CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29121
Docket No. MW-29211
92-3-90-3-85

The Third Division consisted of the regular members and in addition Referee John C. Fletcher 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 (L & T Paint Contractors, Inc.) to paint the interior of the System Maintenance of Way Shop at Pocatello, Idaho beginning November 29, 1988 and continuing (System File S-108/890211).

(2) The Agreement was further violated when the Carrier failed and refused to timely meet with the General Chairman and make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed B&B Painters G. L. Evans, S. L. Irvin and W. S. Wallace shall each be allowed pay at their respective rates for seven hundred four (704) straight time hours and forty-eight (48) overtime hours."

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.

On November 9, 1988, Carrier served notice on the Organization that it intended to contract out the work of painting the interior of its System Maintenance of Way Shop at Pocatello, Idaho. The notice provided:

"This is to advise of the Carrier's intent to solicit bids to cover the painting of the interior of the Pocatello, Idaho, Maintenance of Way Shop.

Special equipment is required to access certain portions of this building."

The Organization responded to the notice stating:

"As you know Rule 52 provides that the Carrier may contract out Maintenance of Way work under one or more of six (6) specific conditions. The six conditions to which I refer are:

1. Special skills are not possessed by the Company's employees.

2. Special equipment is not owned by the Company.

3. Special material not possessed by the Company is only available when applied or installed by the supplier.

4. The work in question is such that the Company is not adequately equipped to handle it.

5. Emergency time requirement situations exist which present undertakings not contemplated by the agreement.

6. Work in question is beyond the capacity of the Company's forces.

Additionally, this Organization received the following commitment from NRLC Chairman C. I. Hopkins in his letter of December 11, 1981.

'The carriers assure you that they will assert good-faith efforts to reduce the incidents 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 good-faith discussions provided for to reconcile any differences. In the interest of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons thereof. (Underscoring added)
>
> In this connection you claim, 'Special equipment is required to access certain portions of the building.' However, you have failed to advise what the equipment in question; whether or not the Carrier has the equipment in its inventory; whether or not the Carrier can rent, lease or purchase the equipment; why the Carrier's own B&B forces cannot paint the interior as it has done in the past; and why, with only 'portions' of the building purportedly presenting the problem, the Carrier is proposing to contract out the painting of the entire building.
>
> In view of these circumstances I cannot enter into an agreement with the Carrier at this time to allow it to contract the Maintenance of Way Department work to outside forces. 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 Carrier responded to the above with a suggestion that the requested conference be scheduled on December 5, 1988, however, the conference did not actually occur until December 22, 1988. The Contractor started work on the project on November 29, 1988, six days before the date first suggested by the Carrier for the conference requested by the General Chairman.

Rule 52, Contracting, is the operative agreement provision involved here. It has been exhaustively reviewed in a plethora of Third Division Awards involving this Carrier and this Organization. In several of these Awards subcontracting notice requirements have been dealt with. In Third Division Award 23578, this Board rejected the notion that such notice was only required in situations where the disputed work was exclusively reserved to members of the Organization. In that Award the Board remarked:

> "The lack of a notice foreclosed the Organization from exercising its option to request a meeting to discuss the propriety of contracting the disputed work."

Award 23578 was released shortly following the December 11, 1981 letter - offering assurances of carriers' good faith efforts to reduce subcontracting and increase the use of maintenance of way forces and restating that the advance notice shall identify the work to be contracted and the reasons therefore.

Award 23578 was followed by Third Division Award 26174 (to name but one in the intervening period). In Award 26174 the Board remarked:

> "The opportunity to discuss subcontracting is an important one. Although Carrier may argue, for example, that its employes are now fully employed, it may be possible for the parties to consider a schedule for performing the work at a time when it is mutually convenient to do so. As noted in Third Division Award 23354, 'For Carrier to ignore this requirement and move ahead with a subcontract because it either thinks that the work to be performed by the outsider is not work exclusively reserved to covered employes or claims it does not have the proper equipment is unacceptable.'"

Subsequently, notice matters were dealt with in Third Division Awards 26422 and 27011. In Award 27011 the Board directed the Carrier to provide notice of subcontracting in the future. It would be illogical to assume that "directing Carrier to provide notice in the future" merely contemplated pro forma compliance with Rule 52 and that other elements of the procedure associated with subcontracting notices could be ignored, especially so in light of the assurances and reaffirmation of intent expressed in the December 11, 1981 letter.

While many of the Awards dealing with no notice (or a defective notice) did not provide a monetary remedy for the defect, Third Division Award 27570 (between these parties) did so. Two years later, in Third Division Award 28619, a monetary remedy was not provided, but the Board again directed:

> ". . .Carrier to provide notice in the future in accordance with the provisions of the schedule Agreement. (underlining added)"

And finally in Third Division Award 28943 the Board sustained a claim and provided a monetary remedy when the Carrier failed to adequately demonstrate that it acted in good faith when work being subcontracted commenced prior to the discussion meeting requested by the General Chairman.

Thus it seems that the language of the Rule, the December 11, 1981 letter and our prior Awards have established a standard whereby Carrier must give the General Chairman notice of all instances where maintenance of way work is to be contracted and must engage in good faith efforts "to reduce the incidents of subcontracting and increase the use of their maintenance of way forces."

With this standard in place it is necessary to look at the record and make a determination if the required good faith effort was exhibited in the contract let for the painting of the Pocatello, Idaho, Maintenance of Way shop. Careful examination of this record fails to establish that any such good faith effort was attempted. In fact the opposite seems to be the situation. For one thing, the record demonstrates that there were furloughed painters available to do the work. For another Carrier has not supported its contentions that any special equipment was required in the project. Both facts were stressed by the General Chairman upon receipt of the notice and at all times thereafter.

But even so, the correspondence Carrier directed to the General Chairman on the subject, when fairly read, clearly manifest two points, the notice was only served to generate pro forma compliance with the requirements of the Rule that a notice be given and that Carrier considers the assurances of the December 11, 1981 letter (supra) to be absolutely meaningless.

With regard to the first point, it is noted that on February 8, 1989, Carrier's Assistant Director Labor Relations candidly stated:

> "In this case since the work is not scope covered, the Company gave notice for informational only and not for bargaining purposes."

And, with regard to the second point, when commenting on the General Chairman's reference to NRLC Chairman's comment that, "the carriers ... will assert good-faith efforts to reduce ... subcontracting," the Assistant Director Labor Relations continued:

> "The above language is not actually contained in the body of the 1981 National Agreement. It is part of a side agreement establishing a standing committee to deal with the subcontracting question. The above-quoted language appears to have been a quid pro quo relating to formation of the standing committee. That standing committee is no longer functioning and it has not been renewed by any of the subsequent national agreements. The entire side agreement including the language quoted above is therefore now

simply a dead letter. Even if the now in active agreement were to be given any weight, the real significance is that it recognizes the right of the industry to subcontract, which right already existed in 1981. (Emphasis added.)"

This Board does not view the December 11, 1981 letter in the same vein. It has been discussed in scores of our Awards involving this and other carriers. It is not "simply a dead letter" which can be ignored. The letter, inter alia, stressed good faith efforts to reduce the incidence of subcontracting and increase the use of maintenance of way forces. While it is correct that it was a quid pro quo (the situation in most if not all labor - management accords) being a quid pro quo does not dilute its viability and in the circumstances present here Carrier is not entitled to enjoy the fruits of the bargain without adhering to the assurances of its Chief Negotiator, as memorialized within a formal document attached to and made a part of the 1981 National Agreement.

This record does not demonstrate, in fact it does not hint, that good faith efforts of any type were advanced in a manner the Organization had been assured they would be in the December 11, 1981 letter. Accordingly the Agreement was violated. The Claim will be sustained. Claimants were furloughed painters at the time the work was performed. No special equipment not readily available to Carrier has been shown to have been required to complete the project. Accordingly Claimants are entitled to be compensated for the hours set forth in Part (3) of the Statement of Claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1992.

CARRIER MEMBERS' DISSENTING OPINION
TO
AWARD 29121, DOCKET MW-29211
(Referee Fletcher)

The Majority found that the Carrier had not complied with the Agreement when it served notice of its intent to contract out work; suggested a date to the Organization to meet to confer about its intent to contract out; and allowed the contractor to commence work prior to the date it set for the conference. The Majority further found that inasmuch as all named Claimants were furloughed at the time, a backpay remedy would be appropriate.

If the Majority had contented itself with the unique set of circumstances of the case, no dissent would have been necessary. Unfortunately, the Majority was not content, but instead, delivered a six-page peroration of the parties good-faith responsibilities under the Agreement. Not even satisfied with setting forth its own views on the subject, it professes to base its conclusions on an analysis of prior Awards which have interpreted the Agreement. It is such profession that requires this dissent.

There have been nearly two dozen Awards of this Board and Public Law Boards that have interpreted nearly every imaginable facet of the parties Agreement dealing with the subject of contracting out, including the good-faith responsibilities of the parties. The prior Awards do not support the Majority's declarations. Indeed, prior Awards have found the evidence of contracting out to be so compelling, that backpay was denied to furloughed employees even when no prior notice was served.

Third Division Awards: 27011, 28619, 28622, 28623, 28789. Indeed, in another contracting out dispute between these parties, the Board denied the Claim in its entirety even when no notice was provided. Third Division Award 28610.

The purpose of this dissent is not to debate the issue here but simply to go on record as registering our strong disagreement with the Majority's characterization of the prior Awards. Fortunately, for the Carrier, the prior Awards speak very clearly for themselves.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENTING OPINION
TO
AWARD 29121, DOCKET MW-29211
(Referee Fletcher)

The Majority was correct in its ruling in Docket MW-29211 and nothing present in the Carriers' dissent distracts from the correctness and precedential value of this award.

The dissent attempts to portray this claim as containing a unique set of circumstances. The only unique thing about this claim and the subsequent award is that an arbitrator finally interpreted the language of the Agreement as written. There are literally hundreds of claims before this Board where the notice issue is involved and until the rendering of this award, some arbitrators had taken a very lenient approach to enforcing the clear and unambiguous language of the rule.

The dissent goes on to contend that the Majority's interpretation of prior awards is incorrect based on the compelling evidence of a past practice of contracting by the Carrier. What the Majority obviously recognized in this case was that past practice is not established by mere lists of dates and locations. What the Majority further recognized in this case was that a past practice can not abrogate the clear terms of an agreement. If the parties had intended to negotiate an agreement without meaning,

they would not have bothered to put pen to paper. In any event, regardless of any perceived past practice, the Organization put the Carrier on notice in 1981 that the notice provision was to be enforced. Because the Carrier is using the same arguments now that it used then, it is only appropriate that an award was finally rendered to enforce the Agreement.

The contracting provisions of the effective Agreement as amended by the December 11, 1981 Letter of Agreement were properly evaluated, the characterization of the prior awards is correct and it is finally evident that the terms "good faith" and "notice", to name but two, have meaning. The award is correct and stands as precedent.

Respectfully submitted,

D. D. Bartholomay
Labor Member