Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36515
Docket No. MW-35887
03-3-99-3-895

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company [former Southern Pacific
(Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (J. G. Scott & Sons Contractor, Inc.) to haul 113 and 136 pound rails from Mile Post 1439.5 at Efaw to Mile Post 1382 at Alamogordo, New Mexico '***to blade and water down yard-track right-a-ways MP 1297.60 and Backhoe operator performing work of dismantling, repairing, and installing main line broken rails, crossing planks, and switch ties MP 820.00-MP1291.54 El Paso Terminal Yards Limits.' On March 9, 10, 11, 12, 13, 16, 17, 18, 19, 20 and April 2, 1998 (Carrier's File 1137651 SPW).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice of its intent to contract out the work in accordance with Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. L. Lopez, A. B. Marquez, D. E. Galdino and J. T. Marquex shall each be allowed an equal proportionate share of the total number of man-hours worked by the contractor's forces at their respective rates 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.

Without prior written notice to the Organization, the Carrier hired an outside contractor to perform work around El Paso, Texas, in March and April 1998. Specifically, the Organization claims that the contractor transported rails, graded and watered down the right-of-way, and dismantled, repaired and installed mainline broken rail, crossing planks and switch ties at the El Paso Terminal Yard limits.

The Organization maintains that this is work reserved to BMWE-represented employees under the terms of the Agreement and by virtue of the fact that they have historically and traditionally performed such work. As stated in its appeal on the property, the Organization's view is that the outside contractor performed work rightfully belonging to the Claimants and "the burden of proof is in the Carrier's hands to prove otherwise." Furthermore, the Organization contends that the Carrier violated Article IV of the May 17, 1968 Agreement, which required at least 15 days notice of intent to subcontract.

The Carrier responds by arguing that the claim is, at best, vague and lacking in specificity. Equally important, the Carrier contends, the Organization has not shown that the disputed work is scope-covered. On the contrary, the Carrier cites numerous instances in which the work in question has been contracted out. Because this was not work within the scope of the Agreement, the Carrier asserts that it was not required to provide the General Chairman with advance notice in accordance with Article IV of the 1968 National Agreement, nor was it prohibited from engaging the services of the contractor in this case.

Additional arguments raised by the parties need not be addressed because the Organization has not established as a threshold matter that the work performed was within the scope of the Agreement.

In accordance with Article IV of the May 17, 1968 Agreement, the Carrier must provide timely written notice to the General Chairman when it plans to contract out work provided that the work falls "within the scope of the applicable schedule agreement." Contrary to the Organization's contention, the burden rests with the Organization to make a prima facie showing that the work was arguably scope covered in order to trigger the notice provisions.

The Organization's burden in this regard is not onerous. For purposes of Article IV, work is considered scope-covered if it is reserved to its craft members by specific Scope Rule provisions or by custom and practice. There need not be a showing that the work was performed exclusively by members of the Organization, nor must the Organization prove that it would prevail on the merits. However, there must be some specifics, beyond general assertion, establishing that the employees in the past have actually done the work or were otherwise entitled to perform it. See, Third Division Awards 29158, 31260, 31599 and 31720.

In this case, the Organization has not met its threshold burden. The Scope Rule involved is general in character. It does not lend support for the Organization's claim to the particular work in question. Neither this Rule nor any of the other numerous Rules cited by the Organization in its claim provides a colorable basis for finding that the Claimants were entitled to perform the work here involved. Moreover, the record is devoid of any evidence that the employees have, at times, performed the work in question. Under the circumstances, we are not satisfied that Article IV of the May 17, 1968 Agreement was violated when the Carrier proceeded to subcontract without providing advance notice to the Organization.

Similarly, the Organization has not carried its burden of persuasion on this evidentiary record with regard to the merits. Again, we are presented only with general assertions by the Organization that its employees historically have performed the work. By contrast, the Carrier submitted probative evidence that it routinely used contractors for the work asserted in this claim. It must be concluded, therefore, that there is no basis for a finding on the merits that the Carrier violated the Agreement or was

otherwise precluded from contracting out the work in question. The claim must be denied for lack of evidentiary support.

AWARD

Claim denied.

ORDER

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 23rd day of April 2003.