Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41030
Docket No. MW-41341
11-3-NRAB-00003-100078

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 (Becker Construction) to perform Maintenance of Way work (remove/ replace wall support and related work to reset the east wall) at the One Spot Building #0343 within the Council Bluffs Yards on August 18, 19 and 20, 2008 (System File J-0852U-276/1511202).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman a proper advance written notice of its intent to contract out said work and when it failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52 and the National December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Weigelt, S. Foster and P. Gantnier shall now '*** each be allowed compensation at their respective rates of pay for all hours worked by the outside contracting force August 18, 19, and 20, 2008. This compensation must be at the Claimants applicable straight time and overtime 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 notice dated January 31, 2008, referencing "Service Order No 39473," the Carrier advised the Organization as follows:

> "This is a 15-day notice of our intent to contract the following work:
>
> Location: In the states of Nebraska, Iowa.
>
> Specific Work: Various construction services on an 'as needed' basis.
>
> * * *
>
> As noted in its letter of February 22, 2008, conference was held on February 19, 2008, with the Carrier further explaining that:
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> * * *
>
> As discussed, a contractor is now required [to] perform incidental work, i.e., trenching, concrete replacement, etc., associated with the replacement of the in-floor jacks (Portec) at the One-Spot facility, located in Council Bluffs, Iowa. . . ."

On November 19, 2009, the Carrier forwarded a copy of the contract with Becker Construction, noting "[a]s per the Organization's request, please find attached a copy of the contract that pertains to Service Order No. 39473."

The contract with Becker Construction provided by the Carrier ". . . is made and entered into as of JANUARY 31, 2008 . . ." — the same date of the notice from the Carrier to the Organization stating the Carrier's intent to contract the work.

The Organization argues that by entering into the contract with Becker Construction on January 31, 2008, and sending notice to the Organization on that same date notifying the Organization that "[t]his is a 15-day notice of our intent to contract the following work . . . ," the Carrier violated the notice requirements of Rule 52. We agree.

Rule 52 – CONTRACTING is clear :

> ". . . 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. . . ." (Emphasis added)

This was not an "emergency time requirements" case. The work was performed in August 2008 — long after the January 31, 2008 notice and effective date of the contract with Becker Construction.

However, the Carrier entered into the contract with Becker Construction on January 31, 2008, and gave the Organization notice of its intent to contract the work on the very same date. But Rule 52(a) states, in pertinent part, that ". . . [i]n the event the Company plans to contract out work . . . it shall notify . . . the Organization . . . 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. . . ." Entering into the contract with Becker Construction on January 31, 2008, and giving the Organization notice on the same date of ". . . a 15-day notice of our intent to contract the following work . . ." does not meet the clear requirement in Rule 52(a) obligating the Carrier to give the Organization at least 15 days' notice ". . . in advance of the date of the contracting transaction . . ." when it ". . . plans to contract out work." By giving the Organization notice of its intent to contract the work on the very same date it entered into the contract with Becker Construction, the notice requirements in Rule 52(a) have not been complied with.

In a series of recent Awards, the Board has reiterated the following principles in contracting cases: (1) exclusivity of performance of the disputed work by scope-covered

employees need not be shown and the Organization need only show that the disputed work falls under the scope of the Agreement (2) while a "mixed practice" of contracting out the disputed work may exist and the Carrier otherwise would have the right to contract the work, the failure of the Carrier to meet its notice obligations concerning contracting requires sustaining of claims where those notice obligations were not followed and (3) affected employees are entitled to make-whole relief for lost work opportunities even if they were working on the dates the contracted work was performed. See Third Division Awards 40763, 40857, 40858, 40859, and 40860 and Awards cited therein.

Those principles govern this case and the remedy. There is no dispute that scope-covered employees have performed the type of work involved in this case. The record shows that the Carrier did not meet its notice obligations under Rule 52. As a remedy, the affected employees shall be made whole for the lost work opportunities on the dates the work was performed by the contractor as set forth in the claim.

AWARD

Claim sustained.

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 23rd day of August 2011.