Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30869
Docket No. MW-30690
95-3-92-3-480

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 outside forces (Prairie Construction Company, Drake Williams Steel and Sol Lewis Engineering) to install rain gutters, installing and/or constructing duct work for heating and air conditioning and rerouting of ducts at the Old Ice House and Communications Building in Council Bluffs, Iowa from November 5, 1990 and continuing (System File S-456/910297).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work as required by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Water Service Foreman T. Dahir shall be allowed compensation at his applicable rate of pay in the amount he would have received absent the violation referred to above."

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.

By letter dated September 7, 1990, Carrier advised the Organization of its "intent to solicit bids to cover the remodeling of the interior and painting of the exterior of the Ice House located in Council Bluffs, Iowa." In its September 13, 1990 response, the Organization stated that such work had customarily been performed by employees of the Bridge and Building Subdepartment while admitting that it had been contracted out on one or two prior occasions, objected to it being contracted in this instance and requested a conference. A conference was held on October 22, 1990 where various issues and positions were discussed. No agreement having been reached, the claimed work commenced on November 5, 1990.

While the work of installing rain gutters and duct work for heating and air conditioning units was performed during the claim period by five contractor employees, this claim, filed on behalf of Claimant, a Water Service Foreman, disputes only the utilization of two of the employees to study blueprints and standards and supervise and assist the installation work.

The Organization argues that Scope Rule 1, when read in conjunction with Rules 4 and 6, specifically reserves the study of prints and standards to the Water Service Foremen classification. It contends that Carrier failed to meet any of the specified exceptions listed in Rule 52(a) in order to justify its contracting out, and that there was no valid proof of past practice presented. The Organization also takes issue with the validity of the notice, arguing that it was unspecific and did not relate to the work involved here, and requests monetary relief despite the fact that Claimant was working.

Carrier notes that a proper notice was served and a conference held prior to the work being performed in this case. It argues that the general nature of the Scope Rule and its past practice of contracting out various remodeling jobs, as established by the record on the property and prior Awards between these parties, prove its entitlement to contract out this work under Rule 52. Carrier states that it is not required to piecemeal a small portion of this large project, and since Claimant was fully employed during the claim period, no monetary relief would be appropriate.

The Board initially finds that the September 7, 1990 notice resulting in the October 22, 1990 conference was sufficient to meet the advance notice and meeting requirements set forth in Rule 52. Nowhere within the correspondence leading up to the conference did the Organization clarify that its objections to the contracting of remodeling work at the Ice House revolved around the Foremen function, but rather, set forth objections to contracting any remodeling work. Since the notice informed the Organization that remodeling work was to be done at the Ice House, it permitted full discussion on the extent of such work to be performed. In fact, the Organization set forth a list of specific questions to be dealt with at the conference, including the number of manhours anticipated. There is no suggestion in the correspondence on the property that all relevant matters were not discussed at the conference. See Third Division Award 30185. The allegation that Carrier did not meet its good faith responsibilities under Article 52 in this regard is without merit.

With respect to the Organization's claim that Carrier may only contract out work customarily performed by employees if one of the five exceptions listed in Rule 52(a) is present, numerous Awards on this property have held that the "prior and existing rights and practices" language of Rule 52(b) permits contracting even in the absence of any of the listed exceptions if Carrier can establish a valid past practice concerning the work in issue. See Third Division Awards 27010, 27011, 28558, 28610, 29431, 29539, 29715, 29717, 30185. In support of its past practice on the property, Carrier submitted a list of 235 examples of subcontracting of remodeling-type work, some of which the Organization questions on the basis of their being undated or unspecific, or relating to non-railroad property. However, considering only listed items which specifically predate the 1973 adoption of the "prior and existing rights and practices" language of Rule 52, in conjunction with prior Awards finding the establishment of a past practice of contracting remodeling work on this property (see Third Division Awards 30200, 30198, 30185, 29186) the record demonstrates a mixed practice on this property with respect to the work in question. Given the extent of this practice, the burden is on the Organization to demonstrate that Foremen work has been treated differently. It has failed to do so. In line with cited precedent, no violation of Rule 52 can be found.

AWARD

Claim denied.

O R D E R

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of May 1995.