Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30193
Docket No. MW-30145
94-3-91-3-581

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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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 the Carrier assigned an outside concern (Neosho Construction Company) to perform machine operating work in connection with roadbed subgrade preparation work for track construction between Mile Post 177.5 and Mile Post 179.25 and between Mile Post 155.84 and Mile Post 156.25 beginning May 2, 1990 (System File S-373/900651).

(2) The Agreement was further violated when the Carrier did not give the General Chairman proper advance written notice of its plan to contract out the above-described work in accordance with Rule 52.

(3) As a consequence of the violations referred to in either Part (1) and/or Part (2) above, Roadway Equipment Operators L. E. Easton, M. C. Tagwerker, D. K. Melius and G. F. Dominguez shall each be allowed pay in the amount of equal proportionate shares of their total number of man-hours expended by the outside concern."

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.

After first serving notice on the Organization of its intent to subcontract, the Carrier proceeded to utilize an outside contractor to accomplish grading work for track construction.

The Organization alleges that this work has customarily and traditionally been assigned to and performed by its members, and that the Carrier violated Rule 52 of the Agreement when it contracted out the work.

Rule 52 reads in pertinent part as follows:

"RULE 52. CONTRACTING

(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 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 contract 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 representative 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.

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

The issue presented in this dispute has been addressed by the Board on numerous occasions. For example, in Third Division Award 29037, the Board concluded:

> "The Scope Rule is a general Rule and the on-property record is conclusive that the work has not been 'customarily' performed by employees. The letters submitted by B&B Painters do not refute the Carrier's evidence that it utilized outside forces for decades to perform work which included painting. The Organization's rebuttal on the property of the sixty-four year record, including the point that the Omaha headquarters was painted by outside contractors only three times in that period, is not on point. It is central to this dispute that proof has been presented by the Carrier that outside forces historically painted buildings, including the Headquarters Building. This probative evidence removes this work from that which the Carrier is restricted from contracting out and is required to give advance notice."

Numerous decisions of the Board have held that the Carrier has the right under Sections (b) and (d) of Rule 52 to contract out work where advance notice is given and the Carrier has established a mixed past practice of contracting out work similar to that involved in the dispute. The record in this case demonstrates a mixed practice on this property with respect to the work in question. It has been performed by members subject to the Agreement in the past but has also been contracted out by the Carrier in the past. We thus conclude that the Carrier did not violate the Agreement when it contracted out the work.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.