Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31000
Docket No. MW-29630
95-3-90-3-616

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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 (Haird C. D. C. Restoration and Construction Company) to construct a loading dock extension which included the installation of dock levelers and a concrete pad for parking semi-truck trailers in front of the Store Department building located at Salt Lake City on July 3, 4, 5, 6, 7, 10, 11, 12, 13, and 14, 1989 (System File S-209/890741).

(2) The Agreement was further violated when the Carrier failed and refused to timely and properly furnish the General Chairman with an 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, furloughed Carpenters D. A. Holt and B. L. Holt shall each be allowed one hundred and sixty (160) hours of pay at the first class carpenter's straight time 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 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 May 4, 1989, the Carrier provided notice to the General Chairman in pertinent part as follows:

> "This is to advise of the Carrier's intent to solicit bids to cover the construction of the extension of the Materials facility dock at Salt Lake City, Utah.
>
> This will involve the forming and installation of dock levelers and truck Dok-Lok safety system and requires special skills by qualified personnel for performance and warranty reasons. This work is beyond the capacity of Company forces. . . ."

A conference was requested by the General Chairman, and such was held. Following discussion, the Carrier proceeded to contract for the project. Thereafter, a claim was initiated on behalf of two employees in reference to the portion of the work of "breaking out old concrete, preparing surfaces, setting concrete forms, pouring and finishing concrete for the dock and semi-trailer platform in front of the Store House Building" at Salt Lake City.

This is another of many disputes concerning the Carrier's contracting of work and involving, as here, the adequacy and/or lack of preliminary notice; the interrelationship of Rule 52 and the Scope Rule; and previous practice on the property as to the particular work involved. After review of but without recounting the applicability of many Awards concerned with this subject, the Board finds here that the Organization's claim has merit, based on the following:

> 1. Notice was provided as to the overall project. No mention is made therein of the concrete platform at issue here, and the Organization contends this was not discussed in conference. While this alone would not necessarily be of determinative significance, it appears from the Organization's account that no opportunity was provided to review whether that particular portion of the project could have or should have been performed by Carrier forces.

2. Although the notice letter does refer to "special skills" as to portions of the project, the Carrier did not affirmatively assert in the Claim handling process that the concrete platform work involved any of the specific criteria which sanction contracting work, as provided in Rule 52.

3. The Carrier does not deny that its forces are capable of and do perform this type of work (although not conceding with what frequency). The Organization offered substantial documentation as to performance of such work by Maintenance of Way forces. The Carrier relies, however, on a listing of 772 instances in which it contends that similar work was contracted. Where a carrier is able to demonstrate widespread and continuing contracting of a particular type work over an extended period, this is frequently persuasive that the Organization has not established that it must be assigned such work because it customarily and traditionally does so. Here, however, the Board finds, as argued by the Organization, that the Carrier's listing does not convincingly prove the point it is intended to make. While the Board has only a limited ability to interpret the information supplied by the Carrier, it can be determined that many of the contracted projects are dissimilar to that under review here. Also, as the Organization contends without dispute, the listing covers many decades and many locations, thus suggesting that contracting such work does not rise to as significant a level as the Carrier argues."

A recent Award involving the same parties is deserving of reference here. This is recent Third Division Award 29310 concerning construction of concrete runways. The Award stated:

"With respect to Carrier's first argument, our review of the record shows an absence of any probative evidence that the concrete work involved in this instance was of such a nature that it could not have been performed by its employees or disassociated from the total rehabilitation project at the East Los Angeles Yards. It is our view, therefore, that Carrier failed to meet its burden of establishing that affirmative defense."

The Organization contends that the contracting firm utilized four employees for 10 eight-hour days. There are, however, only two Claimants. Since the Carrier may properly determine the period of time in which an assignment is to be completed, the Award will be limited to the ten-day period asserted by the Organization and not otherwise contradicted. One Claimant was on furlough at the time, and the other was working at a lower classification than that of his former position as Carpenter. The requested remedy is modified to provide the Claimant on furlough with eight hours' straight time day for each of the specified dates, and for the other Claimant the difference in pay between the Carpenter rate and the rate at which he was paid for the same dates.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.