> "Investigation reveals the machine referred to in your claim is a Fairmont Switch Grinder and that Southern Pacific does not own a machine like this one. The RG1s and RG2s that we own only grind track and are busy. The switch grinder is special and grinds switches and road crossings. This machine is operated by contractor's own people and as you state in claim, Southern Pacific has a foreman or assistant foreman on hand while the machine is being operated."

The Carrier further clarified in its July 8, 1991 letter to the Organization:

> "Southern Pacific purchased two 40-stone rail grinders from Fairmont Railway Motors in the early 1980's to be used primarily to grind curves. Prior to obtaining these grinders, all rail grinding was performed by outside contractors. These two machines are presently combined to get better productivity and are working on the Western Lines. These machines are not capable of grinding rail through switches and road crossings. There are three companies in the United States that have machines that are capable of grinding switches and road crossings. The type of equipment used in this work is not available to the Southern Pacific other than through one of these three companies."

The question before the Board is whether the Carrier violated the notice provision of Article 36 and other Rules in its contracting specific switch and road crossing grinding work to Fairmont as indicated in the Statement of Claim. In support of its contention that the work in question has been traditionally performed by Maintenance of Way employees, the Organization relies totally upon its agreements between 1979 and 1989 relating specifically to the Multiple Rail Grinder equipment referenced in the July 8, 1991 letter noted above, and Article 18 Section 5 of the Agreement referencing designated employees assigned to the Rail Grinder Train. It offered no evidence from employees assigned to the Rail Grinder Train that they ever performed switch or road crossing grinding work.

The Carrier presented some evidence that both rail grinding and switch and road crossing grinding work had been previously contracted. The Organization never contested the Carrier's assertion that its Rail Grinding equipment could not accomplish the disputed switch and road crossing grinding work. Rather, the Organization contended that the Carrier failed to show that it could not lease the equipment in question and utilize employees to perform work on it.

After a careful review of the record, the Board is convinced that this dispute is essentially a scope rule question, in the context where the scope rule has been held to be general in nature. See Third Division Award 28788. Since the scope rule and pertinent agreements and contract provisions do not specifically reserve switch and road crossing grinding work to employees, it was incumbent upon the Organization to establish that the work in question has been historically, traditionally or by practice reserved to employees covered by the Agreement. As noted, they failed to meet that burden in this case, and, under well established doctrine, the claim must be denied. Since the use of the Fairmont Switch Grinder in dispute has not been shown to be reserved to employees under the scope of the agreement or by custom or practice, the Article 36 notice requirements would not apply. See Third Division Award 30180.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders than an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of September 1995.