Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28940
THIRD DIVISION Docket No. MW-28322
91-3-87-3-862

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 remove ties and rail and set steel on the Princeton Avenue Bridge at Mile Post 77.5 beginning June 4, 1986 and continuing through August 23, 1986 (System File NEC-BMWE-SD-1668).,

(2) The Carrier also violated the 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, E.W.E. Crane Operators J. Crandley and R. Liszewski shall each be allowed one hundred sixty-seven (167) hours of pay at their straight time rates and fifty-six (56) hours of pay at their time and one-half overtime 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 is the consolidation of three Claims that cover the time period from June 4, 1986, when Carrier began rebuilding a bridge in Philadelphia. The bridge repair required a crane with sufficient boom length and capacity to hoist rails, cross ties and bridge steel. Carrier says, and the record does not contain evidence to the contrary, that it did not have such a crane of its own. Carrier, therefore, rented a crane from an outside contractor. The terms of the rental, however, required that the crane be operated by two of the owner's employees. The outside employees were on the job a total of 166 straight time and 56 overtime 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 (ERA) 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 it attempted to correct the situation as specified by the ERA as soon as it became aware of its requirements. Despite its technical violation of the ERA, Carrier says it 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 223 hours pay, 167 at the pro rata rate and 56 hours at the punitive rate, 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 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. Had the notice been given, the Claimants would have been entitled to the step rate of the aggregate number of hours expended by the contractor, in this case 223 hours. The Claimants were employed during this period and, therefore, they are entitled to 223 hours at the step rate minus any earnings they had for the same dates on which the contractor worked.

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 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