Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27614
THIRD DIVISION Docket No. MW-26865
88-3-85-3-632

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation (Amtrak)
(other than Northeast Corridor

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

(1) The Carrier violated the Agreement when, without prior notice to the General Chairman, it used outside forces to perform routine track maintenance work (install ties and surface track) at Sanford, Florida beginning June 20, 1984 [System File SMC/WKC(AMTRAK)-84-1/BMWE-TC-047].

(2) Foreman S. M. Chavez and Trackman W. K. Collins shall each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the afore-mentioned track work."

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.

Claimants were employed as Track Foreman and Trackman at Hialeah, Florida.

According to the record, on October 20, 1983, the Carrier purchased trackage and other property at Sanford, Florida in conjunction with the operation of its Auto Train service. Shortly thereafter, the Carrier notified General Chairman F. E. Wallace by letter dated January 23, 1984, of its intent to contract with an outside firm to make repairs of an "emergency nature" to the trackage at Sanford. The letter states:

"Dear Mr. Wallace:

This is to notify you of Amtrak's intention to enter into a contract with an outside firm to handle emergency repairs, as needed, at Lorton, Virginia and Sanford, Florida.

No members of your Organization are employed at either location, necessitating the use of a contractor. It is not yet known who the successful bidder will be. The contract will be made as soon as possible and will be of one year's duration. The only work to be performed under this contract will be of an emergency nature (a happening which creates an unsafe or unstable track condition).

Please feel free to contact us if you have any questions."

During the next several months, the parties had several meetings and correspondence regarding this project as well as other contracting out projects at other locations. During these meetings, the Carrier's position was that it never had any Maintenance of Way forces at Sanford; that it did not have sufficient forces to send to Sanford to perform emergency track repairs, and, that there was not a sufficient amount of work there to justify the establishment of a full-time workforce at that location.

Notwithstanding an inability to reach an understanding on this matter, the Carrier contracted the R.W. Summers Railroad Contractor to complete what it termed "emergency track repairs" during the week of June 20, 1984. The Organization filed a Claim dated August 2, 1984. In its denial of the Claim as it progressed through the appeal channels on the property, the Carrier denied that there was any violation of the Agreement or that Claimants suffered any loss of earnings as a result of the work performed by the contractor. Further, the Carrier maintained that there was insufficient work at Sanford, Florida to justify full-time positions there, and that it had the right to contract out the work of emergency repairs at that location.

In its submission before this Board, Carrier advanced several new arguments. It asserted that Claimants had no contractual right to the work and, further, that it was under no obligation to piecemeal this project. While these arguments would have been duly considered had they been raised on the property, they cannot be raised before this Board for the first time. It has repeatedly been held that the parties are bound by the way the case was handled on the property. See Third Division Awards 1485, 5457, 5469, 7036, 8784, 17231, 19722.

That being the case, we are left with Carrier's assertion that the work involved was performed as the result of an emergency, and therefore this was an exceptional circumstance wherein Carrier is not required to assign a regularly assigned employee to perform the work. As this Board has noted in previous awards, an "emergency" is defined as an "unforeseen combination of circumstances which calls for immediate action." See Third Division Awards 10965, 16454. Unfortunately for the Carrier, the record as made on the property is completely devoid of any factual evidence to support Carrier's statement that there was an emergency. Absent such evidence, we must find that Carrier's defense of "emergency" fails for lack of proof.

We further deem unpersuasive Carrier's contention that there was insufficient work available for a full-time workforce on the one hand, and that, on the other hand, there was insufficient manpower to complete the work in question. As stated in Third Division Award 21609:

> "The Carrier's reason for the subject arrangement was economy, which is a laudable objective but an invalid excuse for violating the Agreement, if a violation occurred. The Carrier's welding and bridge and building forces have been used for similar dismantling work, including the location here involved. Moreover, the Rule 2 describes the subject work, except as it may be covered by the Union Station Maintenance Agreement. Since the latter Agreement does not cover the subject work, it follows that said work is reserved to claimants. If through a lease-sale arrangement the Carrier can contract out the dismantling of structures under its control, there is no effective limit on subcontracting all such work. The claim has merit. The fact that Claimants worked full work week during the involved period is not a defense for Carrier's violation of Claimants' contract rights." (Emphasis added.)

As to the question of damages, Carrier asserts that Claimants were employed full time when the violation occurred. While we recognize that there is a divergence of views on this subject, it is our view, and we have so held in prior cases, that full employment of the Claimants is not a valid defense in a dispute such as involved here. As we noted in Third Division Award 26593, ". . . in order to provide for the enforcement of this agreement, the only way it can be effectively enforced is if a Claimant or Claimants be awarded damages even though there are no actual losses."

A W A R D

Claim sustained.

Award No. 27614
Docket No. MW-26865
88-3-85-3-632

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

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

CARRIER MEMBERS' DISSENT
TO
AWARD 27614, DOCKET MW-26865
(Referee Goldstein)

We have stated many times that the purpose of a dissent is to constructively criticize an Award where the Majority has misstated the facts, erroneously misinterpreted the rules or ignored controlling principles established by this tribunal as the "law of the shop" over the past fifty-four years.

Award 27614 requires our dissent because it represents a deviation from the right or usual course this Board has generally and most recently followed concerning the award of damages in contracting out cases where the Claimants are fully employed and have not demonstrated any actual losses.

Award 27614 is in palpable error when it concludes:

> "As to the question of damages, Carrier asserts that Claimants were employed full time when the violation occurred. While we recognize that there is a divergence of views on this subject, it is our view, and we have so held in prior cases, that full employment of the Claimants is not a valid defense in a dispute such as involved here. As we noted in Third Division Award 26593, '. . . in order to provide for the enforcement of this agreement, the only way it can be effectively enforced is if a Claimant or Claimants be awarded damages even though there are no actual losses.'"

One need only look to the "precedent" relied upon by the Majority to find the error in the decision. The Majority suggests that we look to Award 26593 which supposedly supports the Majority's conclusion that "...full employment of the Claimants is not a valid defense in a dispute such as involved here."

The Neutral obviously went astray when he erroneously followed the "precedent" he created in Third Division Award 26593 which neither party cited to him. It involved an American Train Dispatchers Association case. Our dissent to that Award is incorporated herein by reference.

Be that as it may, the eight Third Division Awards the Neutral cited in support of his decision in Award 26593 were 21678, 20892, 20754, 20412, 20338, 20042, 19924

and 19899. Four of the eight Awards (21678, 20892, 20754, 19924) did not involve the use of an outside contractor's forces.

As for Award 20412 adopted in September, 1974, we are constrained to note that the same Referee ruled just the opposite in Awards 20071 and 20275 which were adopted in December 1973, and June 1974, respectively.

With regard to Awards 20338 and 19924, we call attention to the involved Referee's more recent decision in Award 26673, wherein the Board held:

> "With respect to the remedy, both Claimants were fully employed on the date of the claimed work. While the Carrier's violation in this case is clear, it has been a well established principle of this Board to deny compensation for Article IV violations when no loss of earnings is demonstrated (see for example Third Division Award 23560). We will follow that doctrine in this dispute, with the caveat that repeated violations could well result in a different holding."

As precedent for Award 20042, the Referee relied upon his Award 19899 wherein, as he noted, he fully considered the "full employment" defense. In Award 19899, the Referee stated:

> "We are not congnizant (sic) of any basic reason why the rationale of the Fourth Circuit should be adopted and adhered to by Referees in one line of cases, but ignored in cases dealing with demonstrated violations of Article IV of the National Agreement, nor have the Article IV cases suggested any cogent reason for such a distinction."

While the Referee who authored Award 19899 may not have seen a "cogent reason for such a distinction," since it was adopted in 1973, the Board has continued to recognize such distinction as exemplified by the following Third Division Awards: 19948, 21646, 23354, 23402, 23560, 23578, 24242, 24484, 24884, 25002, 25007, 25103, 25141, 25247, 25447, 25567, 25677, 25694, 26174, 26182, 26378, 26422, 26481, 26783 and 27186.

Under the doctrine of stare decisis, this Board must follow past decisions which have resolved identical issues, unless the precedent was palpable error. Following past decisions which have resolved similar disputes promotes stability and predictability in labor-management relations. Obviously, the most recent trend in the authority, as exemplified by the aforementioned Awards, should have controlled in this case. Any other standard will again lead to chaos.

In conclusion, we call attention to Award 27634 which was adopted on December 16, 1988, just 23 days after Award 27614 was adopted. In that case, the same Referee as in this case sustained the Organization's claim that the Carrier violated the Agreement "...when it did not give the General Chairman advance written notice of its intention to contract out said work," but denied the Organization's claim for 200 hours of pay in behalf of a Repairman at his straight time rate "...since Claimant was fully employed and suffered no loss of earnings..." (Emphasis added)

In Award 27634, the Referee followed the right or usual course this Board has generally and most recently followed concerning the award of damages in contracting out cases where the Claimants are fully employed and have not demonstrated any actual losses. Why he did not do so in Award 27614 is a mystery to us.

Accordingly, we dissent.

Michael C. Lesnik
M. C. Lesnik

P. V. Varga
P. V. Varga

M. W. Fingerhut
M. W. Fingerhut

James E. Yost
J. E. Yost

Robert L. Hicks
R. L. Hicks