

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42388
Docket No. MW-41558
16-3-NRAB-00003-110163**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Excel Construction) to perform Maintenance of Way work (remove/replace roof and related work) on the One Spot Building and the Bridge and Building (B&B) Shop at Pocatello, Idaho beginning on November 5, 2009 and continuing (System File D-0952U-241/1529513).**
- (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 December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants C. Mount, T. Newby, R. Tilley, W. Wallace, R. Olsen and J. Paz shall now each be compensated at their respective and applicable rates of pay for an equal share of the total straight time and overtime hours expended by the outside forces in the performance of the aforesaid work beginning November 5, 2009 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 claim alleges that the Carrier violated the Parties' Agreement when it failed to provide proper notice to the Organization of its intent to subcontract routine B&B work - roof re-shingling - on two buildings in the Yard in Pocatello, Idaho, and again when it used an outside contractor to perform the work.

On October 12, 2009, the Carrier gave notice to the Organization of its intent to contract out certain work at the Pocatello Yard:

“This is to advise of the Carrier’s intent to contract the following work:

Location: Buildings 7137, 7138 and 7129 inside Pocatello Yard
 300S
 Harrison, Idaho 83204

Specific Work: Provide all labor material as outline (sic) and
 equipment to complete scope of work as per proposal”

The Parties conferenced on the matter on October 28, 2009, but did not reach any agreement. The work was performed by Excel Construction beginning November 5, 2009. The Organization filed this claim December 7, 2009. The Parties having been unable to resolve the matter through the grievance process, it was submitted to the Board for a final and binding decision.

The Organization contends that the notice was defective in that it failed to give the reasons for the subcontracting of bargaining unit work, as required by Rule 52

and by the December 11, 1981, Berge-Hopkins letter. In Third Division Award 32333, the Board articulated the fundamental purpose of the notice requirement: did the notice give the Organization “enough information to take a position on whether the work in issue should be contracted out”? Second, did the Parties actually hold a conference to discuss the notice? The latter point is important because a conference is where the Parties can discuss any questions about the notice and the Carrier can clarify and explain any ambiguities. In this case, the notice identified the exact location of the work at issue and referenced a specific work order. (The record does not indicate whether the work order was attached to the notice.) The Parties met in conference shortly after the notice. The Organization had an opportunity then to ask any questions about the work, and the Carrier indicated its belief that there was a mixed past practice that permitted it to contract out the work under Rule 52(b). While the notice did not include the reasons for the proposed sub-contracting, together the notice and the conference gave the Organization “enough information to take a position on whether the work in issue should be contracted out.” More complete notices would be preferable. That said, the Board concludes that the notice was adequate, or at least not so inadequate as to warrant sustaining the claim solely on notice grounds.

Turning to the substantive claim, roof repairs have historically, customarily and traditionally been done by the Bridge & Building Subdepartment, and there is no serious dispute that B&B employees are qualified to and could have performed the work at issue. However, under Rule 52(b) of the Parties’ Agreement, if there is a mixed past practice of having both Carrier forces as well as contractors perform certain work, the Carrier may properly contract the work. The Board has addressed the issue of contracting roofing work between these Parties before, and there are numerous awards that recognize the existence of a mixed past practice whereby the Carrier has used its own forces as well as outside contractors to do roofing work, which bring the work within the “existing rights and practices” language of Rule 52(b).¹ The Organization has not presented evidence to establish that the work at issue in this case is significantly different from that under consideration in those cases. Accordingly, under the principle of stare decisis, this Board is compelled to follow those precedents.

¹ See, e.g., Third Division Awards 29539, 29802, 30102, 30690, and 32395 30690.

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 5th day of October 2016.