Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29309
Docket No. MW-28403
92-3-88-3-190

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein 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 Carrier violated the Agreement when it assigned outside forces to perform the work of hauling material, installing grade, installing ballast, removing asphalt, preparing track surfaces and grading work on the intermodal facility at Los Angeles, California beginning December 9, 1986 and continuing through April 24, 1987 (System File M-565/870501).

(2) The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plan to assign said work to outside forces.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, System Roadway Equipment Subdepartment Operators R. S. Hutchison, C. A. Hintz, D. L. Weber, E. L. Ramsy, S. D. Kleider, J. H. Scott, J. L. Sherman, D. D. Dickinson and G. G. Pischel shall each be allowed eight hundred twenty-two (822) hours of pay at their respective rates."

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.

On or about December 9, 1986, and continuing through April 24, 1987, Carrier assigned outside forces to perform what the Organization insists is Roadway Equipment operator work, i.e., hauling material, installing grade, installing ballast, removing asphalt, preparing track surfaces and grading work at the intermodal facility in Los Angeles, California. The Organization

asserts that the contracted out work is encompassed within the scope of the Agreement and has been performed by its members as a matter of historical practice. It also asserts lack of notice. Carrier contends that: (1) It did furnish the Organization with the requisite notice of intent to subcontract; (2) Claimants did not possess all the skills required to complete the project and Carrier should not be forced to "piecemeal" the work; (3) Claimants had not done this type of work on an exclusive basis in the past, in fact, similar work has been contracted out on numerous occasions; (4) the disputed work does not fall within the scope of the Agreement.

As a preliminary point, this Board notes that certain arguments were not exchanged on the property as required by long established precedent. The only evidence and arguments that the Board can consider are those which have been exchanged between the parties on the property.

Our reading of the record also shows that while there were instances cited by the Organization where the work at issue was performed by employees in the past, Carrier provided equally probative evidence that work of the kind in dispute here has been contracted out frequently over a number of years. We note, too, that the Organization in correspondence with Carrier during the handling of this case on the property, acknowledged that such work had previously been contracted out. Under these circumstances, we must conclude that the Organization has failed to meet its burden of establishing entitlement to the work as a matter of past practice.

As to the notice issue, the record shows that the Organization raised the question in its April 18, 1987 Claim and in its June 5, 1987, notice of appeal. On July 27, 1987, Carrier responded in pertinent part:

> "You have based the major portion of this claim on your contention that you were not provided advance notice of the Carrier's intent to contract this project. It has recently become evident that your Organization has lost several of your files dealing with contracting, either that or you are attempting a new ploy by pleading ignorance of any advance notice when in fact you are in possession of one. My file indicates that you were furnished notice of this project in my letter of November 21, 1986. If you are unable to locate this notice, please advise, and I will arrange to furnish you with a copy of this notice."

There is no indication in the subsequent correspondence between the parties on the property that the Organization requested a copy of the notice. The only reference by the Organization to the notice issue following Carrier's July 27, 1987 letter is the following response contained in a letter dated April 29, 1988, from the General Chairman:

> "I also pointed out to you that I found it highly unusual for the Carrier to serve notice of its intent to solicit bids for contracting work which the Carrier contends is not Scope covered or work not customarily and traditionally performed by BMWE forces to the exclusion of all others. In response you indicate one should not assume that such notices are necessarily an indication on the Carrier's part that work is or is not scope-covered. However, you somewhat contradict yourself by indicating the Carrier has in the past and will in the future continue to serve notice of both scope-covered work and work 'which reasonably could perhaps be perceived as falling at least within the peripheral area of scope-covered work.' In support of your position you offered a quote from a nontypical Award (21287). Again, as stated previously, I cannot agree with your position. It must be remembered Rule 52 requires prior written notice of intent to contract only if work is Scope covered. The Carrier's notices have not been informational in nature only and represent document evidence of the Carrier's recognition that the work in dispute in each case is encompassed within the Scope of one Agreement. Below are some pertinent quotes from two (2) of the obviously more well-reasoned awards addressing this issue."

Under these unique circumstances, where there is no evidence that the Organization heeded Carrier's offer to supply another copy of the notice, and where the Organization at least tacitly suggested at a later date that it had received notice, but was challenging the meaning to be attached to it, vis a vis the Scope Rule, we cannot find that there is sufficient evidence that Carrier failed to adhere to the notice requirements of the contract.

In light of the foregoing findings, we need not, and therefore will not, address the additional defenses raised by the Carrier in connection with Rule 52. We will rule to deny the Claim in its entirety.

A W A R D

Claim denied.

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.