Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28610
THIRD DIVISION Docket No. MW-28421
90-3-88-3-202

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
(
(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 perform construction, maintenance and repair work at the Omaha Headquarters Building beginning July 28, 1986 (System File M-574/870543).

(2) The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plans to assign said work to outside forces.

(3) As a consequence of Part (1) and/or Part (2) above, B&B Subdepartment employes D. L. Albin, W. R. Steer, J. H. Carlson, T. E. Danahy, P. K. Cain, E. C. Sorenson and M. L. Adler shall each be allowed pay at their respective straight time and overtime rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

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 dispute is one of an extensive number of cases in which the Carrier is accused of violating Rule 52, Contracting, both by failure to provide advance notice to the Organization and by having work performed by outside contractors rather than by employees represented by the Organization.

The Organization refers to work performed at the Carrier's headquarters involved with "steelcase furniture, partitions, walls, doors and carpet tiles." The Carrier presented detailed evidence that such work has been frequently contracted out to various suppliers over the course of many years.

While alleging the work belongs to Bridge and Building Subdepartment employees, the Organization has not convincingly shown that such work was "customarily performed" by Bridge and Building Subdepartment employees rather than being contracted out.

Rule 52 specifies the limits within which the Carrier may contract out work. However, as argued by the Carrier, the Rule includes the following:

> "(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. . . .
>
> (d) Nothing contained in this rule shall impair the Company's right to assign work out not customarily performed by employes covered by this Agreement to outside contractors."

The Carrier points out that it has undertaken such contracting out frequently in the past without protest from the Organization. This would appear to constitute a "prior" right of the Carrier in instances of the particular type of office work here at issue.

The central point here, as viewed by the Board, is that the cited headquarters work does not fall specifically under work assigned to Building and Bridge employees, given the history of such work being performed by outside contractors in numerous instances.

In view of this, the Board need not review the Organization's position as to the inclusiveness of Scope Rules nor the Carrier's argument as to the necessity of proof of "exclusivity." These principles have been reviewed innumerable times in other Awards.

The question remains as to whether the Carrier was required to give advance notice under Rule 52, despite the fact that such work was frequently performed by outside contractors without protest by the Organization. As to this point, the Board relies on the conclusion in Third Division Award 27011, involving the same parties, which stated as follows:

> "While the Board believes that the work in question is covered by the Scope Rule for the purpose of advance notice, we are also of the view that the remedy requested herein would, under the unique circumstances of this case, be inappropriate. The Board takes note that the work at issue has apparently been contracted out for over 35 years and therefore falls within the provision of the Agreement which states that 'nothing contained in this rule shall effect prior and existing rights and practices of either party in

connection with contracting out.' Thus, the claim would have to be denied on the merits and it is only on the notice violation that the Organization could prevail. Given the long period of time during which the Organization has acquiesced in the practice of contracting out the disputed work, however, it is the opinion of the Board that the Organization cannot now claim a violation of Rule 52 without first putting Carrier on notice that it believed advance notification was required in this particular instance. Accordingly, it is our judgment that the Board herein is limited to directing Carrier to provide notice in the future, just as in Third Division Award 26301."

Cited Third Division Award 26301 went further to state that a denial Award was proper where the Organization had "slept on its rights" in reference to advance notice concerning a particular type of contracted work. The Board finds this conclusion appropriate here.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 16th day of November 1990.