Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27189
THIRD DIVISION Docket No. MW-26368
88-3-85-3-80

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces to scale the canyon wall and to remove debris from the right-of-way at Mile Post 109 in the vicinity of Radium, Colorado beginning May 23, 1983 (System File D-31-83/MW-27-83).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written Notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, Rock Subdepartment employes P. Holland, M. McCoy, R. Wyckoff, R. Wartzoky and R. Jacobs shall each be allowed pay at their respective rates (straight time and overtime) for an equal proportionate share of the man-hours expended by outside forces in performing scaling work (preparing, drilling, blasting, etc.) and Work Equipment Subdepartment employes J. L. Matlock, W. A. Sisson, C. R. Iacovetto, R. Lee, S. R. Berkenkotter and J. L. Gentile shall each be allowed pay at the respective rates (straight time and overtime) for an equal proportionate share of man-hours expended by outside forces in removing blasted debris from the right-of-way."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The General Chairman of the Organization filed a claim on July 13, 1983 with the Carrier which was amended on July 18, 1983. The claim which alleged violation of Rules of the operant Agreement as well as Article IV of the National Agreement of 1968, states the following:

"The System Committee of the Brotherhood is claiming in behalf of the below named claimants who are employes holding seniority within the Rock Subdepartment and Road Equipment Subdepartment that the Agreement was violated when carrier contracted to an outside party the scaling of canyon wall and removing of debris from right-of-way at Mile Post 109, near Radium, Colorado. This work commenced on May 23, 1983 without prior notification to the General Chairman and it is respectfully requested that each Rock Subdepartment claimant be compensated an equal proportionate share of the straight time and overtime man hours expended by the contractor on that work, such as, wall scaling, blasting, etc. and that each Work Equipment Operator claimant likewise be compensated for the man hours expended by contractor's operators operating the front-end loader involved. This claim is to continue until such time as violation ceases.

Claimants are:

ROCK SUBDEPARTMENT	WORK EQUIPMENT SUBDEPARTMENT
P. Holland	J. L. Matlock
M. McCoy	W. A. Sisson
R. Wyckoff	C. R. Iacovetto
R. Wartzok	R. Lee
R. Jacobs	S. R. Berkenkotter
	J. L. Gentile

Claimants are qualified and have or are performing work similar to that claimed here."

A rock slide occurred at Radium, Colorado on May 1, 1983. Employees and a contractor were both used by the Carrier to clear the slide. According to the record the Carrier shortly thereafter dismissed the contractor and the employees returned to their regular assignments. The instant claim was filed when the Carrier then contracted with Loudermilk Construction Company to do additional work at the site on May 23, 1983, and thereafter. According to the claim the work entailed scaling the canyon wall and the use of a "... jack hammer, dynamite, scaling tools, (and) a front-end loader." The General Chairman stated in the claim that "... with the exception of the loader, type for which is assigned to Work Equipment forces, the Rock Gang has all of the equipment used on this project and are skilled in its application."

The Agreement Rules allegedly violated by the Carrier are the following:

"Rule 1: This agreement governs the rates of pay and working conditions of employes in the Maintenance of Way and Structures Department in the classes enumerated in Rule 3 hereof.

"Rule 2: The following subdepartments are hereby established within the Maintenance of Way and Structures Department covered by this Agreement:

Bridge and Building subdepartment
Track subdepartment
Road Equipment subdepartment
Welding subdepartment
Rock subdepartment

"Rule 3 Classes: The following classes are hereby established for the respective subdepartments listed in Rule 2.

ROCK EQUIPMENT SUBDEPARTMENT

Class 1 Operators
Class 2 Oilers

"Rule 4 Classification Rule: Each of the classes of work coming within the scope of this schedule shall be supervised and performed by the foreman, mechanics, helpers and laborers holding seniority rights for such class of work. When employes of the proper seniority class are not available for emergency work of short duration, mechanics, helpers and laborers may be used for any class of work. This rule shall not be used however to deprive employes of regular work for which they are available."

It is also the position of the Organization that the Carrier gave it no advance notice of its plans to contract out the work and that such is a violation of Article IV of the May 17, 1968 Agreement with amendments and interpretation found in a December 11, 1981 Letter of Agreement. This reads as follows:

"ARTICLE IV - CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement."

"December 11, 1981

Mr. O. M. Berge
President
Brotherhood of Maintenance
of Way Employes
12050 Woodward Avenue
Detroit, Michigan 48203

Dear Mr. Berge:

During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the carriers' forces.

The carriers expressed the position in these discussions that the existing rule in the May 17, 1968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carriers' right to contract out work in situations where warranted. The organization, however, believed it necessary to restrict such carriers' rights because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

Conversely, during our discussions of the carrier's proposals, you indicated a willingness to continue to explore ways and means of achieving a more efficient and economical utilization of the work force....

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

Notwithstanding any other provision of the December 11, 1981 National Agreement, the parties shall be free to serve notices concerning the matters herein at any time after January 1, 1984. However, such notices shall not become effective before July 1, 1984.

Please indicate your concurrence by affixing your signature in the space provided below.

Very truly yours,

/s/ Charles I. Hopkins, Jr.

Charles I. Hopkins, Jr.

I concur:

/s/ O. M. Berge"

As a preliminary point the Board must underline that it is well established doctrine that it cannot consider material or arguments which were not submitted during the handling of a case on property. This firmly entrenched doctrine, which is codified by Circular No. 1, has been articulated in many Awards (Third Division Awards 20841, 21463, 22054; Fourth Division Awards 4132, 4136, 4137). A study of the record shows that the Carrier and the Organization introduced new considerations in their Submissions to the Board which are not part of the exchange on property. Such cannot be considered by the Board when framing its conclusions in this case.

A study of the record shows that the main thrust of the Carrier's denial of the claim is that Rock Subdepartment employees did not have the expertise to do the work in question and that it did not have sufficient equipment to handle the job. In claims such as this the burden of proof lies with the moving party (Second Division Awards 5526, 6054; Third Division Award 15670; Fourth Division Awards 3379, 3482). The Organization presents probative evidence that the employees did have the expertise to do the work in question and that they had "...historically" done so. The Carrier has not sufficiently refuted the fact that its forces did not have the capability to scale, drill holes for dynamite, and blast the canyon walls in question. With respect to the equipment available the Organization states that it was not true that the Carrier did not own a loader of the type used by the contractor. In its November 8, 1983 correspondence to the Carrier the General Chairman states:

> "...(the) Carrier owns seven (7) front-end loaders. The L-9R, L-10, L-11R, L-12R, L-13R, L-14R and L-15R. In fact, the L-12R was working at Radium, being operated by Claimant Iacovetto, ditching and not far from where the employees' work was being contracted out...."

This is never substantively refuted in the record by the Carrier.

On the record taken as a whole the Organization has sufficiently met its burden of proof that the work in question fell under the protection of the Agreement Rules cited in the foregoing. Since that is so the Carrier was required to apply the provisions of Article IV of the 1968 Agreement with its amendments and interpretations. There is no dispute that it had not done so. On merits the claim must be sustained.

The Carrier further argues that the Claimants were employed at the time the provisions of the Agreement were allegedly violated. In this respect a review of the public record shows that this is not the first time that an issue such as the instant one has been submitted to the National Railroad Adjustment Board. Several Awards have already been issued by the Board on this question between this same Carrier and this same Organization with respect to Article IV of the 1968 Agreement (Third Division Awards 25335, 25447). Both of these prior Awards conclude, as the Board has here, that the Carrier was in violation of the Agreement. Neither of these earlier Awards, however, provide monetary relief for the contravention of contract. There is, nevertheless, considerable precedent to be found in Awards issued by the National Railroad Adjustment Board to warrant the conclusion that in cases comparable to this one monetary relief is appropriate because of the loss of earnings opportunities (Third Division Awards 16009, 16430, 18365). Furthermore, the Awards issued by the Board on the question of damages are both viable and complex and it is not necessary to do a complete analysis of that line of Awards here. Some of them are not totally on point. There is one line of Awards, however, which addresses whether damages are proper if a Carrier is found in violation of a rule of contract on more than one occasion (Third Division Awards 23354, 23578, 24484). In the instant case the Carrier must have known that its forces were capable of doing the work in question and it has insufficiently refuted the position of the Organization in this respect.

The Claimants named in the Statement of Claim shall each be paid, therefore, an equal proportionate share of the man-hours expended by the Carrier for outside forces when the latter performed contract work in the vicinity of Radium, Colorado beginning May 23, 1983 and thereafter. There is a question with respect to whether employees Wartzok and Jacobs, cited in the Statement of Claim, are proper Claimants. According to the Carrier, "... Claimant R. Wartzok was granted a ninety day leave of absence on January 17, 1983 (or some 7 months or so before the claim was filed) and never returned or contacted Carrier. Claimant R. Jacobs resigned account another job on May 13, 1983 (or some 2 months before the claim was filed)." That this is factually so is not disputed by the Organization. It is the position of the Board, therefore, that the proper manner in which to apportion the relief herein granted is to divide it up in equal proportionate shares among the remaining Claimants who were employees of record at the time the claim was filed.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of June 1988.

DISSENT OF CARRIER MEMBERS
TO
AWARD 27189 (DOCKET MW-26368)
REFEREE SUNTRUP

At Page 6 of the Award we find the following:

> "....the Organization has sufficiently met its burden of proof that the work in question fell under the protection of the Agreement Rules...."

While the parties raised many and diverse issues and contentions, the normal contractual rights of the Organization was not an issue. What was disputed was the ability of the Rock Subdepartment to handle "this particular job". The reasons for the Carrier's conclusion was stated in the on-property record as follows:

> "Please be advised that the May 1, 1983, rock slide at Mile Post 109, which you refer to in your claim, was one of, if not the largest slide with which carrier has ever contended. It was also the most dangerous. The magnitude of this slide was far beyond the scope of capability of carrier's modest rock gang, which in May 1983 consisted of a foreman, one powderman and three hammermen. It literally had to be seen to be believed. Some rocks were larger than a boxcar. Reinforcing carrier's opinion that the Mile Post 109 slide was not within the capabilities of the rock gang, I am attaching copy of a statement from one of the claimants, M. A. McCoy, in which he so states. The rock gang itself was utilized and compensated during the time for which you are claiming at another problem site located in Glenwood Canyon."
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> "The rock slide at M.P. 109 on May 1, 1983, was one of the largest we have had in several years. Not only was it large, but very dangerous, for the potential rock still hanging even after we had removed all the rock on the ground. This condition in itself makes it evident that to properly scale the rock and contain it from coming down would need experienced people that have done this type of work and that do it all the time....

> Also, due to the amount of moisture we had, it was almost impossible to pull our people or equipment off of any job we were doing. There were many rock slides along our right-of-way before and during this slide and after it. We were in an emergency situation along our whole railroad, thus we could not contain all of it with our equipment or personnel."
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> * * * * * * * *
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> "Assistant General Roadmaster Gonzales had also examined the situs and determined the work of scaling this unstable, sheer canyon wall was extra hazardous, not safe and not of the type our forces have ever performed or are equipped to perform. It required special climbing equipment to enable a workman to hang to the canyon wall and drill holes for the placement of explosives. It was work beyond the normal work experience and expertise of the Carrier's rock gang."

Other than to repeatedly assert that the work was reserved to the Rock Subdepartment, the Organization never rebutted the material facts of this particular situation. Thus, the conclusion that:

> "....Carrier must have known that its forces were capable of doing the work in question and it has insufficiently refuted the position of the Organization in this respect."

clearly ignores material facts of record.

While there was much argument during the on-property handling concerning whether notice was or was not required, the Organization advised the Carrier some ten (10) months after the incident that:

> "The notice or lack of notice is not the main thrust of this claim. It is the obtrusive contracting out of the employe's work which causes them loss of job opportunity, compensation and benefits which were derived therefrom."

While there have been disputes in which the Organization has successfully argued that the Carrier involved had improperly contracted out their work, this is not one of those cases. Carrier had legitimate reasons for its action.

Finally, while several Claimants were improper and were rightly excluded from the Award, the awarding of compensation to employees who were employed at the time is not warranted on this record. Prior Awards 25335 and 25447 were cited by the Majority but were not followed. In Award 27186, also adopted by the Board at the same time and involving the same parties and a similar dispute, the following disposition was rendered:

> "Conversely, we find no plausible grounds, given our decisional holdings in past cases to award compensation, since all claimants, except one, who was on vacation, were actively employed at the time the work was performed. See Third Division Award Nos. 23402, 18305, 19155, 19399, 19948."

We Dissent.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost

LABOR MEMBER'S RESPONSE TO
CARRIER MEMBERS' DISSENT TO
AWARD 27189 (Docket MW-26368)
Referee Suntrup

A reading of Carrier's dissent reveals nothing more than a reflux of its position as presented to the referee in panel discussion. To reiterate the Organization position here on the issues raised in the dissent would only serve to add paper weight to the issue already decided by Referee Suntrup. However, Carrier's comments concerning "the awarding of compensation to employees who were employed at the time is not warranted on this record", is not plausible when compared to the reasoning adopted in the Award.

Referee Suntrup pointed out that, "There is, nevertheless, considerable precedent to be found in Awards issued by the National Railroad Adjustment Board to warrant the conclusion that in cases comparable to this one monetary relief is appropriate because of the loss of earnings opportunities (Third Division Awards 16009, 16430, 18365). Furthermore, the Awards issued by the Board on the question of damages are both viable and complex and it is not necessary to do a complete analysis of that line of Awards here. Some of them are not totally on point. There is one line of Awards, however, which addresses whether damages are proper if a Carrier is found in violation of a rule of contract on more that one occasion (Third Division Awards 23354, 23578, 24484)). It is apparent that this Referee will no longer condone a repeated violator of an Agreement rule and allow the continuous "hand slapping" (no compensation) for such transgressions. What the authors of the dissent failed to reveal, eventhough they referenced three awards on this property, was the multitudinous dockets wherein this Carrier violated the same provisions of the Agreement without consequence. Perhaps, now, this

Carrier will adhere to its commitments previously set forth in the December 11, 1981 Letter of Agreement, i.e.,

> "The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

D. D. Bartholomay, Labor Member