Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31284
Docket No. MW-30392
95-3-92-3-137

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 (Interior Construction and Prairie Construction Company) to perform basic Bridge and Building Sub-department work (installing and stripping forms, pouring and finishing concrete, constructing walls, installing drywall and other remodeling work) in the Ice House in Council Bluffs, Iowa from September 17, 1990 and continuing (System File S-424/910164).

(2) The Agreement was further violated the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman R. E. Portis and Carpenters I. Espinosa, R. L. Sparks, W. J. Harris and D. M. Eckart shall each be compensated at their respective rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces commencing September 17, 1990 and continuing until the violation no longer exists."

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, the Carrier informed 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." The Organization objected to that action by letter dated September 13, 1990 further requesting "... a conference be scheduled and held prior to the work being assigned to and performed by a contractor, for the purpose of discussing the matters relating to said contracting transaction." By letter dated September 19, 1990, the Carrier agreed to meet "at our next conference on contracting notices." Conference was held on October 22, 1990, without resolution.

The contractor commenced working on September 17, 1990.

With respect to the type of work involved, Awards decided on this issue have denied similar claims protesting the Carrier's contracting out of this type of work. See e.g., Third Division Awards 28610, 29186, 29611. With respect to the kind of work involved and the Carrier's general ability to contract out such work, those Awards are not palpably in error and shall be followed.

The issues in this case involve the notice and conference requirements of Rule 52. Rule 52(a) states when the Carrier intends to contract out, 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 ...." Thereafter, if requested by the General Chairman "to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose." Here, the Carrier's notice was dated September 7, 1990 for work which commenced on September 17, 1990 – therefore less than the required 15 days' advance notice – and the work commenced prior to the Carrier's September 19, 1990 letter indicating agreement to discuss the matter in conference (and thus prior to the conference itself) in accord with the Organization's request.

Therefore, we find that the Carrier did not meet its notice and conference obligations imposed by Rule 52(a). See Third Division Award 31288 and Awards cited therein.

Because the Carrier failed to meet its notice and conference obligations under Rule 52(a), under the circumstances the claim shall be sustained, but only for those Claimants on furlough at the time the contractor performed the work. See Third Division Awards 31031 and 31025. We do not believe this is a situation calling for payment of the claim for Claimants who were working on the dates in question. Compare Third Division Award 30823 where the Carrier overtly misled the Organization asking the Organization to hold off pending conference while the matter was reevaluated with the possibility that the Carrier's forces would do the work and then contracted out the work without further notice. That is not this case. Here, the correspondence reveals the parties responding in the manner they have in so many of these cases with the same basic notice by the Carrier, protest and request for conference by the Organization, agreement to meet by the Carrier and conference without resolution. Nevertheless, notwithstanding the manner in which this case was treated by the parties and the Carrier's ability to ultimately contract out the work, the notice and conference obligations of Rule 52(a) remain. This Board cannot change that language. Balancing the foregoing against the wealth of decisions allowing the Carrier to contract out, which decisions are premised upon the Organization's acquiescence in the Carrier's past similar actions, under the circumstances of this case this Board believes a remedy is appropriate because the Carrier failed to meet its mandatory notice and conference obligations imposed by Rule 52(a). But considering the above, that remedy should only be for those Claimants, if any, who were in furloughed status at the time the contractor performed the disputed work.

Third Division Awards 28943 and 29121 cited by the Organization do not change the result concerning the remedy. In Award 28943, the remedy was only for furloughed employees. Similarly, in Award 29121, the claimants were in furloughed status. In Third Division Award 29472 cited by the Organization, a remedy was imposed "regardless of the Claimants' alleged assignment to other work" because the Organization had to request a conference on two occasions to get the Carrier to meet and, by the time the conference took place, the work had already commenced. That is not this case. Here, the Carrier met upon the Organization's first request. In short, no aggravating circumstances have been shown in this case to warrant relief beyond those who may have truly lost work opportunities.

The matter is therefore remanded to the parties for a joint check of the Carrier's records to determine the number of hours the contractor performed the work, whether Claimants were on furlough, the length of any such furloughs and whether those furloughs overlapped the time the contractor performed the work in dispute. Only the furloughed Claimants holding seniority at the time the contractor performed the work shall be entitled to relief. Those furloughed Claimants shall be made whole for the number of hours the contractor performed the work.

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 19th day of January 1996.