NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION

Award No. 31524
Docket No. MW-30620
96-3-92-3-381

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Soo Line 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 (Wisconsin Central, Ltd.) to perform Maintenance of Way and Structures Department work (track surfacing, application of anchors and related work) on the Ladysmith Line from November 20 through December 21, 1990 and January 2 through 9, 1991 (System Files R650/8-00029 and R647/8-00019).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.

(3) As a consequence of the violations in Parts (1) and/or (2) above, Maintenance of Way and Structures Department employes*:

(a) Tamper Operators T. M. Lee and A. N. Bates, Ballast Machine Operator R. L. Fitzl, Machine Operator J. S. Bizeau and Trackmen:

J. R. Trentor	D. W. Haara	C. I. Petzhold
D. R. Erickson	J. E. Paine	A. L. Bryant
E. C. Pattee	J. R. Kaneski	J. F. Thayer
L. J. Anstett	G. E. LaPorte	D. J. Noble
G. R. Petzhold	R. S. Anderson	M. W. Noha
W. A. Noha		

shall each be compensated, `... the equivalent of two hundred (200)

hours each at the pro rata rate, and have all overtime, vacation, fringe benefits, and other rights restored ....' for the work performed from November 20 through December 21, 1990.

(b) In addition, Track Subdepartment employees:

D. A. Berry	J. R. Trentor	C. I. Petzhold
J. E. Paine	D. W. Haara	A. L. Bryant
D. R. Ericson	J. R. Kaneski	L. J. Anstett
A. J. Fornengo	M. W. Noha	W. A. Noha
W. L. Benson	B. P. Nilson	D. R. Wendt
G. R. Petzhold		

shall each be compensated, `... the equivalent of fourty-eight (sic) (48) hours each at the pro rata rate, and have all overtime, vacation, fringe benefits, and other rights restored ....' for the work performed from January 2 through 9, 1991."

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.

At the time the dispute arose, the Carrier owned track between Superior and Ladysmith, Wisconsin, known as the "K" Line. While the Carrier owned the K Line, it operated no trains on that line. Wisconsin Central operated trains on that line.

On November 15, 1990, Wisconsin Central advised the Carrier that it desired to run unit ore trains on the K Line, but that track conditions would not accommodate such an operation. Specifically, Wisconsin Central advised the Carrier that surface correction work and installation of rail anchors were needed before Wisconsin Central could run its unit ore trains.

The Carrier asserts that although its forces started some of the work, it did not have sufficient forces or available equipment to complete the work prior to freeze-up as desired by Wisconsin Central. According to the Carrier, at the time it was having difficulties fulfilling manpower requirements on its own work. Wisconsin Central advised the Carrier it would provide necessary equipment and personnel to do the work.

On November 15, the Carrier orally advised the Organization of the situation and on November 16, 1990 followed up with written notice. In that notice, the Carrier also advised the Organization that "we are agreeable to utilizing all qualified, available track department maintenance of way employes to assist in the completion of this necessary track work."

Conference was held on November 19, 1990. According to the claim, the work began on November 20, 1990.

According to the Carrier, the work performed on the K Line by Wisconsin Central forces was not paid for by the Carrier. Wisconsin Central ultimately purchased the K Line from the Carrier.

Obviously, this case presents a unique set of facts. Assuming for the sake of discussion that Wisconsin Central's use of its own forces without charge to the Carrier to upgrade track it was using but was owned by the Carrier constitutes "contracting out" by the Carrier within the meaning of Rule 1, under the facts of this case, the Carrier could engage in that action. Under Rule 1, the Carrier can contract out "when time requirements must be met which are beyond the capabilities of Company forces to meet ...." Here, the Wisconsin Central needed the track upgraded on the K Line prior to freeze-up so that it could run the unit ore trains. While the Organization may dispute the Carrier's contentions, we find the evidence sufficiently shows that the Carrier was not able to provide adequate personnel and equipment to meet that deadline. Under the circumstances, contracting out was permissible under Rule 1.

The remaining issue concerns the notice. According to the evidence established in the record, upon learning of Wisconsin Central's desires, the Carrier notified the Organization in writing on November 16, 1990 of the circumstances. The parties met on November 19, and the work commenced on November 20, 1990. Rule 1 requires the Carrier to give the Organization notice "as far in advance of the date of the contracting transaction as is practicable and in any event, not less than fifteen (15) days prior thereto." Clearly, although advance written notice was given, the 15 day requirement was not met.

Under the unique circumstances of this case, at best, the notice violation was a technical one for the approximate 10 day period that the work was performed during the 15 day notice period. We are not satisfied that given the time constraints imposed by Wisconsin Central and work requirements elsewhere on the Carrier's territory that Carrier forces could realistically have been used to perform the necessary work on the K Line prior to freeze-up. Stated differently, given the shortage of time in which the work had to be done and the evidence showing that there were difficulties for the Carrier in getting its other work done, we do not view the performance of the work by the Wisconsin Central forces as true losses of work opportunities for the Carrier's forces. Given our discretion in the formulating of remedies, we would not impose affirmative monetary relief in such a case.

Finally, the fact that Wisconsin Central ultimately purchased the K Line from the Carrier does not change the result. The record reveals that the transaction was conducted at arm's length between the Carrier and Wisconsin Central and was not a subterfuge to subvert rights of the employees under the Agreement. Indeed, the evidence shows that Wisconsin Central and the Carrier ended up in litigation over the purchase price which would not be expected if the transaction was designed to subvert employee entitlements.

Under the circumstances, a denial award is required.

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 July 1996.

LABOR MEMBER'S DISSENT
TO
AWARD 31524, DOCKET MW-30620
(Referee Benn)

The Majority incorrectly reviewed and rendered a denial decision in this case without fully considering the correspondence as it was exchanged on the property. Hence, a dissent is required.

In this case, the Carrier allowed employes of Wisconsin Central to come onto its property and perform track work that is reserved to employes represented by the Brotherhood of Maintenance of Way Employes (BMWE). There can be no question but that the Carrier contracted out the work of replacing rail anchors and surfacing more than twelve (12) miles of the Carrier's mainline between Superior and Ladysmith, Wisconsin, also known as the K Line. Inasmuch as the delegation of such work to others is a contracting transaction, advance written notice was required prior to the work being performed. Under date of November 16, 1990, the Carrier notified the Organization of its desire to assign Wisconsin Central to perform track work on the K Line. The parties met on November 19, 1990 where the Organization attempted to convince the Carrier that it had within its machinery inventory idle machinery capable of performing the work and that it had just recently furloughed a number of BMWE employes who could have been recalled to perform the work. As it was pointed out by the General Chairman within his December 21, 1991 letter of appeal, said conference was merely pro

forma because the Carrier had granted Wisconsin Central permission to perform the work prior to discussing the matter with the Organization. The Carrier never denied that such was the case during the handling of this dispute on the property. Inasmuch as the parties are required by the notice provisions of the Agreement to meet and discuss the issue in good faith, the Organization cannot fathom how the Board determined that the Carrier complied with said provisions when Wisconsin Central began the work on November 20, 1990, which was the day following the conference. The record as it was developed on the property clearly showed that the Carrier failed to comply with the good-faith provisions of the Agreement. The Majority held that "Under the unique circumstances of this case, at best, the notice violation was a technical one for the approximate 10 day period that the work was performed during the 15 day notice period. ***" To the contrary, the Carrier's obligation was to notify the Organization fifteen (15) days prior to contracting out the work; meet with the Organization and discuss the matter in "good faith" prior to contracting out the work. Therein lies the fallacy in the Majority's decision. It only assumed that had proper notice been given, the Carrier would have been able to establish an exception to the Scope Rule. Obviously, absent timely notice, conference and good-faith discussions under the Scope Rule, neither the Organization much less the Majority would know whether

the exceptions had been met by the Carrier. Hence, the Carrier was able to remove the work from the Agreement via a Board award and escaped compensating the employes that would have been assigned to perform the work.

In effect, the Majority has negated the Scope Rule by allowing the Carrier to rely on the assumption that Wisconsin Central employes had a greater right to perform the work than the Claimants. Such reasoning is contrary to the Scope Rule of the Agreement and such notions should not be allowed to creep into this arena. If blatantly not following the Agreement is not "bad faith", then perhaps the Majority, since it has already decided to abrogate certain provisions of the Agreement, might enlighten the Minority as to its definition of that term. Therefore, I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member