Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30287
Docket No. MW-28975
94-3-89-3-392

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 the Carrier assigned outside forces to install concrete drains, manholes, a retaining wall and perform related excavation and grading work in connection with a slope stabilization project ata Mile Post 986.75 in the vicinity of Uintah, Utah, beginning May 3, 1988. (System File S-35/880525)

(2) The Agreement was further violated when the Carrier failed to properly and timely notify and confer with the General Chairman concerning its intention to contract said work as required by Rule 52.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Roadway Equipment Operators I. R. Gilbert, L. E. Easton, J. R. Landeros, B&B Carpenters D. W. Hilton, G. B. Roper, P. J. Kern and D. J. Herrera shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by the outside forces performing the work identified in Part (1) above beginning May 3, 1988, and continuing until the violation is corrected."

FINDINGS:

The Third 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.

On March 8, 1988, the Carrier sent the following notice to the General Chairman:

> "This is to advise of the solicitation of bids covering slope stability work in the vicinity of Uintah, Utah.
>
> This project involves grading and the installation of horizontal and collector drains and associated headwalls and manholes. The drains will be installed at depths of up to 25 feet. The work also involves seeking of the site and planting of 1,000 cottonwood and other seedlings indigenous to the area."

On March 16, 1988, the General Chairman wrote the Carrier objecting to the subcontracting and requesting a conference. The Carrier responded April 4, setting forth its position and indicated it was available for an in-person or telephone conference. On April 18 the General Chairman wrote a nine-page letter to the Carrier responding to the Carrier's position and indicating that he was still interested in discussing the matter. Subsequently, the Carrier issued the contract and the instant claim was filed.

At the outset the Board finds proper notice was given. Moreover, the Carrier never refused to hold a conference as provided in the Agreement. There seems to be shared culpability in never actually having talked about the notice. The Organization requested a conference, and the Carrier indicated it was willing to hold one. Yet, neither party, perhaps out of stubbornness or lack of genuine desire never picked up the telephone to either arrange a mutually convenient time or to discuss the substance of the matter. Under these circumstances a violation of the notice provisions cannot be found.

As for the merits, it is well established that matters of this nature are controlled by Rule 52. Rule 52 prohibits the Carrier from subcontracting ". . . work customarily performed by employees . . ." except under certain enumerated circumstances. Thus, as a threshold matter, the Organization must show that the work in question has been customarily performed by its members or, by virtue of other specific and unambiguous language, is reserved to them.

After reviewing the record the Board is unconvinced that there is any reservation by custom or language of the work in question to the employees of the Carrier. The record shows a history of using outside contractors and employees to such an extent that it cannot be said that employees customarily do this work. At best, it is a mixed practice. Moreover, the use of outside contractors predates Rule 52. This is significant since the rule states in Paragraph (b) that "Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out." Notably Paragraph (d) states: "Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employees covered by this Agreement to outside contractors."

In view of the foregoing, the claim is denied.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of July 1994.