Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28943
THIRD DIVISION Docket No. MW-29071
91-3-89-3-511

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company

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

(1) The Agreement was violated when the Carrier assigned outside forces (Armstrong Giltbedt Construction Company) to construct the Operations Office building in Fife Yard, Washington from July 25 through September 2, 1988 (System File S-66/890007).

(2) The agreement was further violated when the Carrier failed to timely and properly notify and meet with the General Chairman concerning its intention to contract out said work as required by Rule 52.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Bridge and Building Carpenters D. H. Hector, G. D. Johnson, G. S. Edmunds, G. G. Perrenoud and D. R. Scoville shall each be allowed one hundred ninety-two (192) hours of pay at their respective straight time 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 challenges the propriety of Carrier's contracting out the construction of a new Operations Office at its Fife Yard in Washington State. The contractor worked a total of 960 hours between July 25 and September 2, 1988. The Claim is that each of five named Claimants should be compensated for 192 hours at their straight time rates.

This extensive record raises a wide range of issues concerning the appropriateness of contracting out work under various Rules, including Rule 52, of the parties' Agreement. There are many prior decisions of this Board which guide the handling of matters involving Scope, past practice, notice, exclusivity, and the like under Rule 52. We, however, do not reach the substantive merits of those issues in this Award. The decision in this matter turns on a quasi-procedural issue.

The Organization alleges that Carrier violated the Agreement in failing to act in good faith with respect to the notice and meeting requirements of Rule 52. The record shows that the contractor began the disputed work four days prior to the meeting during which the Company and Organization representatives "... shall make a good faith attempt to reach an understanding concerning said contracting ...." The Carrier scheduled the date for the meeting.

Because of the important nature of the issue and the unique facts of the record on the property, extensive quotation from the parties' correspondence and Rule 52 will be made.

Rule 52 reads in full as follows:

"Rule 52. CONTRACTING

(a) By agreement between the Company and the General Chairman work customarily performed by employes covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, request a meeting to discuss matters relating to the said contracting transaction, the designated representative of the

Company shall promptly meet with him for that purpose. Such Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

(b) Nothing contained in this rule shall affect prior and existing rights and practices 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.

(c) Nothing contained in this rule requires that notice be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than maintenance of way employes in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disaster.

(d) Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employes covered by this Agreement to outside contractors." (Underlining supplied)

Carrier's contracting out notice dated June 30, 1988 read as follows:

"This is to advise of the Carrier's intent to contract the construction of an Operations Office at Fife, Washington.

This type of work has customarily been performed by outside contractor's forces. The Carrier has neither the skilled manpower nor the proper equipment to safely and competently undertake and complete this project in a timely manner.

Serving of this 'notice' is not to be construed as an indication that the work falls within the 'scope' of your agreement, nor as an indication that such work is necessarily reserved to those employes represented by the BMWE."

By letter dated July 12, 1988, the General Chairman wrote back challenging the Carrier's plans. This four page letter claimed the work was covered by the Scope Rule and alleged violations of the permissible conditions for contracting found in Rule 52(a). It provided lengthy supporting argument and also alleged a violation of the industry Letter of Understanding dated December 11, 1981 which, among other things, promised good faith efforts to reduce the incidence of subcontracting. In addition, the General Chairman's letter contained the following request:

> "Provided the Carrier chooses to ignore this advice and intends to contract this work out in any event, I request a conference be scheduled and held prior to the work being assigned to and performed by a contractor, ..." (Underlining supplied)

Carrier's response dated July 19, 1988, read as follows:

> "Reference your letter of July 12, 1988, concerning the Carrier's intent to contract the construction of an Operations office at Fife, Washington.
>
> Initially, the notice of intent does not imply that the work in question comes under the scope of your Agreement. The Company has a history and past practice of contracting the type of work.
>
> In any event, I am willing to discuss this issue at 10:00 A.M. on July 29, 1988 in my office at Omaha, Nebraska." (Underlining supplied)

According to the record, the General Chairman and the Carrier representative did meet in Omaha on the scheduled date. By letter dated August 17, 1988, the Company representative reported the results of the conference. The letter incorrectly lists the date of the conference as being June 24, 1988. In addition to several other defenses, it listed two Carrier defenses found in parts (b) and (d) of Rule 52, and it quoted from prior decisions of this Board (Third Division Awards 27010 and 27011) where these defenses were recognized. It also challenged the applicability of the December 11, 1981 industry Letter of Agreement to their Agreement. Significantly, the letter does not mention that the work was already underway nor does it claim emergency circumstances. It closed as follows:

> "* * * For these reasons I indicated to you it was the Carrier's intent to proceed with the contracting as proposed."

The General Chairman responded by letter dated August 22, 1988. His letter also listed the incorrect date of June 24, 1988, for the conference. It again argued the Organization position and listed what were felt to be shortcomings in the Carrier position. In its list was this claim:

"(7) I do not believe the Carrier has made a good faith attempt to work something out with this Organization which would hopefully be satisfactory to both parties."

The next event of record was the filing of the Claim on September 15, 1988. It did not mention that the work commenced four days prior to the July 29, 1988, Omaha meeting. It did allege a violation of several Rules, including Rule 52, and the December 11, 1981 Letter of Agreement.

Carrier responded with a denial letter dated October 18, 1988. It asserted an historical practice of contracting out the type of work in question and lack of exclusive performance by the bargaining unit.

The Organization appealed, dated December 29, 1988, and again alleged, among other things, a violation of Rule 52. The Carrier response, dated February 27, 1989, again raised Rule 52 defenses provided in parts (b) and (d) of the Rule.

The matter was again discussed in conference on April 20, 1989. The Carrier issued a six page conference response, dated June 16, 1989, denying the Claim. The Rule 52(b) and (d) defenses were quoted once again. Language from several prior Awards was also cited along with some collective bargaining history. In addition, his letter contained the following sentence:

"Records also indicate notice was served as required under Rule 52. (copy attached)." (Underlining supplied)

The General Chairman wrote again to the Carrier advocating the Organization's position. This letter was dated June 27, 1988. Before Carrier responded, the General Chairman wrote the Carrier again on September 18, 1989, to advise of his discovery of what he described as a "significant discrepancy." In a five page letter the General Chairman challenged the good faith of Carrier's actions by explaining his recent discovery of the incorrect June 24, 1988 date for the contracting discussion conference in Omaha. Pertinent portions of the letter follow:

"In reviewing the U-52-8032 file you will note the Carrier did not serve its notice of intent until June 30, 1988. In light of this fact, it is obvious that the June 24, 1988 date to which each party referred could not have been the date for the conference. Further review of the file indicates that Mr. Shannon proposed that the two (2) parties meet to discuss the contemplated transaction on July 29, 1988. I traveled to Omaha and discussed the matter with you on July 29, 1988 as proposed in an unsuccessful attempt to persuade the Carrier to utilize its own Maintenance of Way forces to perform the work associated with the project.

My reason for referring to this as a 'significant' discrepancy of the facts is because the true facts of the matter as outlined herein clearly reveal the Carrier did not comply with the 'good-faith' provisions of Rule 52 or commitments given this Organization by NRLC Chairman C. I. Hopkins previously. The following is a quote taken from Rule 52:

(Quotes last sentence of Rule 52(a))

In a letter dated December 11, 1981, NRLC Chairman C. I. Hopkins made the following written commitment to this Organization:

(Quotes 'good-faith' portions of the letter)

As you can see from this information the parties are to meet to make a good faith attempt to reach an understanding prior to the work being performed. In reviewing the claim file in this regard, it is developed the Carrier had contracting forces commence operations on this project July 25, 1988, four (4) days before the Carrier scheduled or held the conference at which good faith discussions were to take place. At the conference held July 29, 1988, I was unaware that the work had obviously already been farmed out and I engaged in what I thought were good faith discussions. Since the work was already contracted to outsiders and had already begun, it appears the Organization was the only party engaged in good faith bargaining which disappoints me greatly.

I must also point out that no time restrictions or self-executing cancellation clauses are contained in the December 11, 1981 letter of Agreement which could be applied. * * * the 'good-faith' clauses contained in our current Agreement and the December 11, 1981 letter, are still in effect. Further, the Carrier's obvious total disregard for same is considered to be a violation of each."

The Carrier responded on September 28, 1989, to the Organization's new charge of bad faith as follows:

"This refers to your letter dated September 18, 1989, File U-52-8032.

Whatever the date of the conference was, the important fact here is that a conference was held during which no change in the Company's intent to contract out the work in question was agreed to. Therefore, whether the conference has been held sooner or held later, the outcome would have been the same. That is, no matter when the conference was held, the same set of facts would have come to bear, and those facts would have led to the same conclusion. The timing of the conference lends absolutely nothing to your frequently made charge of 'bad faith.'

As you know, timing of the conference on subcontracting has been left primarily in your hands. The conference dates are set primarily at your initiative. Given your involvement in scheduling the conference dates, it seems to me that there is something intricately wrong with your attempt to take those dates, turn them around and use them as evidence of bad faith on the part of the Company. The fact that a conference was held is in and of itself an indication of good faith on the part of the Company in conformance with the requirements of Rule 52.

As we have discussed many times in the past, the December 1, 1981 Hopkins' Understanding is not applicable on the Union Pacific. Subcontracting on the UP is not covered by the National Agreement; it is covered exclusively by Rule 52. The December 11, 1981 Hopkins' letter applies to application of the National Agreement only; it does not reach Rule 52. Furthermore, the December 11, 1981 letter was limited in its application to scope covered work, which is not at issue here.

If there is any bad faith involved in this case it is on the part of the Union in attempting to use the grievance and arbitration process to modify the Labor Contract as opposed to use of the negotiation process. The Company isn't doing anything different with respect to subcontracting than it has ever done. What has changed is not the rules or the practice of the Company; what has changed is the attempt of the Union to create grievances and use them as a vehicle for modifying the Labor Contract." (Underlining supplied)

Following the above exchange regarding the issue of good faith, the Carrier, on October 10, 1989, formally issued a denial to the Organization's outstanding June 27, 1989 appeal. This denial was silent on the subjects of good faith and Rule 52 and raised no new issues or argument.

On November 22, 1989, the Organization issued its letter of intent to file with this Board thereby closing the record on the property.

In its Ex Parte Submission, Carrier again raised all of the defenses it used on the property. In addition, it contended that Rule 52 had no application to the matter at hand. It said that only work "customarily" done by employees covered by the Agreement is subject to the restrictions of Rule 52. It went on to argue that if employees covered by the Agreement do not customarily perform particular work, the Carrier is not required to serve notice and meet in conference prior to contracting the work.

This Board has carefully reviewed and rereviewed the extensive record herein. As a result, we reject the Carrier's contentions regarding the inapplicability of Rule 52 to the facts at hand for three reasons. First, and probably most importantly, it is new argument that was not presented on the property. The Organization has properly objected to its consideration. In keeping with long established precedent, we will not consider such de novo argument here.

Second, Carrier's new argument is inconsistent with its position on the property. It made repeated references to its compliance with the notice requirements of Rule 52 and specifically said, in its September 28, 1989, letter quoted earlier, that subcontracting is covered exclusively by Rule 52. Indeed, it never denied having to satisfy the good faith meeting requirement the Organization asserted it had. Moreover, while it did contend that the December 11, 1981 Letter of Agreement applied only to Scope covered work, it did not make the same contention regarding Rule 52.

Third, Carrier's new argument is inconsistent with the prior decisions of this Board. The Board in Third Division Award 28443 clearly held that the advance notice and meeting provisions are required whenever any contracting is done, whether the work is "customarily performed" or not. We find the Carrier Members Concurrence and Dissent in that Award to be imaginative but strained and unpersuasive. See also Third Division Awards 23578 and 27011. Several other Awards of this Board also recognized the notice and meeting requirements of Rule 52(a) to be applicable despite denial of the claim under the Rule 52(b) past practice exception. See, for example, Awards 28558, 28619 and 28622.

In light of the foregoing, it is not necessary for us to decide whether the December 11, 1981 Letter of Agreement applies to impose a good faith meeting obligation in addition to Rule 52. We find the notice and meeting provisions of Rule 52 to be sufficient, in and of themselves, to establish such a requirement.

The Organization has alleged a failure to act in good faith on the part of the Carrier and has provided sufficient evidence of the charge to shift the burden to the Carrier to show that it did act in good faith. On the unique record before us, we find that Carrier has failed to satisfy its burden. It has offered no explanation whatsoever, not even innocent oversight, for the commencement of work prior to the good faith discussion meeting with the General Chairman.

The importance of good faith dealings in the labor-management context cannot be overstated. It is a fundamental element of an effective relationship. In view of the foregoing findings, it follows that Carrier did not properly contract out the work in question. Because of the nature of the violation, it cannot be treated as a mere technical violation of the Agreement.

The Carrier has sustained its burden of proving that one of the named Claimants was fully employed throughout and suffered no cognizable lost work opportunity. The other four were furloughed and did, under the facts of this matter, suffer a lost work opportunity. They should each be compensated for 192 hours of straight time pay as claimed.

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.

CARRIER MEMBERS' DISSENT
TO
AWARD 28943, DOCKET MW-29071
(Referee Wallin)

In dissenting to the Majority's holding in this case, only one Award of an experienced referee will be cited:

The Award is Third Division Award 28850, involving the same parties to this dispute, and the same issue. The Board concluded:

> "The Board lastly notes that it found no evidence that the Organization's requested meeting to discuss the contracting transaction was not agreed to by the Company or would not promptly have taken place. Rule 52(a) states that 'if the General Chairman...requests a meeting..., the Company shall promptly meet with him....' There is no record that the Organization suggested any 'mutually convenient time' or that the Carrier avoided its contractual responsibilities and acted in bad faith. For the reasons stated, the Claim must be denied."

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 28943, DOCKET MW-29071
(Referee Wallin)

The dissent was correct in that the two awards referred to involved the same parties and the same issue. However, the issue involved a different fact pattern in that Award 28850 dealt with a dispute wherein the Carrier had given advance notice prior to contracting out the work and the Organization had not properly requested that a conference be held. In this award, the Carrier notified the Organization of its plans to contract out the work and the Organization properly requested that a conference be held prior to the commencement of the work. The Carrier scheduled the conference for July 29, 1988 but allowed the work to commence four days prior. Obviously, the Carrier had no intention of dealing with this Brotherhood in good faith as required by the Agreement. Hence, the Board appropriately held that:

> "The importance of good faith dealings in the labor-management context cannot be overstated. It is a fundamental element of an effective relationship. In view of the foregoing findings, it follows that Carrier did not properly contract out the work in question. Because of the nature of the violation, it cannot be treated as a mere technical violation of the Agreement."

Respectfully submitted,

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' REPLY
TO
ORGANIZATION MEMBER'S RESPONSE
TO
AWARD 28943, DOCKET MW-29071
(Referee Wallin)

In the dispute that led to Third Division Award 28850, the Organization requested a conference to discuss the Carrier's contracting out notice in the following manner:

> "Provided the Carrier chooses to ignore this advice and intends to contract this work out in any event, I request a conference be scheduled and held prior to the work being assigned to and performed by a contractor, for the purpose of discussing the matters relating to said contracting transactions."

The Organization's Reply in this dispute refers to the Organization's request for a conference in Award 28850 and states:

> "...Award 28850 dealt with a dispute wherein the Carrier had given advance notice prior to contracting out the work and the Organization had not properly requested that a conference be held."

In this dispute, the Organization's request for a conference was made as follows:

> "Provided the Carrier chooses to ignore this advice and intends to contract this work out in any event, I request a conference be scheduled and held prior to the work being assigned to and performed by a contractor, for the purpose of discussing the matters relating to said contracting transaction."

The Organization concedes that the Organization's request for a conference in the dispute in Award 28850 was not proper and yet finds the request here was proper notwithstanding the fact that the language is identical.

The position of the Board in Award 28850 on the issue of conference is that good faith is a two-way street and the Organization has no less responsibility in this area than does the Carrier. If the Majority here had followed that sage approach, the claim would have been denied.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost

ORGANIZATION MEMBER'S RESPONSE
TO
CARRIER MEMBERS' REPLY
TO
ORGANIZATION MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 28943, DOCKET MW-29071
(Referee Wallin)

It is gratifying to read that at least the Carrier Members recognize that "good faith is a two-way street".

In the original response to this award, I pointed out that the request for a conference in Award 28850 was not properly based on the fact that the Organization had acquiesced in delaying the holding of the conference. In this dispute, the Organization had properly requested a conference and the Carrier responded by setting a date which it had not done in the prior award. Hence, since the work had started four days before the conference was held, it is obvious that "good faith" was not part of the Carrier's demeanor in this dispute.

Respectfully submitted,

D. D. Bartholomay
Labor Member