Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38238
Docket No. MW-36763
07-3-01-3-298

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien 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 outside forces to perform routine Maintenance of Way right of way cleaning work (cut and pickup rail, material, scrap and general cleanup) between Hawley, Idaho and Senter, Idaho on the Nampa Subdivision commencing on February 25, 2000 and continuing through March 3, 2000, instead of Messrs. R. S. Gomez, D. W. Sirois, W. L. Evans, D. A. White, J. J. Ugalde, D. L. Hoover, R. J. Warth, R. T. Mills, J. Hernandez and K. B. Dawson.

(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 said work and 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, Claimants R. S. Gomez, C. W. Sirois, W. L. Evans, D. A. White, J. J. Ugalde, D. L. Hoover, R. J. Warth, R. T. Mills, J. Hernandez and K. B. Dawson must each '*** be allowed at his applicable rate a proportionate share of the total hours, both straight and overtime hours worked by the contractor doing the work claimed as compensation for loss of work opportunity suffered February 25, 26, 27, 28, 29, March

1, 2 and 3, 2000. Additionally, in an effort to make Claimants whole for all losses suffered, we are also claiming that the Carrier must treat Claimants as employees who rendered service on the days claimed qualifying them for vacation credit days, railroad retirement credits, insurance coverage and any and all other benefits entitlement accrued as if they had performed the work claimed.'"

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.

On March 1, 1999, the Carrier executed a Purchase and Removal Agreement with the L. B. Foster Company (hereinafter referred to as the Contractor). The Contractor agreed to provide labor, materials, equipment and supervision for the removal and purchase of rail and other track material "as is, where is" behind system rail gangs during the 1999 annual Track Maintenance Program for the scheduled projects of the 8501 System Rail Gang and the 8511, 8512, 8513 and 8514 Curve Gangs. In consideration for this work, the Carrier agreed to sell the Contractor the railroad trackage and appurtenances that were removed.

Between February 25 and March 3, 2000, the L. B. Foster Company performed work on the Carrier's right-of-way between Hawley and Senter, Idaho, on the Nampa Subdivision.

The Organization filed a claim on behalf of a Roadway Equipment Operator, a Welder, a Welder Helper, a Truck Driver and six Laborers on the Idaho Subdivision contending that they should have been assigned the purported right-of-

way cleaning work rather than the L. B. Foster Company. The Organization asserts that the outside contractor cut and picked up rail, material and scrap, work customarily performed by the Claimants. The Organization also alleged that the Carrier failed to give the General Chairman advance notice of the work contracted to the L. B. Foster Company as required by Rule 52(b).

The Carrier denied the claim insisting that all scrap material was sold to the contractor "as is, where is." The Carrier maintains that Rule 52(b) gave it the right to utilize a contractor to remove track and debris from its right-of-way. Furthermore, according to the Carrier, there has been a mixed practice on the property of both Maintenance of Way employees and contractors performing this work. Additionally, the Carrier asserts that it gave the General Chairman notice of its plans to contract out this right-of-way work on February 9, 1999.

With some exceptions not pertinent to this claim, Rule 52(a) allows the Carrier to contract work customarily performed by Maintenance of Way employees. However, in the event the Carrier plans to contract out work customarily performed by Maintenance of Way employees, Rule 52(a) requires the Carrier to notify the appropriate General Chairman in writing as far in advance as is practical, but in no event not less than 15 days prior to the date of the contracting transaction except in emergencies.

The Carrier's May 25, 2000 notice to the General Chairman clearly did not comport with the requirements of Rule 52. Rule 52(a) requires the appropriate General Chairman to be given advance notice of the contract. The May 25, 2000 notice was given 83 days after the disputed work was completed. Moreover, Rule 52(b) expressly states that the Carrier is required to give advance notice to allow the General Chairman or his representative to discuss the work being contracted out and, if possible, to reach an understanding. Notice given 83 days after the contracted work ceases obviously did not give the General Chairman the opportunity to discuss this work.

The Carrier further argues that its February 2, 1999 notice to the General Chairman apprised him of the work that was contracted to the L. B. Foster Company. However, the March 1, 1999 Purchase and Removal Agreement with L. B. Foster, on its face, was applicable to the 1999 annual Track Maintenance Program. There is no evidence in the record that this contract was extended into 2000 and that the Organization was notified of this extension. Therefore, the "as is,

where is" sale of rail and other track material to the L. B. Foster Company under the March 1, 1999 Purchase and Removal Agreement is immaterial because there is no evidence that it applied to the work subject of this dispute that was performed in February and March 2000.

Award 83 of Public Law Board No. 6302 between these parties is quite similar to this dispute even though it involved the unloading of ties rather than the removal of rail and other track material. Award 83 held, in part, that Rule 52 is violated when no notice of contracting out, or an inadequate notice, is given regardless whether the work contracted had been performed in the past by both Maintenance of Way employees and outside forces. The Board in Award 83 concluded that the Agreement was violated by the Carrier's failure to give notice of the contracting at issue.

The Board feels compelled to follow Award 83 because it is comparable to the dispute now before us. Yet, Award 83 is distinguishable in one respect. In Award 83, there was a complete failure to give the requisite notice, whereas here the Carrier asserts that its February 2, 1999 notice encompassed the work performed one year later. For the reasons expressed above, we found that argument unavailing. Consistent with prior Third Division precedent, the appropriate remedy for this violation is to make whole any Claimants who were furloughed between February 25 and March 3, 2000.

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 18th day of July 2007.