NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 30066
Docket No. MW-29695
94-3-91-3-40

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 (Walt Mildon) to paint the interior and exterior of the Twin Falls Depot at Twin Falls, Idaho on October 120, 21, 23, 27 and 30, 1989 (System File S-233/900120).

2. The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with timely and proper advance written notice of its intention to contract out said work as required by Rule 52.

3. As a consequence of the violations in Parts (1) and/or (2) above, B&B Painter W.S. Wallace shall be allowed seventy two (72) hours of pay at the first class painter's rate."

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 employe 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.

This claim protests the contracting of painting work on the interior and exterior of Carrier's Twin Falls, Idaho Depot during five days between October 20 and 30, 1989. There is no dispute

that Carrier did not serve notice of contracting out the work until the same day that the work began.

The extensive record in this matter raises a wide variety of issues, such as scope, reservation of work, exclusivity, past practice, and the like, which deal with the substantive propriety of contracting out the disputed work. In addition, the parties have each cited a number of prior Awards in support of their respective positions. We, however, do not reach the merits of those questions. We find the decision in this dispute turns on the quasi-procedural issue of notice.

Rule 52, the parties' Rule dealing with contracting of work, has been the subject of numerous Awards of this Board. Two of the more recent Awards, Third Division Awards 28943 and 29121, provide a sufficiently thorough discussion of the history and operation of the notice requirements under Rule 52 that further elaboration will not be provided here. Suffice to say, however, the precedent establishes that the advance notice and meeting requirements are invoked whenever any contracting is done, whether the work is "customarily performed" by the employees or not. See also, for example, Third Division Awards 28443, 28558, 28619 and 28622.

In addition to the advance notice and meeting requirements of Rule 52, however, the Organization contends that the Carrier did not comply with its good faith obligations under the December 11, 1981 Letter of Agreement. While the Carrier challenges the applicability of the Letter of Agreement to the instant dispute, its contention must be rejected in light of the Organization's evidence and argument on the point.

The Organization contends, in essence, that the December 11, 1981 Letter of Agreement represents a commitment on the part of the participating carriers in that they gave assurances, as of that date, that they would assert good faith efforts to reduce the incidence of contracting out work and increase the use of employee forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees. That is, indeed, what one paragraph of the Letter of Agreement says.

Taken together, Rule 52 and the December 11, 1981 Letter of Agreement have significant and serious impact on the record before us. As the Board said in Award 29121:

> "Thus it seems that the language of the Rule [52], the December 11, 1981 letter and our prior Awards have established a standard whereby Carrier must give the General Chairman notice of all instances where maintenance of way work is to be contracted and must

engage in good faith efforts 'to reduce the incidents of subcontracting and increase the use of their maintenance of way forces.'"

Here Carrier dated its notice to the General Chairman the same day as the contractor began the work. The record contains no sufficient showing of circumstances that prevented the Carrier from providing advance notice in accordance with Rule 52. By allowing the work to commence before the General Chairman received notice, the Carrier effectively precluded itself from meeting with the Organization and developing an "on-property" record that showed it had acted with the requisite degree of good faith. It must be found, therefore, that the Carrier did not properly contract out the work in accordance with the effective Agreement.

The question of the appropriate remedy for violations of this nature has been the subject of many on-property Awards. As we view their reasoning, damage awards appear to have been confined to furloughed claimants. Although Carrier raises a full-employment defense to the instant Claimant, the record reflects that he was a furloughed painter working in a lower paying bus driver position. Under the circumstances, we find Claimant should be compensated for the differential in rates of pay for all hours worked by the contractor.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin, Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.