NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 30190
Docket No. MW-28939
94-3-89-3-348

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 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 perform road crossing rehabilitation work, i.e., removing old crossing material (asphalt, gravel, debris, etc.) and applying asphalt material at various crossings between Perry, Kansas and Topeka, Kansas on April 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15, 1988 (System File S-37/880557).

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 the violations referred to in Parts (1) and/or (2) above, furloughed Group 3 First Class Carpenters E.F. Zimmerman, D.G. Hogan and M. Wilson shall each be allowed:

> '*** seventy three and eight three one hundredths (73 83/100) hours pay at their respective Group 3 First Class Carpenters Rate 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 employe or employes involved in this dispute are respectively carrier and employe 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.

It is the opinion of the Board that the Claim before the Board can be resolved on the basis of Rule 52. Rule 52 requires notice to the Organization when the Carrier contracts out work "customarily" performed by bargaining unit employees. Additionally, if the subcontracted work has been customarily performed by Carrier employees, there are limited circumstances under which it can be contracted out.

The record reveals that there is a mixed practice of the Carrier utilizing its employees and outside contractors to do asphalt crossing work. Given this fact, it cannot be said that the usual, ordinary, or customary course of action has been for the Carrier to assign the work to the bargaining unit. Under such facts, the Organization has not fulfilled its burden to demonstrate that the work in question has been "customarily" performed by its members. Additionally, the Board notes that the long standing practice of using outside contractors predates Rule 52. This is significant since such practices are preserved and unaffected by Rule 52 pursuant to Paragraph (b).

The Agreement was not violated.

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.