Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30280
Docket No. MW-28927
94-3-89-3-336

The Third Division consisted of the regular members and addition Referee Gil Vernon when award was rendered.

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

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

(1) The Carrier violated the Agreement when it assigned outside forces to paint light towers at the TOFC/COFC Facility at Los Angeles, California from January 7, 1988, through and including February 4, 1988, (System File 1565-52/880131).

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

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Furloughed Group 5 B&B Painters M. Maximillion and T. L. Street shall each be allowed two hundred ninety-seven (297) hours' 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 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 waived right of appearance at hearing thereon.

The instant case involves the application of Rule 52, which reads as follows:

"RULE 52. CONTRACTING

"(a) By agreement between the Company and the General chairman work customarily performed by employes 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 employes, 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 undertaking not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall 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. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contacting but if not understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

"(b) Nothing contained in this rule shall 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.

"(c) Nothing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the sue of contractors or use of other than maintenance of way employes in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disasters.

"(d) Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employes covered by this Agreement to outside contractors." (Emphasis added.)

The work involved the painting of light towers that, when assembled, are 60-80 feet tall. However, all the painting and preparation (sandblasting) was done on the towers unassembled at ground level.

At the outset the issue of notice must be addressed. It is undisputed that no notice was given. The Carrier argues that no notice was necessary since the work is not reserved to the Organization by virtue of the Scope Rule or by custom and practice. In reference to the latter, the Carrier made reference to evidence documenting the use of outside firms to do painting for many years. The Organization, of course, argues that notice is necessary, that the Scope Rule does reserve painting to its members, and that they have customarily performed painting work.

In a strict sense, Rule 52(a) read unto itself only required notice for the contracting out of "work customarily performed by employees covered under this agreement." However, Rule 52(b) seems to soften this stricture to some degree as it relates to the notice requirements. It flatly states, while preserving the existing rights and practices, that the purpose of the Rule is to require notice and give the Organization a chance to discuss the matter prior to the horses getting out of the barn. The straight-forward requirement in 52(b) to give notice creates somewhat of a contradiction between it and 52(a). This tension can be reasonably resolved by requiring notices in all cases, not only where the work has without dispute been customarily by Carrier forces, but in all cases where a claim of custom and practice can be legitimately made.

This is a reasonable application of the Rule because it gives meaning and effect to both 52(a) and 52(b). This is particularly true since 52(b) specifically protects the existing rights and practices in spite of requiring notice. Thus, there is no harm or prejudice involved in requiring notice. Indeed, the fact notice is given does not constitute an admission that work is Scope covered or has been customarily performed by Carrier forces. There may be instances where the Organization has never done certain work or done it so infrequently relative to outside concerns that it cannot be said that its members have done it customarily. In such cases no notice is required. However, the Carrier runs the risk of not giving notice if subsequently the Board is convinced that there is a reasonable basis to claim custom and practice on the part of the Organization. Again, there is no prejudice in giving notice as the standard for giving notice is less restrictive than the standard for establishing custom and practice on the merits under Rule 52(a).

In this case the remedy for the failure to give notice is to sustain the Claim in its entirety since the Claimants were furloughed at the time of the Agreement violation. There was lost work opportunity, and thus, the awarding of damages is not a penalty. As for the number of hours the Board notes the Carrier has taken no particular exception to the number of days, personnel, or hours that the Organization asserted in its initial claim were expended by the contractor.

## AWARD

Claim sustained.

## O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of July 1994.