Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29393
THIRD DIVISION Docket No. MW-28669
92-3-89-3-22

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 outside forces were used to construct a new fence 'Railroad West of the Boiler Shop' at Pocatello, Idaho on August 31, September 3 and 4, 1987 (System File M-647/871208).

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

(3) As a consequence of the violations referred to in Parts (1) and (2) above, First Class B&B Carpenters A. S. Kunz, C. L. Harris and H. L. Christiansen shall each be allowed twenty-one and one-third (21 1/3) hours' pay at their respective straight time rate."

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.

On August 31 and September 3-4, 1987, an outside company constructed a chain link fence west of the Boiler Shop at the Carrier's Pocatello, Idaho, facility. The Organization thereafter filed a claim on the Claimants' behalf, contending that this work is historically and traditionally reserved for employees covered by the Agreement. The Carrier denied the claim.

This Board has thoroughly reviewed the extensive record in this case, and we find that the Organization has not met its burden of proof that the Carrier violated the Rules when it subcontracted the construction of a new fence.

First of all, this Board should note that the Scope Rule does not specifically require that all fencing work be performed by employees represented by the Organization. There is no reference to fence work in Rule 1. Moreover, the Organization has not demonstrated that it has exclusively performed the fencing work for the Carrier in the past. As a matter of fact, the Carrier has submitted substantial evidence that, on at least 33 occasions in the past, it has subcontracted the installation of chain link fences and other types of fences over its entire system from 1953 through 1980.

Rule 52 states in Section (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."

Section (a) of the same Rule requires that only work "customarily" performed by the employees covered by the Agreement is subject to the restrictions of Rule 52. There has been no showing that the Organization's members customarily perform the fencing work for the Carrier. The notice requirements in Rule 52(b) apply only to work belonging to the Organization employees which would be work that they customarily perform. Hence, this Board can find no violation because of the lack of notice in this case.

Moreover, in a recent decision of this Board, Third Division Award 28610, this Board discussed the question of whether a Carrier is required to give advance notice under Rule 52 when the type of work that is frequently performed by outside contractors is executed without protest by the Organization. In that claim, we denied the claim and relied upon the conclusion of this Board in Third Division Award 27011, in which we stated:

> "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."

As we stated in Award 28610, a denial Award is proper where an Organization has "slept on its rights" in reference to advance notice concerning a particular type of contracted work.

Given the facts in this case, and the history of subcontracting the construction of chain link fences by this Carrier, we cannot find that the Organization has met its burden of proof. Therefore, the claim must be denied.

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 17th day of September 1992.