Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40959
Docket No. MW-41302
11-3-NRAB-00003-100147

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
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 (Dondlinger and Sons Construction) to perform Maintenance of Way work (replace pillar blocks and related work) on the piers at BR 277.63 on the Sharon Springs Subdivision beginning on October 20, 2008 and continuing through November 19, 2008 (System File D-0852U-231/1513700).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a 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 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Bejan, M. Goin, K. Manley, M. Schooler and K. Weber shall now each be compensated for two hundred thirty (230) hours at their respective Group 3 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 were given due notice of hearing thereon.

By letter dated September 29, 2008, the Carrier advised the Organization as follows:

> "This is a 15-day notice of our intent to contract the following work:
>
> Location: Bridge 277.63 Sharon Springs Subdivision - near Hays, Kansas and Bridge 225.15 near Ellsworth, Kansas.
>
> Specific Work: This request is to cover the repairs for two bridges on the Sharon Springs Subdivision Bridges 277.63 and 225.15. Furnish all labor, supplies, materials, equipment and supervision to replace bridge pier tops, install new anchor bolts, level spans, place dowels and reinforcement bars to face abutments and wing walls with a minimum of 8" of concrete. (Full scope to be discussed at showing)"

Conference was held under Rule 52 on October 9, 2008, without resolution. According to the Organization, the contracted work commenced on October 20, 2008.

The Carrier's notice was adequate under Rule 52. See Third Division Award 31170 (". . . the notice given was sufficient to inform the Organization of what work

was being contemplated for contracting."). The Carrier's September 29, 2008, notice meets that test.

The Carrier contracted out bridge repair work in the past and claims protesting such action under Rule 52 have been denied. See Award 31170, supra, finding that ". . . the Carrier's evidence is sufficient to establish a past practice of contracting out concrete bridge repair work. . . ." There is no reason to deviate from that precedent established between the parties permitting the Carrier to contract out the work in dispute. The prior precedent is not palpably in error and, for purposes of stability, must be followed.

The Organization's general arguments seeking to avoid many years of Awards involving contracting out disputes between the parties concerning many areas of scope-covered work cannot cause a different outcome. No matter how well-framed the Organization's arguments may be — arguments which address its positions that the work in dispute has customarily, historically and traditionally been assigned to and performed by and is reserved to B&B Sub-department employees as scope-covered work; that the Carrier's actions are not in conformity with the December 11, 1981, Berge-Hopkins letter; and that the Rule 52 criteria for contracting out have not been met — putting aside that these kinds of arguments have been advanced by the Organization in the past, the fact remains that between these parties (and provided the Carrier follows the notice and conference requirements in Rule 52) the Carrier has the ability to contract out scope-covered work if there is a practice showing that the Carrier has contracted out that work in the past. See Third Division Award 40861:

> "The Carrier is correct that in what it refers to as "mixed practice" cases, the Board has found that contracting of scope-covered work is permissible under Rule 52 where the Carrier has contracted that work in the past. See e.g., the Board's recent decisions in Third Division Awards 40755 (fence construction work) and 40756 (vegetation control). With respect to the type of work performed in this case [loading ballast], prior Awards have upheld the Carrier's ability to contract out similar work. See Third Division Awards 33645 and 37644."

The Board is not blindly following prior Awards and ignoring the Organization's arguments. Instead, the Board is following the long-held doctrine that for purposes of stability, prior Awards must be followed unless they are palpably erroneous. See Third Division Award 34204:

> ". . . [F]or purposes of stability, we cannot decide this case de novo, but we are required to defer to that prior Award. To do otherwise would be an invitation to chaos and would result in encouraging parties after receiving an adverse decision to attempt to place a similar future dispute before another referee in the hope of obtaining a different result."

The prior Awards between the parties allowing the Carrier to contract out scope-covered work if a practice exists showing the Carrier has done so in the past are not palpably in error. Stability requires that we follow that doctrine. If this Board did not follow that doctrine, chaos would result and the parties would then be encouraged to engage in referee shopping seeking to find someone who might be persuaded to simply disregard a long line of decisions.

The result the Organization seeks is a sword with two edges. The Organization has routinely prevailed in contracting out cases with employees receiving full make whole relief for lost work opportunities (even though they were working) where the Carrier failed to follow the notice and conference requirements in Rule 52. Those claims have been sustained even where the contracting out would have been permissible under Rule 52 if only the Carrier met its notice and conference obligations. See e.g., Third Division Award 40763 (although fencing work could be contracted out because the Carrier had done so in the past, the claim was sustained because the contracted work began less than 15 days after notice was given in violation of Rule 52).

If the Board disregarded the long-established precedent between the parties that allows the Carrier to contact out work where it has an established practice of doing so in the past, then the Organization's precedent of prevailing in failure to provide notice and meet conference obligations cases would be open to a similar fate of being disregarded. If that occurred, then the structure of Rule 52 would be rendered entirely useless. See Third Division Award 32862:

> ". . . [O]ur function is to enforce language negotiated by the parties. In Article IV and as a result of negotiations, the parties set forth a process of notification and conference in contracting disputes. The Carrier's failure to follow that negotiated procedure renders that negotiated language meaningless."

Here, the Carrier met its notice and conference obligations under Rule 52. There is a practice of contracting out the disputed work in the past. Based on prior precedent which is not palpably erroneous, the Carrier's actions do not violate Rule 52. The claim shall be denied.

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 14th day of April 2011.