Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31030
Docket No. MW-30195
95-3-91-3-643

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 Agreement was violated when the Carrier assigned an outside concern (Pioneer Roofing Company) to install a new roof at the Diesel Shop, Salt Lake City, Utah beginning on June 28, 1990 and continuing (System File S-350/900583).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman advance written notice of its intention to contract out the work involved here in accordance with Rule 52.

(3) As a consequence of the violations referred to in either Part (1) and/or Part (2) above, Utah Division B&B Carpenters S. K. Stuart, D. A. Holt, B. L. Holt and J. L. Smith shall each be allowed pay for an equal proportionate share of the total number of straight time and overtime man-hours expended by the contractor forces at their applicable straight time and overtime rates of pay."

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.

Without giving the Organization prior notice of its intent to do so, the Carrier contracted out the replacement of a roof at the Diesel Shop, Salt Lake City, to Pioneer Roofing Company. Work commenced June 28, 1990.

Rule 52 requires advance notice be given to the Organization:

> "... 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 ...."

Because of the lack of notice of its intent to contract out the work, the Carrier violated Rule 52. Third Division Award 23578 ("Rule 52 uses the mandatory term 'shall' and notice is required regardless of whether or not the erection of earth mounds for signal facilities is historically, traditionally, and customarily performed by Maintenance of Way employes.").

We are not satisfied that an emergency existed warranting the operation of the exculpatory emergency language in Rule 52 (requiring notice "except in 'emergency time requirements' cases"). The deteriorating condition of the roof was known by the Carrier for quite some time prior to its contracting out the work. According to the Carrier on the property, leakage was experienced during the winter of 1989-1990 and spring storms brought about further leakage. The work did not begin until June 28, 1990. While the condition of deterioration of the roof may have had potentially dangerous effects, given the history of the deterioration of the roof, this was not the kind of event that needed sudden and immediate attention. On the property, the Organization asked the proper questions:

> "... [I]f a true emergency situation existed, common sense tells us that you would want to eliminate the condition as soon as possible. You indicate in your letter that the leaking of the roof occurred as early as 1989 and continued through the spring of 1990. If it was an emergency, why did the Carrier wait until June and July of 1990 to have the work performed? Why did the Carrier not have the contractor perform the work on Sunday? Is the Carrier suggesting it postponed the purported emergency during the 6 to 9 months before the work was performed....?"

Taken to its logical extent, the failure to maintain any structure or piece of equipment could have potentially dangerous ramifications and every maintenance function would become an emergency. The exception carved out for emergencies in Rule 52 would then swallow up the rule. We must find that no emergency existed.

With respect to the remedy, the Carrier is correct that ordinarily on this property monetary relief is awarded for contracting out violations only when employees are on furlough. See e.g., Third Division Award 29308. But, for lack of notice situations, see Third Division Award 23578:

> "A long line of Third Division Awards precludes us from providing the claimants with pecuniary relief where they have not proved loss of work opportunity or loss of earnings due to the Carrier's failure to tender the required notice unless the Carrier has flagrantly or repeatedly failed to comply with Rule 52. See Third Division Awards No. 23354 (Dennis); No. 21646 (Ables); No. 20275 (Eischen) No. 20671 (Eischen); No. 18305 (Dugan). In this case we do not find any evidence of a malicious motive underlying the Carrier's failure to give the Rule 52 notice.
>
> While we must deny the claimant's request for monetary damages, we expect the Carrier, in the future, to fully and properly comply with the Rule 52 notice provisions."

See also, Third Division Award 26174:

> "At the same time, we are also persuaded by the decision in Award 23354, that compensation must be denied because all affected employees are fully employed and suffered no loss. This is a position that has long been applied in the industry and we find no basis for ruling to the contrary. This is not to say, however, that there is no merit to the Organization's contention that flagrant and continued disregard of a Carrier's responsibility to provide proper notification should result in the sustaining of a monetary Claim. It is an argument that warrants attention and we will continue to consider it in the future."

Subsequent to the issuance of Third Division Awards 23578 and 26174, this Board has had the opportunity to consider the scope of the remedy on this property in cases were notice is not given in accord with the requirements of Rule 52. See e.g., Third Division Awards 30286, 30066, 29310. Those more recently decided cases have specifically limited relief in lack of notice cases to employees who were on furlough. We find those recent awards are not palpably erroneous and, for purposes of stability, must be followed. Therefore, the monetary relief requested in this case shall be limited to employees on furlough, if any.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 1st day of September 1995.