NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 30185
Docket No. MW-28908
94-3-89-3-310

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
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(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 perform remodeling work, i.e., construction of a conference room, on the second floor of the 5500 Ferguson building, at East Los Angeles, California, beginning on February 15, 1988 (System File 1576-52/880178).

2. The Agreement was further violated when Carrier did not give the General Chairman prior advance written notice of its intention to contract out the work involved here, in accordance with Rule 52 and the December 11, 1981 Letter of Agreement.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Group 3 California Division B&B Carpenters W.E. Peacock, R.D. Lee, E.L. Baker and T. Moreno shall each be allowed pay at their respective rates for an equal proportionate share of the number of man-hours expended by the outside forces performing the afore-described work beginning February 15, 1988 and continuing."

FINDINGS:

The First 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.

The Claim before the Board protests the Carrier's use of an outside contractor to perform remodeling work on the second floor of the 5500 Ferguson Building in East Los Angeles. The Claim lists as a specific example of the remodeling work, the construction of a conference room. The Parties' agreement contains the following language relative to contracting out:

> "(a) By agreement between the Company and the General Chairman work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contact out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

(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.

(c) Nothing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than maintenance of way employes in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disasters." (Emphasis added.)

Among the many issues raised by the Organization is whether advance notice was given. The Organization asserts notice was not given. The Carrier says it was. The issue in this case is not whether notice was given. Notice unquestionably was given, contrary to the assertions of the Organization. The question is whether it was adequate. The Carrier sent the following letter to the General Chairman on October 19, 1987:

> "This to advise of the solicitation of bids covering the remodeling of the north and east sides of the second floor of the 5500 building in East Los Angeles, California, to accommodate the relocation offices of the Sales, Law and Claims Departments.
>
> This work will primarily involve the relocation and installation of moveable partitions and walls, as well as painting, ceiling work and new carpeting. It is imperative the work be performed as expeditiously as possible."

The General Chairman responded by letter on October 30, 1987. He did not request a conference, but instead, set forth his opposition and reasons therefore in his letter. The Board notes he took no issue with the adequacy of the notice. Later the General Chairman claimed that the October 19, 1987, letter did not constitute notice because it did not specify that a conference room was being constructed and because it did not set forth the reasons for the contracting out.

The Board finds that the notice was adequate. The notice informed the Organization what kind of work was going to be done and where it was going to be done. It was sufficient to say that remodeling was going to take place, including the relocation and installation of walls. It is not reasonable to suggest that the Carrier must specify what kind of space or room the relocation might create, i.e., conference room, computer room, or storage. The fact the notice did not say that a conference room was going to be built did not prejudice the Organization's ability to evaluate the notice or proceed with the Claim. If it wanted more detail, it could have asked. As for whether it is necessary to cite reasons for a notice under Rule 52, we note that Rule 52 contains no such requirement. The Organization is correct that the December 11, 1981, National Letter of Agreement does require that reasons must be stated in notices required thereunder. However, there is a basis to question whether that applied in view of the fact the Parties adopted Rule 52 in 1973. In any event, the notice of October 19, 1987, did imply the contracting was necessitated by the need for expedition.

The remaining relevant issues revolve around whether the work in question is "customarily" performed by bargaining unit employees. If it is, there are limited circumstances under which the Carrier may contract the work out.

In fulfilling its burden of demonstrating that the work has, indeed, been customarily performed by employees under the Agreement, it is the Board's opinion that exclusivity need not be shown. To say that something has customarily been done is not necessarily to say it has been exclusively done. Exclusivity suggests a uniform and undifferentiated practice. Custom is less restrictive and suggests that when something is customarily done, it is the ordinary, usual, and normal course of action. This term leaves room for exceptions and departures.

The Board is not convinced by this record that employees have "customarily" done remodeling projects in Carrier buildings. While there is evidence that Carrier forces have done remodeling projects, there is just as reliable evidence suggesting that contractors for many years have done remodeling projects. This mixed practice makes it difficult to conclude that it has been the Carrier's usual course of action to have its forces do remodeling projects. Thus, no violation can be found. This is a particularly appropriate conclusion since the Parties, when they negotiated Rule 52, permitted the Carrier in Rule 52 (b) to preserve existing practices. There is evidence in the record concerning the use of contractors for remodeling which predates the negotiation of Rule 52 (b). Accordingly, this practice is unaffected by the dictates of Rule 52 in any event.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 26th day of April 1994.