Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31042
Docket No. MW-30406
95-3-92-3-153

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 to clean the right of way of ties, tie butts and debris between Mile Posts 927 and 985 on the Wyoming Division commencing November 7, 1990 and continuing (System File S-441/910215).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance proper written notice of its intention to contract out said work and failed to 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, Eastern District Roadway Equipment Operators R. M. Angelo and D. K. Melius shall each be allowed pay at their respective straight time and overtime rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces commencing November 7, 1990 and continuing."

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 employee 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.

The work of cleaning the right of way of ties, tie butts and debris was contracted out and performed by contractor's forces beginning November 7, 1990 between Mile Posts 927.0 and 985.0 on the Wyoming Division.

In the past on this property, this issue concerning the type of work involved in this dispute has been resolved in the Organization's favor. See Third Division Award 30005. That Award is not palpably in error. Nothing in this record concerning the practices on the property detracts from the validity of Award 30005.

As in Award 30005, as remedy, Claimants are entitled to monetary relief, but only if they were in a furloughed status at the time the contractor performed the work.

In light of the outcome, the issue over whether the notice covered the work in dispute is moot.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 1st day of September 1995.

LABOR MEMBER'S CONCURRENCE
AND DISSENT
TO
AWARDS 31037, 31038, 31041,
31042, 31044 AND 31045,
DOCKETS MW-30347, MW-30349, MW-30391,
MW-30406, MW-30411 AND MW-30414
(Referee Benn)

These awards correctly find that the Carrier violated the Agreement, hence a partial concurrence is appropriate. However, the Majority has misrepresented the findings of precedent Award 30005 in order to justify its denial of damages to Claimants who were not furloughed at the time of the violation. While it is true that in Award 30005 the Board awarded damages to furloughed claimants, it did so simply because all of the claimants were furloughed at the time of the violation. This fact is amply demonstrated by the fact that in Award 30528, with the participation of the same Referee as in Award 30005, the Board awarded damages to claimants who were not furloughed at the time in a dispute involving the contracting out of similar work.

In denying and/or declining to award damages in other claims presented by the Organization, this same Majority has often expressed its regard for the value of the principle of stare decisis, which it has described as the settling of similar disputes arising under the same rules in a similar manner in order to promote stability. However, in order for stare decisis to have any value in promoting stability, the Board must apply it even-handedly. Stability is not promoted when the Majority of this

Board misrepresents the findings of a prior award in order to avoid an award of damages where a violation is found.

Inasmuch as the Majority here has misrepresented the findings of Award 30005 and refused to recognize the efficacy of precedent awards in order to impose its own notions of equity and industrial justice, the subject awards are palpably erroneous and valueless as precedent on the issue of damages.

Respectfully submitted,

G. L. Hart
Labor Member

CARRIER MEMBERS' DISSENT
THIRD DIVISION AWARDS 31037, 31042, 31044 and 31045
DOCKET Nos. MW-30347, MW-30406, MW-30411 and MW-30414

The majority opinion flies in the face of solid Third Division Award precedent as well as the Organization's own recognition of the Carrier's contractual right to use contractors to remove tie butts and debris from the right of way.

The majority relied on Award **30005**. This Award consisting of a mere two pages failed to analyze the Rule unique to this property.

On the other hand, this Division's six page decision in Award **30063** thoroughly analyzed this Carrier's rule and practice.

Likewise, the BMWE's own conduct demonstrates the Organization's recognition of the Carrier's contractual right as to the issue involved. The Organization recently withdrew a case similar in nature, i.e. Case 95-3-242. Similarly, in 1993, the Carrier served notice on the BMWE that it would contract for tie butt and debris pickup at twenty-seven locations consisting of several hundred miles of track. The BMWE filed claims involving only two of the locations -- the two locations comprised only 57 miles of trackage.

The Organization may have won the crap-shoot in this instance, but these Awards are of no precedential value as to the Carrier's rule or practice.

M. W. Fingerhut

M. C. Lesnik

P. V. Varga

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
THIRD DIVISION AWARDS 31037, 31042, 31044 AND 31045,
DOCKET NOS. MW-30347, MW-30406, MW-30411 AND MW-30414
(Referee Benn)

Insofar as the contracting violation is concerned, the majority opinion in the above-cited awards is consistent with Third Division award precedent. Attention is invited to Award 28817, in which the Board found that work of the character involved here was not only reserved, which would have been sufficient, but was "exclusively reserved" to Maintenance of Way employes and sustained the claim in full, ordering payment of damages to the Claimants and specifically rejecting the Carrier's claim of impunity where the Claimants were not furloughed at the time the work was performed.

In Award 29561, the Carrier had contracted out the work of picking up scrap ties. It asserted that the contractor involved had bought all the scrap ties involved "as is, where is". The Organization showed that assertion to be false in that the Carrier retained a portion of the ties. The Board found that contracting out occurred when consideration was given to the contractor in exchange for performing the work of cleaning up the ties it had not purchased, sorting them and transporting the portion the Carrier retained. The Board considered the parties' arguments, found the portion of the work which did not involve an "as is, where is" sale to have been contracted out in violation of the Agreement and awarded damages to Claimants who were not on furlough at the time of the violation.

In Award 30005, the Carrier again contracted out the work of picking up and disposing of scrap ties. The Board considered the parties' arguments, along with the prior awards, found a violation and awarded damages. Inasmuch as the Claimants therein were all furloughed at the time of the violation, there was no question for the Board to decide as to the remedy to Claimants not on furlough.

In Award 30528, the Board considered a claim where similar work was contracted out after notice was provided to the General Chairman and a conference was held, considered all the arguments of the parties again, all the prior awards, found a violation and again awarded damages to Claimants who were not on furlough at the time of the violation.

As can readily be seen, contrary to the Carrier Members' assertion of "solid Third Division Award precedent", the anomalous prior award on this issue is Award 30063. The Majority's error in Award 30063 is exceedingly clear when attention is given to the fact that it avoided consideration of even one of the prior awards having to do with handling ties and cleaning scrap ties from the right of way but did specifically cite prior awards which involved dissimilar work under dissimilar circumstances. On the other hand, as pointed out in the Labor Member's Concurrence and Dissent to the

above-captioned awards, the only point on which they represent an anomaly and departure from the established Third Division precedent is in their limitation on the award of damages and they stand as precedent insofar as the underlying violation is concerned.

The Carrier Members' assertion that the Organization has somehow recognized some alleged right of the Carrier to contract out work of the character involved here is simply ludicrous. The fact that the claims in these awards have been filed and progressed to this Board is ample evidence that the Organization continues to object to the contracting out of the subject Maintenance of Way work. The remainder of the Carrier Members' contentions contained within the final two paragraphs of their dissent are so far afield as to preclude the necessity of comment, except to say that: (1) there is no evidence before the Board to indicate that those contentions are true and (2) they are apparently boasting about the number of times this Carrier has violated the Agreement. Repeatedly violating the Agreement and boasting about it, after this Board has found the work to be "exclusively reserved" to Maintenance of Way employes (Award 28817) and cannot be contracted out without the concurrence of the Organization even where advance notice is served (Award 30528), simply proves that this Carrier is

refusing to fulfill its duties under the Railway Labor Act to "... exert every reasonable effort to make and maintain agreements ... and to settle all disputes, whether arising out of the application of such agreements or otherwise...."

As a final point, in accordance with the Railway Labor Act and Circular No. 1 of this Board, awards are rendered based on the record of the handling of the claim on the property and the on-property handling is closed when the claim is filed at the Board. The Carrier Members' suggestion that actions allegedly taken in a case or incident arising after this case was already pending at the Board somehow could enter into a determination of whether or not this award is erroneous is simply outrageous. Hence, there is no need here to address the factual errors contained in those allegations.

Respectfully submitted,

G. L. Hart
Labor Member