

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39531
Docket No. MW-37421
09-3-NRAB-00003-020483
(02-3-483)

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 (Tatman Construction) to perform Maintenance of Way and Structures Department work (construct walls, install windows and doors, install and finish sheet rock and related work) at the superintendent's office in North Platte, Nebraska commencing on March 5 through 22, 2001, instead of Nebraska Division Bridge and Building Subdepartment employees T.A. Engleman, J. W. Gurwell, R. L. Rangel and J. D. Shepard (System File W-0152-159/1275037).
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman any advance written notice of its intent to contract out said work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of Maintenance of Way forces as required by Rule 52 and the December 11, 1981 Letter of Understanding.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, ‘*** Claimants Engleman, Gurwell, Rangel, and Shepard must be allowed compensation for an equal

proportionate share of all man hours worked by the outside contracting force of Tatman Construction commencing on March 5th, 2001 and continuing through March 22nd, 2001 for a total of four hundred forty eight (448) hours spent on performing this work. This compensation must be allowed at their respective straight time rate as compensation for this violation of the Agreement.”

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.

The essential facts of this case are not in dispute. In March 2001, the Carrier contracted out the construction of an extension to the Superintendent's office in North Platte, Nebraska. The Organization filed the above claim on May 3, 2001. In that claim it contended that the Carrier had, without notice to the Organization, contracted out work reserved to B&B employees. In support of its position the Organization cited Rule 52 of the parties' Agreement. That Rule, reads in pertinent part, as follows:

“(a) By agreement between the Company and the General Chairman, work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by

the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it will 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, except in 'emergency time requirements' cases. . . .

- (b) Nothing contained in this rule will affect prior and existing rights and practices of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

The Carrier denied the claim on June 27, 2001. In its denial, the Carrier stated that it had customarily contracted out the work at issue and, therefore, there was clearly a mixed practice regarding such work and it was thus not work reserved to B&B employees. The claim was subsequently progressed in accordance with the parties' Agreement without resolution and is properly before the Board.

The Board reviewed the record in this case. We find that the Carrier has shown that there was a long-standing mixed practice regarding contracting out work of the nature at issue. Thus, we are in agreement with the findings in Award 3 of Public Law Board No. 6205 that in the absence of a showing of "prior and existing rights and practices" the language in Rule 52(b) permits contracting, even in the absence of any of the five exceptions contained in Rule 52(a). In the present case, however, the Carrier acknowledges that it contracted out the work at issue without notice to the Organization. It stated that the supervisor in charge of

contracting out the work reviewed the work schedules of the relevant B&B employees and found that they were fully occupied with other work and, therefore, not available for the work on the office extension. Such a “review” cannot be viewed as a substitution for the clear requirement that the Organization be notified. In the instant case, we do not find this to be fatal to the Carrier’s position, but we caution that such omissions in the future may well leave the Carrier vulnerable to a finding of a violation of Rule 52.

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 2nd day of February 2009.