Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33646
Docket No. MW-32425
99-3-95-3-313

The Third Division consisted of the regular members and in addition Referee Robert Perkovich 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 used outside forces (Neosho Construction Company Inc.) to perform Bridge and Building Subdepartment work (removing drip and cross pans, removing appurtenances to the drip pans, forming, pouring, finishing concrete walks, removing forms and cleaning the construction area) at approximately Mile Post 334 in the Las Vegas, Nevada Yards beginning October 18 through 30, 1993 and beginning November 1 through 29, 1993 (System Files C-7/940189 and C-8/940188)

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out the work cited in Part (1) above and failed to make a good faith effort to reduce the incidence of contracting out the scope covered work and increase the use of their Maintenance of Way forces as required by Rule 52(a) and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Part(1)and/or (2) above, Mr. F. C. Bruner II shall be allowed eighty (80) hours' pay at the water service foreman's straight time rate and twenty (20) hours' pay at the time and one-half rate; Messrs. P.K. Chamberlain and J. D. Blankinship shall each be allowed eighty (80) hours' pay at the B&B foreman's straight time rate and twenty (20) hours' pay

at the time and one-half rate for the work performed in October, 1993 and one hundred fifty-two (152) hours' pay at the B&B foreman's straight time rate in November 1993 [a total of two hundred thirty-two (232) straight time hours and twenty (20) over time hours]; Messrs E.L. Baker and D.S. Holland shall each be allowed eighty (80) hours pay at the B&B First Class Carpenter's straight time rate and twenty (20) hours' pay at the time and one-half rate for the work performed in October, 1993 and one hundred fifty-two (152) hours' pay at the B&B First Class Carpenter's straight time rate for the work performed in November, 1993 [a total of two hundred thirty-two (232) straight time hours and twenty (20) overtime hours]."

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.

The Carrier notified the General Chairman of the Organization, by letter dated August 2, 1993 that within 15 days it intended to solicit bids for contract work in downtown Las Vegas, Nevada, more specifically to furnish and place gravel, install membrane, install drip pans and lift station. The Carrier also asserted in its notice that the work in question was "customarily and traditionally" performed by contractors and concluded its notice by inviting the General Chairman to contact its Labor Relations Department in the event that the Organization wished to discuss the matter.

The General Chairman accepted the Carrier's invitation and a conference was held. However, the parties were unable to reach any accommodation and the contractor

commenced the work in question and performed the work between October 18 and October 30, and again between November 1 through 29, 1993. In so doing it utilized ten employees for approximately 232 manhours.

The Organization contends that the Carrier violated the parties' Agreement in one or two ways. First, it contends that the Carrier violated its obligation under Rule 52 to give notice to the Organization of the contract and that when it discussed the matter with the Organization at conference it did so in bad faith. Alternatively, it asserts that the contracting out of the work in question, with or without regard to the notice and discussion, also violated Rule 52.

We disagree on both points. First, with regard to the process followed by the Carrier before the contractor commenced the work in question, there can be no question that the Carrier did in fact give notice to the Organization. Thus, the only flaw with respect to notice could be if it were inadequate and here the Organization contends that the notice was flawed because it was "...plainly vague...failed to specify a valid reason for the Carrier's desire to contract out the subject work" and failed to indicated the dates on which the work would begin. However, the plain language of the Carrier's notice clearly set forth the nature of the work to be performed and stated that the work was customarily performed by contractor employees. Thus, although the Organization may disagree with that assertion and claim that it is invalid or wrong, its assertion to that affect does not make the statement invalid, nor does it undermine the notice. With regard to the other flaw detected by the Organization, although it is true that the notice was not date-specific, it nonetheless provided enough information to enable the Organization to take a position whether the work in issue could be contracted out. Further, the parties held a conference on this very point at which the issue was discussed. In addition, the record in this case, as supported by the extensive history between these parties on the issue of contracting out and notice thereof, leads the Board to the conclusion that both the Organization and the Carrier have taken hard and fast positions and behaviors that would not and have not lead to problem-solving discussions. Therefore, we cannot find that the Carrier was impaired in the fashion described by the Organization.

On the merits, the overwhelming weight of arbitral authority on the Third Division is that the Carrier has the right under Rule 52(b) and (d) to contract out work where there is a mixed practice of contracting out work similar to that involved in the dispute. The record in this case more than amply demonstrates such a mixed practice

on this property, such that the work in question has been performed by members subject to the Agreement, but also by those working for outside contractors. Thus, the Carrier did not violate the Agreement when it contracted out the work in question.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of November 1999.