Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29303
Docket No. MW-29307
92-3-90-3-211

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Missouri Pacific Railroad Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (States Construction Company) to perform bridge construction work on Bridge 127.0 between Debbie and Fada on the Dallas Subdivison beginning October 17, 1988 (Carrier's File 890221 MPR).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman advance written notice of its intention to contract out said work as required by Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to Parts (1) and/or (2) above, B&B Foreman W. L. Birdow, Jr., 1st Class Carpenter J. Jackson, Jr., 2nd Class Carpenters V. W. Adams, F. O. Blalock, H. H. Armstrong and Hoisting Engineer E. Tyler shall each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man-hours expended by the contractor's forces performing the work outlined in Part (1) above beginning October 17, 1988 and continuing until the violation was corrected."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

In October 1988, Carrier contracted with the States Construction Company for work on a bridge between Debbie and Fada, on the Dallas Subdivision. The work involved converting an existing trestle bridge to a concrete structure. It was performed for a period of time by these outside forces and then taken over by members of Carrier's B&B Subdepartment.

The Organization alleges among other things in this claim that the subcontracted work is covered by the Scope Rule in the parties' Agreement and is reserved to B&B forces. It further maintains that Carrier violated the Agreement and exercised bad faith when it failed to notify the General Chairman of its intent to subcontract.

Both parties submitted numerous Awards in support of their respective positions. Of special interest are the dozen or so involving this Carrier and Organization, all of which were issued on or after January 29, 1991. Four deal specifically with bridge work and, as in the instant dispute, Carrier apparently provided extensive evidence to show that it contracted out this work for a number of years without protest from the Organization. In all four Awards, it was concluded that Carrier was not barred from subcontracting this work in general by virtue of past history on the property. The reasoning in these Awards (Third Division Awards 28654, 29007, 29019, and 29034) is sound and we see no reason to deviate from their Findings.

In Award 29007, for example, the Board concluded that "evidence demonstrating something less than strict exclusive performance is sufficient to establish Scope coverage" where there is a general Scope Rule. It reasoned persuasively that:

> "After work had been performed by an outside contractor, albeit by agreement, the Organization would no longer be able to prove exclusive performance by the employees. Such a result is not logically consistent with the cooperation terms of Article IV of the Agreement or the December 11, 1981 National Letter of Agreement."

In Award 29034, the Board added that while total exclusivity need not be shown, the Organization did have the burden of proving "more than a shared or mixed practice." This test is a reasonable one. The Organization must be able to prove under a general Scope Rule that in all of those instances where the work in question is performed, it is performed preponderantly, or in the main, by Agreement-covered forces. The Organization apparently did not meet that test in the prior cases and has not done so in the instant dispute.

In two of the four cases involving bridge work, no notice was given to the General Chairman. In both instances the Board determined that since the Organization had, in the past, acquiesced to the subcontracting of the disputed work, it was required to give Carrier sufficient notice that it would

expect notification of Carrier's intent to contract out the work in the future. If one concludes that these two Awards were sufficient to place Carrier on notice of its responsibility in this respect in regard to bridge work, it must be noted that the incident in the present case occurred in October 1988, three years prior to the issuance of those Awards. Thus, while also directing Carrier to provide the requisite notice in the future (thus sustaining the claim in part), we must also deny that portion of the claim that seeks compensation.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1992.