Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30210
Docket No. MW-28540
94-3-88-3-362

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein 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 System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to install culverts, placing rip-rap, widen the grade, level berms, construct a new fence and remove four (4) road crossings between Mile Posts 907 and 908 on the Wyoming Division from May 18, 1987 through June 30, 1987 (System File M-631/871012).

(2) The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plan 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 19 Roadway Equipment Operator I.R. Gilbert shall be allowed three hundred two and one-half (302.5) hours of pay at the R.E.O. Class A straight-time rate. Furloughed B&B Carpenters R.M. Galik, D. T. McIntosh and R.E. Rondeau shall each be allowed three hundred two and one-half (302.5) hours of pay at the First Class Carpenter 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 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.

This case is part of a series of claims triggered in 1986 when Carrier contracted with the Neosho Construction Company of Gerig, Wyoming, to correct a major track stabilization problem which extended over a five to six mile area near Altamont, Wyoming. The work in dispute here began on May 18, 1987, and continued through June 30, 1987. It involved the installation of culverts, the widening of the grade, leveling berms and construction of 3/4 miles of new fences near Mile Post 907 and Mile Post 908. Carrier maintains that it did not have the equipment necessary to handle a project of this magnitude. Furthermore, it argues that the disputed work was part of an overall project and Carrier is not required to "piecemeal" the work.

The Organization contends that work of the character involved here is clearly encompassed within the scope of the Agreement and is reserved to its roadway equipment operators and carpenters. Moreover, the Organization submits that Carrier failed to provide the required advance written notice of its plans to contract out of work in question in accordance with Rule 52. Finally, the Organization submits that Carrier's claim that it is not required to "piecemeal" the work is misplaced.

Carrier acknowledges that it did not notify the Organization of its intent to subcontract, but argues that the disputed work was not exclusively reserved to the employees in question either by express contract language or custom and practice. To the contrary, Carrier maintains there is a longstanding practice of using outside forces to perform the type of work at issue here and that its prior right and practices are expressly maintained under the Agreement.

After careful review of the record in its entirety, we find that our prior award concerning the subcontracting out of another portion of this project is dispositive of the instant case as well. In Third Division Award 28622, this Board stated:

> "...Pursuant to Rule 52(a), the parties have agreed that work 'customarily performed by employes' can be contracted out in certain enumerated circumstances provided that the required advance notice is provided. Whether or not Carrier ultimately prevails on the merits of the dispute, it is our conclusion that it may not make a predetermination on the subject by ignoring the notice requirement when there is a valid or colorable disagreement as to whether the employes customarily performed the work at issue....

At the same time, there is compelling evidence that, given the longstanding practice by the Carrier of contracting out similar work, this claim would have to be denied on the merits under Rule 52(b) and (c) and it is only on the notice provision that the Organization would prevail. Under these circumstances, as we have ruled in the past we find that a pecuniary award would be inappropriate and instead direct Carrier to provide notice in the future in accordance with the provisions of the schedule Agreement."

Also see Third Division Award 28623; Public Law Board No. 4219, Award 8.

We direct that in this case, the Carrier shall, as it has been directed to do in the prior Awards, provide notice in the future when planning to subcontract a project of this type.

AWARD

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Linda Woods - Arbitration Assistant

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