

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32367
Docket No. MW-31110
97-3-93-3-61**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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 (Perma Bond from Payson, Utah) to perform B&B Subdepartment work, i.e., preparing the surface, mixing, blending and applying epoxy preservatives with a non-slip additive to the Diesel Fuel Building B-25 on the Idaho Division at Pocatello, Idaho, on September 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 30, October 1, 2, 3, 4, 7 and 8, 1991 (System File S-611/920091).**
- (2) The Agreement was further violated when the Carrier failed to provide a proper advance notice and 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, Idaho Division B&B Painters W. S. Wallace and R. L. Lewis shall each be allowed three hundred four (304) hours' pay at the First Class Painter's rate of pay for the total number of man-hours expended by the outside forces.”**

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 were given due notice of hearing thereon.

On August 5, 1991, Carrier sent the following notice to the General Chairman:

“This is to advise of the Carrier’s intent to solicit bids to cover the resurfacing of the concrete floor in the service track area of the diesel shop located at 237 East Day St. in Pocatello, Idaho

The scope of the work will include cleaning the concrete surface, filling irregularities to facilitate drainage to existing floor drains, any necessary priming and sealing. The material used is to provide a non-skid surface, be resistant to fuel, oil and chemical spills, and be fire resistant.

This work is being performed under the provision of the CBA which states, ‘Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out.’

Serving of this ‘Notice’ is not to be construed as an indication that the work described above necessarily falls within the ‘scope’ of your Agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMW.

Additionally, I will be available to conference this Notice at a mutually agreeable time within the next fifteen (15) days in accordance with Rule 52 of the Agreement.”

The Organization responded to Carrier's notice maintaining that: "Such work is specifically identified and designated as being Bridge and Building (B&B) Subdepartment employees' work under Rules 1 and 8 of our current Agreement." The Organization further maintained that such work had "customarily and traditionally" been assigned and performed B&B employees. Finally, the Organization stated that Rule 52 provides that Carrier may only contract out "M of W work" under one or more of the five specific conditions:

1. Special skills are not possessed by the Company's employees.
2. Special equipment is not owned by the Company.
3. Special material not possessed by the Company is only available when applied or installed by the supplier.
4. The work in question is such that the Company is not adequately equipped to handle it.
5. Emergency time requirement situations exist which present undertakings not contemplated by the Agreement and is beyond the capacity of the Company's forces.

According to the Organization, since Carrier's Notice of Intent did not "claim" that one of the five conditions exists, "there is no valid basis for the proposed transaction." Subsequently, the Organization initiated a claim specifically on behalf of Claimants alleging that they should have been used in lieu of the contractor to perform the work at issue.

Carrier denied the claim on the assertion that the painting which the contractors had performed was not "ordinary painting", but that it involved the use of an epoxy product which the manufacturer would only sell to "certified applicators." Additionally, Carrier stated that a training course is required for certification in both the handling and installation of the product, which it characterized as a "hazardous material." Carrier noted that there were no Company employees who are certified to handle the material. Alternatively, Carrier challenged the "excessive" time claim, maintaining that both Claimant were "fully employed", and working on other projects at the time the

construction work was subcontracted. Finally, Carrier made reference to its "long-standing and well established practice" of subcontracting painting and flooring work.

A careful review of the evidence presented on this record leads us to conclude that there is no contractually enforceable basis for the Organization's claim challenging Carrier's right to subcontract the work in dispute. At the outset, Carrier served the General Chairman the requisite notice of its intent to contract out the work in dispute. Rule 52 - "CONTRACTING" - is clear and unambiguous regarding preservation of Carrier's historical right to subcontract out certain types of work. Carrier successfully established evidence of a tradition or practice of subcontracting out like work; demonstrating a long standing record of subcontracting the same type of work, sustained in a plethora of prior Awards between these Parties. In that connection, the Organization's reliance upon Third Division Award 29121 is misplaced. In that particular case, unlike the present matter, Carrier failed altogether to serve the requisite notice.

AWARD

Claim denied.

ORDER

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 30th day of December 1997.