Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30746
Docket No. MW-28514
95-3-88-3-327

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein 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 Carrier violated the Agreement when it assigned outside forces to perform track maintenance and renewal work in the St. Louis Terminal beginning June 9, 1987 (Carrier's File 871060).

(2) The Carrier also violated Article IV of the May 17, 1968 National 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 violations referred to in Parts (1) and/or (2) above, furloughed Foreman J.P. Thieret and furloughed Trackmen D.X. Shrewsbury, R.E. Parrin, Sr., S.J. Schwalbert, R.D. Moesch, D.C. Baez, R.B. Sant and H.J. Freise, Jr., seven (7) days per week, beginning June 9, 1987 and continuing until such time as the violation is corrected. In addition, each of the Claimants' seniority rights shall be extended by two (2) years."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

Beginning on June 9, 1987, Carrier assigned outside forces to perform track maintenance and renewal work in the St. Louis Terminal. The Organization filed a claim, alleging that Carrier had violated the Agreement by making this assignment when Claimants were on furlough status. It also asserted that Carrier failed to give the General Chairman the required advance written notice of its intent to contract out. During the handling of this dispute on the property, the Organization further contended that the work at issue here is clearly encompassed within the scope of the Agreement and is customarily performed by the Carrier's Maintenance of Way forces. Numerous written statements were presented to the Carrier as evidence that employees have performed the same work as that in issue here. The Organization also argued that Carrier's lack of notice of its intent to subcontract can hardly be considered an "oversight", as claimed by the Carrier, particularly considering its propensity for failing to provide notice in other subcontracting cases. The Organization stresses that Carrier's handling of this dispute demonstrates its failure to act in good faith in accordance with its contractual obligations as set forth in the December 11, 1981 Letter of Agreement.

Carrier defends by arguing at the outset that this case should be dismissed because there was no conference held on the property as mandated by the Railway Labor Act. This defect bars the Board from considering the merits of the instant claim, Carrier urges.

However, even if the Board somehow reaches the merits of the case, Carrier contends, the Scope Rule cited by the Organization is general and contains no job descriptions or guarantees of assignment to specific tasks. Moreover, the Carrier submits that the Organization has failed to show that such work has customarily and traditionally been reserved to Maintenance of Way forces. To the contrary, Carrier maintains, there is substantial evidence which demonstrates that such work has customarily been performed by contractor's forces without protest. The Organization is simply attempting to rewrite the Scope Rule of the Agreement under the guise of interpretation, Carrier submits. Additionally, Carrier argues that it was not necessary to notify the Organization of its intention to subcontract, since this work has not been performed exclusively by Maintenance of Way employees. Finally, Carrier points out there has been no proof that Claimants were qualified to operate the machinery in question, and therefore no damages should be awarded if this claim is sustained.

Turning to the threshold objection raised by the Carrier regarding the failure to conference this case as required under the provisions of the Railway Labor Act, our review of the record indicates that the instant claim was denied on appeal on January 17, 1988 by the Carrier. In a letter of April 15 1988, the Organization requested to conference the claim during the regularly scheduled conferences held that same month. As Carrier's subsequent November 7, 1988 letter explains, the request was received after the Carrier's representative left to attend the conference, and therefore apparently no conference was held at that time. However, Carrier's Nov. 7, 1988 letter confirms that the parties did discuss the case on October 26, 1988. Moreover, there is no indication in that letter that Carrier intended to challenge the arbitrability of this claim. To the contrary, from all appearances, the letter suggests that there was a discussion of the claim so as to cure any possible earlier defect. On that basis, we reject the Carrier's argument that this case should be dismissed for failure to comply with the procedural requirements set forth under the Railway Labor Act.

Turning to the merits, we must conclude that when Carrier planned to contract out the work at issue here, it was required under Article IV of the Agreement to notify the General Chairman of its intent. Carrier's statement on the property that the lack of notice was an "oversight" simply does not excuse or justify the defect.

Carrier's other argument was also unpersuasive. It contended that the general Scope Rule did not provide the Organization with the exclusive right to perform the work in question. However, on the property, the Organization submitted extensive evidence demonstrating that the work has been reserved to its members by virtue of custom and past practice. It is well established in cases of this nature that where there is no specific reservation of work provision in the controlling Agreement, the Organization is permitted to show that the work has customarily and traditionally been performed by members of its craft. Third Division Awards 26711, 23423, 25276.

The Carrier argued on the property that there was a countervailing practice of subcontracting out work similar to that in question without objection by the Organization. However, that assertion was not supported by probative evidence. In its Submission, Carrier for the first time provided certain information about projects contracted out over the years. The problem, though, as the Organization correctly points out, is that this information was not offered during the claim handling procedure and thus may not be considered by the Board.

Given this state of the record, we can only conclude that, based on the failure to give advance notice and the lack of proof that the work is clearly outside the scope of the agreement, the claim must be sustained. Questions as to employee qualification to perform the work, availability of equipment, etc., are all issues which should have been discussed after notice was afforded the Organization and prior to the time the work was contracted out. As furloughed employees, Claimants are entitled to the compensation claimed.

## AWARD

Claim sustained.

## O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 24st day of February 1995.

CARRIER MEMBERS' DISSENT
TO AWARD 30746, DOCKET MW-28514
(Referee Goldstein)

The Award in this dispute is an anachronism. It was argued before the Board on September 25, 1990, approximately four and one-half years ago. At that time there were no recent Awards of the Board dealing with the contracting out of work on this property. At present, there are more than 60 Awards. As the Awards have come down in the years following the argument of this dispute, the Board has developed a consistent line of interpretation of the parties contracting Rules covering virtually every type of work. Much of the rationale set forth in this Award, dealing with the issues of notice and evidence required to be presented by the Carrier, has been rejected by the Board in the long stream of cases involving the parties and these issues. Indeed, the only portion of this Award that remains valid today is the backpay remedy which the Board correctly found appropriate only with respect to furloughed employees.

Reading this Award is helpful in resurrecting nostalgic memories, it is not useful as a precedent.

M. W. Fingerhut

M. C. Lesnik

P. V. Varga