Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28939
Docket No. MW-28321
91-3-87-3-861

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

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

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

(1) The Carrier violated the Agreement when it assigned outside forces to unload track panels at the 15th Street Yard on May 8, 1986 (System File NEC-BMWE-SD-1596).

(2) The Carrier also violated the Agreement when it did not give the General Chairman advance written notice to its intention to contract said work.

(3) As a consequence of the aforesaid violations, E.W.E. Crane Operators R. Liszewski and J. Crandley shall each be allowed eight (8) hours of pay at their pro rata rates."

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.

This Claim arose on May 8, 1986, when Carrier was engaged in unloading track panels from gondola cars in North Philadelphia. Carrier began the project with its own crane and workforces. Its crane soon proved inadequate to the task. Although this point is disputed, Carrier said it had no suitable crane available to finish the unloading. Furthermore, the track panels were located on "foreign" gondola cars that would start generating costly hourly delay charges if the project was held up too long. Carrier, therefore, rented a crane from an outside contractor. The contractor, however, insisted that the crane be operated by two of its employees. The outside employees were on the job eight hours.

The Scope Rule required at least 15 days advance notice to the General Chairman before the Carrier could contract out work. There is also a special Agreement, known as the Equipment Rental Agreement to deal with situations where, as here, outside equipment could not be obtained without owner supplied operators. The remedy provided by this special Agreement was to step rate a number of Trackmen, to be named by the District Chairman, equal to the number of outside operators used. This special Agreement also required advance written notice. The notice and naming of Trackmen was accomplished by specially developed Forms #1 and #2.

The dispute boils down to a damages issue. Carrier admits it did not provide the requisite advance written notice. It maintains, however, that circumstances prevented it from doing so. Carrier urges that it did communicate verbally with the District Chairman and acted, at all times, in good faith. It says its liability should be limited to step rating two lower rated employees which is what the special Agreement would have provided. The Organization, on the other hand, contends that the proper measure of damages is payment for lost work opportunities, which would be 8 hours pay for each of the two employees listed in the Claim.

Each of the parties have raised procedural objections to certain contents of the other's Submission to the Board. We have reviewed these matters and find them to be without merit.

We find that the special Agreement would have been applicable to the facts at hand. Had the required advance written notice been provided, Carrier's obligation would have been to step rate two employees to be named by the District Chairman. This is what the Carrier has offered to do throughout the handling of this matter on the property. The Organization, however, stresses that a damage award greater than the Carrier's normal obligation is required to deter the Carrier from ignoring the requirements of the Agreement in the future. Both parties cite prior Awards of this Board in support of their respective positions.

The Board is aware of the divergence of Awards on this damages issue when faced with a proven violation. However, we believe the better line of reasoning would find no basis in the instant facts for a damages award in excess of that provided by the special Agreement. The record in this case does not support a finding that Claimants lost work opportunities. Both were fully employed at all times material herein. Moreover, there is no evidentiary basis for concluding that the Carrier acted in bad faith in renting the outside equipment. Accordingly, the proper measure of damages, on this record, is to step rate for eight hours two employees to be named by the District Chairman.

A W A R D

Claim sustained in accordance with the Findings.

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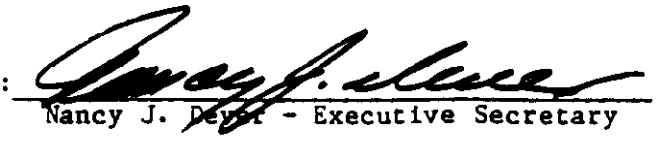
NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of August 1991.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 28939, DOCKET MW-28321 AND AWARD 28940, DOCKET MW-28322
(Referee Vernon)

The Majority was correct when it found that the Carrier had violated the Agreement in both instances and, therefore, a concurrence is appropriate. However, the Majority erred in its reasoning concerning the violation and the remedy allowed.

The Majority held that "Had the required advance written notice been provided, Carrier's obligation would have been to step rate two employees to be named by the District Chairman." To the contrary, the Carrier's obligation was to notify the Organization prior to contracting out the work and, if requested, meet with the Organization concerning the contracting in accordance with the Scope Rule. If the purpose of the contracting was to rent or lease equipment, the Carrier was also obligated to advise the Organization of that fact and then be prepared at the conference to establish that it did not own the equipment needed nor could the equipment be rented or leased without an operator. If that was not the case and it was established that a piece of equipment could be rented or leased without an operator, then a member of this Organization would be assigned to operate the rented or leased equipment. Therein lies the fallacy in the Majority's decision. It only assumed that had notice been given, the Carrier would have been able to establish the exceptions provided for and the "step rate" under the January 28, 1977 Memorandum of Agreement would have applied. Obviously, absent notice and conference under the Scope

Rule, neither the Organization, much less the Majority, would know whether the exceptions had been met by the Carrier. Hence, the Carrier was able to remove a position from the Agreement via a Board award and escaped compensating the employes that would have been assigned to operate the machines.

In effect, the Majority has negated the Scope Rule by allowing the Carrier to rely on the compensation provisions of a second Agreement without following the mandate of notice provision. If blatantly not following the Agreement is not "bad faith" then perhaps the Majority, since it has already decided to abrogate certain provisions of the Agreement, might enlighten the Minority as to its definition of that term. I, therefore, dissent.

Respectfully submitted,

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' CONCURRING OPINION AND RESPONSE
TO
LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARDS 28939 AND 28940, DOCKETS MW-28321, MW-28322
(Referee Vernon)

The Organization is correct in characterizing the Majority holding as one that allows the Carrier, under the January 28,1977 Equipment Rental Agreement (ERA), to do no more than notify the Organization of its intent to contract out under the ERA and pay the step rate allowance.

The Organization is incorrect in finding fault with such holding. The basis of the Majority decision was threefold.

First, the Majority found that the streamlined ERA was intended to modify the cumbersome requirements of the Scope Rule insofar as equipment rental is concerned. Inasmuch as the ERA's specific terms provide that it is establishing a different procedure in this area, such finding can hardly be questioned.

Second, the Majority determined that the specific Agreement dealing with the expedited procedures to be followed in equipment rental cases took precedence over the general provisions of the Scope Rule dealing with the contracting out of work. Countless Awards of this Board, going back to its inception, have consistently held that specific agreements take precedence over general ones. Clearly, such holding is not subject to question.

Third, in construing the language of the ERA, the Majority interpreted the Agreement in the manner described in the Dissent. The Majority's Findings clearly outline the rationale for the decision.

Regarding the Organization's displeasure with the Majority's interpretation, we offer our condolences and conclude with the old adage that "you win some and you lose some."

Michael C. Lesnik
M. C. Lesnik

M. W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

P. V. Varga
P. V. Varga

James E. Yost
J. E. Yost