Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31721
Docket No. MW-31177
96-3-93-3-60

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(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 (Shurigar Dirt Contracting, Inc. and Neosho Construction Company) to haul fill material and do the necessary grading work in connection with the construction of roadbed for a new track on the south side of the existing tracks between Mile Posts 828.25 and 830 on the Wyoming Division, beginning September 19, 1991 and continuing (System File S-606/920095).

2. The Agreement was further violated when the Carrier failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Eastern District Roadway Equipment Operators D. J. Kobza, R. L. Wehrer, C. D. Steuben, T. D. Morgan, L. E. Easton, D. D. Dickinson, D. K. Melius, and R. M. Angelo and Wyoming Division Group 15 Truck Drivers L. E. Gilbert, D. L. Johnson and K. B. Poledna shall each be allowed pay at their respective rates of pay for an equal proportionate share of all straight time and overtime hours expended by the outside forces beginning September 19, 1991 and continuing until the violation ceases to exist."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of 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 were given due notice of hearing thereon.

On August 27, 1991, Carrier gave the Organization notice of its intent to solicit bids for grading and embankment work, sub-ballasting, extension of masonry arch, removal of right-of-way fence and other incidental work in connection with the construction of a siding at M. P. 830 on the Salt Lake Subdivision. On September 10, 1991, the General Chairman replied with a twenty-one page letter arguing that Carrier was precluded from subcontracting the work in question. The letter ended by requesting a conference. The contractor began work on September 19, 1991. On September 24, 1991, Carrier responded with a three page letter defending the subcontracting at issue and advising the General Chairman to "arrange to include these cases on the agenda for handling at our next conference on contracting notices." Conference was held on October 2, 1991.

The Organization contends that Carrier violated the Agreement by contracting out work which, in the Organization's view, was reserved to the employees. The Organization maintains that Rule 52(a) allows Carrier to contract out such work only under specified circumstances and that Carrier has failed to show that it fell within those circumstances in the instant case. The Organization maintains that Carrier's contention that it has subcontracted this work in the past is irrelevant in light of Rule 52(a) and, in any event, is not supported by the record.

Furthermore, the Organization contends that Carrier violated Rule 52(a)'s requirement that, upon request of the General Chairman, Carrier "promptly meet" and make a good faith effort to reach an agreement concerning the subcontracting. The Organization argues that the meeting in the instant case took place after the subcontracting had begun, characterizes the meeting as a sham and accuses Carrier of bad faith in violation of Rule 52(a).

The Organization urges that a monetary remedy be imposed, even though the Claimants were fully employed during the period in question. The Organization argues that Carrier did not demonstrate that the Claimants could not have performed the work by rescheduling other work or on an overtime basis. In the Organization's view, the Claimants should be compensated for their lost work opportunity.

The Organization further maintains that a monetary remedy is appropriate because Carrier is a repeat violator of the notice and meeting requirements. The Organization argues that Carrier's bad faith requires that Carrier be ordered to compensate the Claimants to deter future violations.

Carrier contends that the Scope Rule is general in nature and that the Organization had the burden of proving that it has exclusively performed the work in question. Carrier argues that, not only did the Organization fail to prove exclusivity, but that Carrier has contracted out such work frequently over the years. Carrier argues that on several occasions this Board and a Public Law Board have upheld Carrier's long-standing practice of contracting out this type of work.

Carrier maintains that it did comply with Rule 52(a) by giving the Organization sufficient notice of its intent to subcontract and making itself available to meet to discuss the matter. Finally, Carrier argues that if it did violate the Agreement, no monetary remedy is in order. Carrier contends that the Claimants were fully employed during the period in question and, therefore, suffered no monetary losses.

This Board does not write on a clean slate. The issue of subcontracting has been the subject of numerous Awards between the parties over the years. The specific issues raised in this case have been resolved on several occasions by this Board and by Public Law Board No. 5546. We see no reason to deviate from the holdings in these prior cases.

Specifically, this Board and Public Law Board No. 5546 have interpreted Rule 52(b) as allowing subcontracting under the circumstances presented here. Rule 52(b) provides: "Nothing contained in this Rule shall effect (sic) prior and existing rights and practices of either party in connection with contracting out." This Rule allows Carrier to contract out work where it has established a long-standing past practice of doing so. Carrier introduced evidence of such practice during handling on the property. It has introduced similar evidence in prior cases and this Board and Public Law Board No. 5546 have consistently held that Rule 52(b) allows Carrier to contract out the work at issue in this case. See Third Division Awards 30193, 29309, 28622, 28619, 27011, 27010: Public Law Board No. 5546, Award Nos. 3, 6. We reach the same result.

Rule 52(a) requires that Carrier give at least fifteen days notice of its intent to subcontract. Carrier complied with this requirement. However, the Rule also requires that, upon request, Carrier promptly meet with the Organization and make a good faith effort to reach agreement regarding the proposed subcontracting. As our previous awards have held, Carrier does not comply with this requirement where, as here, the conference takes place after the outside contractor has begun work. See, e.g., Third Division Awards 31171, 31036, 31031.

We next consider the remedy for Carrier's violation of Rule 52(a). We are not persuaded that a monetary remedy is appropriate.

Although there is precedent between the parties for a monetary remedy for lost work opportunity where the subcontracting itself violates the Agreement, See Third Division Award 30827, numerous Awards between these parties consistently restrict monetary relief for notice and conference violations to furloughed employees. See, e.g., Third Division Awards 31171, 31031, 31026, 30281, 29825, 29792, 28849, 29023, 29021, 28849, 28559, 28733.

Third Division Award 28513 did grant monetary relief to fully employed claimants for a notice violation by a different Carrier. We justified the relief as follows:

> "[T]hose awards [denying monetary relief for notice violations] do not address the situation presented in this case where the Carrier failed to the degree demonstrated by this record to follow the previous admonitions of this Board over the requirement to give notice."

We do not find Award 28513 to control the instant case. We recognize that the violation in this case arose after our Awards put Carrier on notice of its obligations to give proper notice to the Organization of its intent to subcontract. See, e.g., Third Division Award 29825. However, Carrier did give the Organization timely notice as required by Rule 52(a). Although the conference was held after the contractor had begun work, there was an exchange of lengthy written positions with respect to the proposed subcontracting. Each party clearly understood the other party's position by the time the conference was held and it was quite clear that each party would likely maintain its position in conference. Under these circumstances, we conclude that a monetary remedy for fully employed Claimants would not be appropriate.

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 25th day of September 1996.