Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31730
Docket No. MW-31226
96-3-93-3-316

The Third Division consisted of the regular members and in addition Referee Robert Richter 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 forces to perform Maintenance of Way and Structures Department work in connection with concrete work (setting forms, tieing rebar, pouring and finishing concrete, installing anchor bolts, removing forms and incidental work in connection therewith) in connection with constructing extensions to the existing concrete box culverts and bridges and the installation of culverts located between Mile Post 297.50 and Mile Post 301.50 on the Nebraska Division beginning on October 7, 1991 and continuing (System File S-609/920090).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman proper advance written notice of its intention to contract out said work as contemplated by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman K.E. Peterson and Carpenters D.T. McIntosh, I. Espinosa, R.K. Hughes and J.P. Nila shall each be allowed compensation, at their respective rates, in an '*** equal proportionate share of the man hours worked by the employees of the outside contracting force ***' beginning October 7, 1991 and continuing."

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 were given due notice of hearing thereon.

This Board has two issues to resolve in this case. We will deal first with the charge that the Carrier violated Rule 52(a). Rule 52 of the Agreement reads as follows:

"RULE 52. CONTRACTING

(a) By agreement between the Company and the General Chairman work customarily performed by employees 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 employees, 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 undertakings 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 carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier 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 use of contractors or use of other than maintenance of way employees in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disaster.

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

On August 5, 1991 the Carrier notified the Organization the following:

"This is to advise of the Carrier's intent to solicit bids to cover the grading and excavation, the subgrade stabilization, asphalt work, and installation of gravel surface for service road in connection with the construction of a third main line near O'Fallons, Nebraska on the Sidney Subdivision between approximately MP 298.00 and MP 300.00.

This work is being performed under that provision of the collective Bargaining Agreement which states, `Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out'.

Serving of this `Notice' is not to be construed as an indication that the work described above necessarily fails within the `scope' of your Agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the Brotherhood of Maintenance of Way Employes.

Additionally, I will be available to conference this Notice at a mutually agreeable time with the next fifteen (15) days in accordance with Rule 52 of the Agreement."

On October 31, 1991 the Organization filed the claim now before this Board. One of its positions is that the Carrier failed to give prior notice to the work performed in this claim.

The Carrier responded by stating it did not have to give notice on work not covered by the Scope Rule of the Agreement.

Previous Awards of the Third Division (See Awards 29121 and 30066) have held that advance notice is required. In Award 30286 of this Board between the same parties a similar dispute was resolved. In that case the Board held:

"Given the state of the record on the property, the Board concludes that notice was not given. Thus, the finding that Rule 52 was violated is inescapable. The remaining question is one of remedy. It is noted that, according to the Carrier, one of the Claimants was employed at the time of the violation. If this is true, we are not convinced on the basis of this record that there was a lost work opportunity for that Claimant. As for the furloughed Claimant, he is entitled to damages as claimed. The Parties are directed to make a joint check of the records to verify the status of the Claimants at the time of the violation."

In this case we will similarly rule that advance notice of the concrete work was not given.

The question as to whether the Carrier violated the Scope Rule when it contracted out the concrete work has been resolved by this Board in previous Awards. In Third Division Award 31172 the Board held:

"The record in this case demonstrates a mixed practice on this property with respect to the concrete construction work in question, which has been confirmed in prior Awards of the Board. Third Division Awards 30287, 30262 and 28623. Numerous decisions of the Board have held that the Carrier has the right to contract out work under Rule 52(b) and (d) where advance notice is given and the Carrier has established a mixed past practice. We conclude that the Carrier did not violate the Agreement when it contracted out the work."

Further, in Third Division Award 31029 involving the same parties in a similar dispute the Board held:

"Second, with respect to the kind of work involved in this dispute, this Board has held that the Carrier can contract out such work. See Third Division Award 31035 and Awards cited therein. Those Awards are not palpably erroneous and, in the interest of stability, they will be followed."

As to the Carrier's position that the Organization failed to reject its declination, we find a 69 page response met the requirement of the Time Limit Rule.

The Board has found that the Carrier failed to serve proper notice in the case. The Carrier argues the Claimants were fully employed at the time the contractor performed this work and as such are not entitled to any additional compensation. The Organization states the Carrier has consistently failed to give notice and it is time it "paid the piper." In this case the Carrier did give the Organization notice, albeit insufficient as to the work performed. There appears to be no intent on the part of the Carrier to deceive the Organization. Therefore, in accordance with previous Awards of this Board involving the same parties it holds that inasmuch as the Claimants were fully employed no compensation is due. However, the Carrier is forewarned that it is obligated to give proper notice and future failures may be dealt with differently.

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.