Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31325
Docket No. MW-30307
96-3-92-3-37

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Terminal Railroad Association of St. Louis

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

(1) The Carrier violated the Agreement when it assigned or otherwise allowed 27 employes of the Burlington Northern Railroad Company to perform track maintenance work at the Madison Yard, Madison, Illinois from September 17, 1990 through October 5, 1990 (System File 1990-21/013-293-14)

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out work referenced in Part (1) above.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the below listed Claimants * shall each be compensated at their respective straight time and overtime rates of pay '***for all pay received by the tie gang of the B&N while off of their property and on the T. R. R. A. property during the weeks of September 17, 1990 through October 5, 1990.'

* Henry Goodwin - Foreman
R. Gray - LMO
D. Stogner - LMO
R. Gower - LMO
R. Glenn - LMO
J. West - LMO
W. Bailey - LMO
L. Crouch - LMO
D. Matthes - LMO
T. Whitley - LMO
R. McCranie - Laborer
R. Vann, III - Laborer
J. Gatlin - Laborer
M. Kayser - Laborer
O. Rodriquez - TMO
R. Jackson - TMO
J. Mason - TMO
J. Pfeiffer - TMO
L. Gates - TMO
W. Edwards - Laborer
R. White - Laborer
E. Schuessler - Laborer
J. Fenton - Laborer
C. Perkins - Laborer
R. Brown - Laborer
S. Gray - Laborer
R. Hoffman - Laborer"

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.

This dispute concerns the Carrier's assignment of outside forces (27 employees of another railroad) to replace crossties in the tracks at Madison Yard at Madison, Illinois. This was work which was commenced on September 17, 1990.

The Carrier first argues that the Claim is defective in that the Organization changed the dates claimed as to when the work was performed (actually reducing the period involved) and then, in the later stages of the claim handling procedure, reverted back to the original dates. The Board finds that this temporary change in dates is not sufficiently significant to deter the Board from reviewing the Claim.

What is of determinative significance is whether, as the Organization argues, the Carrier failed to comply with the terms of Article IV of the May 17, 1968 Agreement, or, in the alternative, as the Carrier contends, the Organization failed to take advantage of its rights to a conference.

Article IV reads in pertinent part as follows:

> "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 designated 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."

On March 30, 1990, the Chief Engineer orally advised the General Chairman of the Carrier's intention to contract the work described. On April 18, 1990, the Chief Engineer wrote to the General Chairman as follows:

> "This letter will confirm my verbal notice to you, and our conference held on April 6, 1990, of Carrier's intent to contract tie renewal in Madison Yard, Madison, Illinois by a Burlington Northern mechanized tie gang.
>
> It was discussed that TRRA does not have a complete set of mechanized tie gang equipment and cannot justify the purchase of such. No BMWE Track employees are furloughed and will not be furloughed while the BN-BMWE crew is working."

On May 3, 1990, the General Chairman responded, "We had no conference on April 6, 1990, discussing this issue." He also stated that he did not consider the March 30 discussion to be "...a conference on the matter."

From the evidence provided, the Board cannot resolve this total disagreement as to an April 6 meeting. There followed, however, correspondence as to notice and conference. The Chief Engineer wrote to the General Chairman on May 9, 1990, in pertinent part as follows:

> "If you did not accept our meeting which was held on April 6, 1990 as the conference, I am available at your convenience for another conference. My letter dated April 18, 1990 was Carrier's formal notice of intent to contract."

The General Chairman responded on May 20, 1990, in pertinent part as follows:

> "If the carrier wishes for their April 18, 1990 letter to be the formal notice of intent to contract out tie work then I must inform you that your notice is improper."

The General Chairman, in this letter, gave no explanation as to why he considered the April 18 letter "improper" as a formal notice of intent to contract. He went on to state that equipment for this work which the Carrier owned in the past could now be rented and then be operated by Carrier employees.

There is, however, no indication that any conference on the matter was requested thereafter by the Organization. The actual work did not commence until five months after the Carrier's notice and indication of availability for conference. The Claim herein followed.

As the Board understands it, the Organization contends that the Carrier's April 18, 1990 letter was not "proper", apparently because it was not in the usual form of such notification letters, and that the earlier "verbal" notice did not meet the requirements of Article IV. That Article does, of course, require written notice of intent, but it has no specification as to the exact form in which the letter is written. Disregarding the oral notice on March 30 and setting aside the issue of a conference on April 6, the Board nevertheless finds that the Carrier's April 18 and May 3 letters clearly gave notice of intent to contract, offered a conference, and were written months in advance of the required 15 days. They met all requirements of Article IV.

The Organization properly insists on written notice of at least 15 days, as required by Article IV. Where such notice is not given, or where the work has already been contracted, the Organization seeks and frequently obtains a sustaining Award on this point alone, regardless of the nature of the contracted work. One example of this is Third Division Award 23928, involving the same parties. It follows, however, that the Organization must also comply with Article IV if it wishes to dispute the proposed contracting. This requires the General Chairman to request a meeting to confer on the matter. The record shows that he failed to do so, contending only that the Carrier's written notice was somehow "improper". The Board finds that the Carrier, in writing, was clear and unambiguous as to proposed contracting and offer of conference. The Organization's failure to take advantage of its opportunity under Article IV requires a denial Award, without further examining the merits. This parallels the Organization's insistence in other instances on a sustaining Award where advance notice is not timely provided.

As stated in Third Division Award 28337:

> "If the Organization fails, for whatever reason, to take advantage of its contractual right to have such a meeting and passes up an attempt to engage in contemplated good faith discussions, it misses its opportunity to demonstrate 'that work within the scope of the applicable schedule agreement is contracted out unnecessarily.'
>
> Without such a meeting and discussion, which by the language of the Agreement must be originated by the Organization, we doubt that we have license to explore further the merits of the transaction."

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of January 1996.