Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29312
Docket No. MW-28797
92-3-89-3-195

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company
(former Missouri 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 (Osmose Wood Preserving, Inc.) to perform bridge work at M.P. 207-6 on the River Subdivision of the Eastern Division on December 1, 2, 3, 4, 7, 8, 9, 10 and 11, 1987 (Carrier's File 880017 MPR).

(2) The Agreement was further violated when the Carrier failed to properly and timely notify and confer with the General Chairman concerning its intention to contract said work as required by Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Carpenters J. C. Boyer, C. R. Canton, J. W. Penrod, D. L. Fall and Motor Car Operator S. Parastar shall each be allowed:

> '...eight (8) hours per day, per Claimant, and including any overtime and Holiday pay, and any additional expense incurred by these furloughed employees that would normally be covered by benefits paid by the Carrier. This claim is for DECEMBER 1, 2, 3, 4, 7, 8, 9, 10, and 11, 1987.'"

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 dispute involves the contracting of certain specialized bridge repairing activities over a nine day period in December 1987. Both parties have raised numerous issues, many theoretical hypotheses and have presented voluminous precedent to support these arguments. In the Board's view, having examined the record carefully, certain fundamental facts and Rules are determinative of the issues herein.

From the record it is clear that the Scope Rule of the contract is general in nature. Further, the type of work in dispute has been performed over a long period of time both by employees covered by the Agreement as well as by outside contractors. Thus, there is no "exclusivity" in fact as an issue herein.

Article IV of the May 17, 1968 National Agreement together with the Letter of Understanding of December 11, 1980 are controlling in this matter. Article IV provides as follows:

> "ARTICLE IV - CONTRACTING OUT
>
> In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designed representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.
>
> Nothing in this Article IV shall affect the existing rights 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.
>
> Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement." (Underscoring added)

At the time of the incident specified in this claim, the Claimants were all in a furloughed status. On October 30, 1987, Carrier notified the General Chairman of its intention to contract out the work of epoxy injection concrete work on the bridges in question. Attached to that letter was a Carrier internal document dated October 27, 1987, which stated that bids had been solicited and received for the work and that a particular contractor had been selected. A contract for the work was entered into on November 1, 1987, with the selected contractor. Thereafter, on November 9, 1987, the conference between the Organization and the Carrier took place to discuss the contracting out.

The Organization insists that the Carrier acted in bad faith in this situation since it had entered into a binding agreement to contract out the work before even discussing it with the General Chairman. Carrier, on the other hand asserts that it gave the proper notice as required by the National Agreement. Furthermore, Carrier notes that it had valid reasons for contracting out the work since it did not have the available employees, equipment or expertise to accomplish the work.

The parties intent expressed in Article IV of the 1968 Agreement was further reaffirmed in the December 11, 1981 Letter Agreement. That 1981 understanding provides in part as follows:

> "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 the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

This Board is keenly aware of the major concern of the Organization to preserve work for its members. We are also aware of the pressures on Carriers to perform their functions efficiently and at the lowest cost. However, in this case the facts seem to indicate that Carrier did not honor its commitments in good faith. It failed to demonstrate that it was complying with the requirements of Article IV (or the 1981 Agreement) in good faith. A pro forma compliance with the letter of the Agreement is obviously meaningless and cannot be condoned; the decision and actions to contract out the work had been taken prior to any discussion with the Organization. Based on this threshold determination alone, the Claim must be sustained (see for example Third Division Awards 23203, 23928, 26314 and 26770 in support of this conclusion).

With respect to remedy there is an unresolved problem. The record is unclear as to which work was accomplished by the contractor and which by B & B Gang #3703. For that reason, for purposes of remedy alone, the matter is remanded to the property for a joint check of Carrier's records to make that determination as well as to ascertain which of the Claimants were on furlough at the time that the work was performed. Based on this joint investigation, the furloughed Claimants will be compensated equally in direct relation to the contractor's work.

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 24th day of July 1992.