Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31756
Docket No. MW-30698
96-3-92-3-486

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

(*Brotherhood of Maintenance of Way Employes*
PARTIES TO DISPUTE: (
(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 outside forces (Osmose Concrete Railroad Contractors) to perform Maintenance of Way and Structures Department work (concrete repairs) to MacArthur Bridge, the Merchants Bridge and Bridge(s) A and B from March 14 through April 8, 1991 (System File 1991-3 TRRA/013-30C).

(2) The Agreement was further violated when the Carrier failed to properly notify and discuss with the General Chairman its intent to contract out said work as required by Article IV of the 1968 National Agreement.

(3) As a consequence of the violations referred to in parts (1) and/or (2) above, B&B employees K. Robert, S. Wolf, A. Cracchiolo, and C. Carrico, A. Rameriz, C. Lovett and J. Wilson shall each be allowed eight (8) hours pay at their respective hourly rates, two (2) hours pay at their respective time and one-half rates for five (5) days per week and ten (10) hours pay at their respective time and one-half rates for every Saturday from March 14 through April 8, 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 were given due notice of hearing thereon.

On March 9, 1991, the abutment on Bridge A at the entrance of the A&S yard broke out. The Carrier considered this to be an emergency situation and on March 11, 1991 wrote the Organization the following letter:

> "Confirming our conversation this date, the Carrier advises our intent to contract concrete restoration to various bridge, piers and abutments.
>
> Our forces are involved in an extensive steel and tie repair program, and there are no BMWE employees furloughed.
>
> The abutment on Bridge A at the entrance to the A&S Yard broke out on March 9, 1991, last Saturday night. As this is a serious condition, we are proceeding to arrange for a contractor in advance of the fifteen (15) day notification. You stated you have no objection to waving the fifteen (15) day notification requirement.
>
> If you desire a conference, I am available at your convenience."

On April 7, 1991, the General Chairman responded:

> "This will confirm our telephone conversation held on March 21, 1991 concerning Bridge A and your letter dated March 11, 1991. During our conference on March 11, 1991 I advised you I was against all contracting that our employees could perform but I understood that situations do happen when time is important. We agreed that the meeting held on March 11, 1991 would be considered the conference."

On April 8, 1991, the General Chairman filed a time claim on behalf of the Claimants claiming payment for the Carrier's impermissible subcontracting of bridge concrete work. The General Chairman made his claim after visiting the worksite and determined that the Osmose Concrete employees were also performing work on Bridge B and the MacArthur and Merchants Bridge between March 14, and April 8, 1991.

The Carrier declined the claims initially by alleging that an emergency situation had occurred, that the Organization was notified of the emergency in the March 11, 1991 letter, that the contractor had special equipment necessary to complete the project and that all Claimants were fully employed during the contracting period.

After conceding that the General Chairman initially accepted the Carrier's explanation of emergency and waived the 15 day notice requirement found in Article IV, the Organization went on to argue that the Carrier acted in bad faith. According to the Organization, the Carrier's bad faith surrounded the fact that the March 11, 1991 pre-subcontracting notification letter was deliberately vague when referring to work other than the emergency work performed on Bridge A.

The Organization argues that the underlying requirement of Article IV's notification provision requires both parties to act in good faith when discussing potential subcontracting situations. Here, according to the Organization, the Carrier merely vaguely referred to other projects and then acted in bad faith by contracting projects not fully described in the subcontracting notification letter of March 11, 1991. Moreover, none of the disputed additional projects were emergency repairs, the rationale on which the General Chairman based his initial waiver of the 15 day notice requirement.

The Organization next argues that the work of concrete masonry repair on the Carrier's bridges and piers is plainly and clearly covered within its Scope Rule. Therefore, since the work proposed to be contracted was clearly within the Scope Rule, the Carrier was obligated to discuss its subcontracting intentions, which it did not do.

The Organization also takes issue with the fact that the subcontractor required special equipment since, according to the General Chairman's inspection, the only special equipment utilized by the subcontractor were temporary steelposts holding the abutments.

Finally, the Organization urges us to not only find a violation, but also to award money damages to the Claimants to preserve the integrity of the Agreement as was done on this property in *Third Division Award 23928.*

The Carrier counters by arguing that the Organization waived its rights under the Agreement specifically, Article IV Contracting Out, when the General Chairman fully discussed the Carrier's contracting contentions and waived the 15 day notice requirement.

Furthermore, the Carrier argues that the Organization failed to prove that the work of bridge concrete repair falls exclusively within the Scope Rule.

The Carrier argues that the Organization failed to cite an Agreement rule prohibiting contracting out under the circumstances involved in this case.

Next, the Carrier argues that the disputed work has customarily and traditionally been contracted out and finally, the Carrier argues that all Claimants were fully employed during the contracting out period and therefore, suffered no monetary loss.

In order to fully resolve this dispute, we must first determine whether the Carrier's March 11, 1991 letter to the General Chairman constituted adequate notice of its intention to subcontract out specific tasks.

Article IV Contracting Out, requires a 15 day prenotification requirement of any Carrier projects that it intends to subcontract. This 15 day notice requirement can be waived by the Organization. It has been held that a mere telephone conversation is inadequate notice to comply with the Article IV notification requirements. *Third Division Award 23928.*

After reviewing the March 11, 1991 letter, we find that the Carrier adequately gave notice to the Organization of its intent to perform emergency repairs to Bridge A at the entrance to the A&S Yards which broke out on March 9, 1991. However, with respect to the other projects supposedly encompassed by the notice, namely, concrete repair work on the MacArthur Bridge, the Merchants Bridge and Bridge B, we find that the Carrier's notice failed to comply with the good faith requirements to fully and fairly disclose its subcontracting intentions. Since a mere conversation without a complete written confirmation is inadequate notice as established by Third Division precedent. the Carrier was obliged to more fully disclose in writing the full extent of its intended work to be performed by the subcontractor.

Any waiver of the 15 day notice requirement by the Organization can only be made upon a full disclosure of all facts. While we find that the Carrier adequately notified the Organization of its intention to perform emergency repairs on Bridge A, the level of detail in referring to the Bridge A project is absent in the other subcontracting situations.

Therefore, the Organization could not have made a fully informed waiver of the 15 day notice requirement. Since we find that the Carrier failed its prenotification requirement as required by Article IV, we find that the Agreement was violated with respect to all projects except the work performed in an emergency nature on Bridge A.

Next, we must determine the level of penalty.

There has been a divergence of opinion concerning whether to compensate fully employed claimants. The rule on the Third Division has developed to the point where the Division will compensate fully employed claimants regarding Scope Rule violations if it can be shown that the particular carrier has repeatedly violated the prohibitions against subcontracting.

We will note for the record that this particular Carrier has been found to violate the subcontracting provisions of the Agreement in *Third Division Awards 23928 and 28998.* Consequently, an award of money damages is appropriate in this matter.

Therefore, since we have found the Carrier violated the Agreement only with respect to parts of the initial claim, we will remand the matter to the property for the parties to determine the number of hours performed by the contractor on the projects other than the emergency work performed on Bridge A. Once the determination is made as to the amount of damages, we further order that the amount of damages be equally divided among the Claimants.

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 24th day of October 1996.

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THIRD DIVISION

Award No. 31756
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(2) The Agreement was further violated when the Carrier failed to properly notify and discuss with the General Chairman its intent to contract out said work as required by Article IV of the 1968 National Agreement.

(3) As a consequence of the violations referred to in parts (1) and/or (2) above, B&B employees K. Robert, S. Wolf, A. Cracchiolo, and C. Carrico, A. Rameriz, C. Lovett and J. Wilson shall each be allowed eight (8) hours pay at their respective hourly rates, two (2) hours pay at their respective time and one-half rates for five (5) days per week and ten (10) hours pay at their respective time and one-half rates for every Saturday from March 14 through April 8, 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 were given due notice of hearing thereon.

On March 9, 1991, the abutment on Bridge A at the entrance of the A&S yard broke out. The Carrier considered this to be an emergency situation and on March 11. 1991 wrote the Organization the following letter:

> "Confirming our conversation this date, the Carrier advises our intent to contract concrete restoration to various bridge, piers and abutments.
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> Our forces are involved in an extensive steel and tie repair program, and there are no BMWE employees furloughed.
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> The abutment on Bridge A at the entrance to the A&S Yard broke out on March 9, 1991, last Saturday night. As this is a serious condition, we are proceeding to arrange for a contractor in advance of the fifteen (15) day notification. You stated you have no objection to waving the fifteen (15) day notification requirement.
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On April 8, 1991, the General Chairman filed a time claim on behalf of the Claimants claiming payment for the Carrier's impermissible subcontracting of bridge concrete work. The General Chairman made his claim after visiting the worksite and determined that the Osmose Concrete employees were also performing work on Bridge B and the MacArthur and Merchants Bridge between March 14, and April 8, 1991.

The Carrier declined the claims initially by alleging that an emergency situation had occurred, that the Organization was notified of the emergency in the March 11, 1991 letter, that the contractor had special equipment necessary to complete the project and that all Claimants were fully employed during the contracting period.

After conceding that the General Chairman initially accepted the Carrier's explanation of emergency and waived the 15 day notice requirement found in Article IV, the Organization went on to argue that the Carrier acted in bad faith. According to the Organization, the Carrier's bad faith surrounded the fact that the March 11, 1991 pre-subcontracting notification letter was deliberately vague when referring to work other than the emergency work performed on Bridge A.

The Organization argues that the underlying requirement of Article IV's notification provision requires both parties to act in good faith when discussing potential subcontracting situations. Here, according to the Organization, the Carrier merely vaguely referred to other projects and then acted in bad faith by contracting projects not fully described in the subcontracting notification letter of March 11, 1991. Moreover, none of the disputed additional projects were emergency repairs, the rationale on which the General Chairman based his initial waiver of the 15 day notice requirement.

The Organization next argues that the work of concrete masonry repair on the Carrier's bridges and piers is plainly and clearly covered within its Scope Rule. Therefore, since the work proposed to be contracted was clearly within the Scope Rule, the Carrier was obligated to discuss its subcontracting intentions, which it did not do.

The Organization also takes issue with the fact that the subcontractor required special equipment since, according to the General Chairman's inspection, the only special equipment utilized by the subcontractor were temporary steelposts holding the abutments.

Finally, the Organization urges us to not only find a violation, but also to award money damages to the Claimants to preserve the integrity of the Agreement as was done on this property in *Third Division Award 23928.*

The Carrier counters by arguing that the Organization waived its rights under the Agreement specifically, Article IV Contracting Out, when the General Chairman fully discussed the Carrier's contracting contentions and waived the 15 day notice requirement.

Furthermore, the Carrier argues that the Organization failed to prove that the work of bridge concrete repair falls exclusively within the Scope Rule.

The Carrier argues that the Organization failed to cite an Agreement rule prohibiting contracting out under the circumstances involved in this case.

Next, the Carrier argues that the disputed work has customarily and traditionally been contracted out and finally, the Carrier argues that all Claimants were fully employed during the contracting out period and therefore, suffered no monetary loss.

In order to fully resolve this dispute, we must first determine whether the Carrier's March 11, 1991 letter to the General Chairman constituted adequate notice of its intention to subcontract out specific tasks.

Article IV Contracting Out, requires a 15 day prenotification requirement of any Carrier projects that it intends to subcontract. This 15 day notice requirement can be waived by the Organization. It has been held that a mere telephone conversation is inadequate notice to comply with the Article IV notification requirements. *Third Division Award 23928.*

After reviewing the March 11, 1991 letter, we find that the Carrier adequately gave notice to the Organization of its intent to perform emergency repairs to Bridge A at the entrance to the A&S Yards which broke out on March 9, 1991. However, with respect to the other projects supposedly encompassed by the notice, namely, concrete repair work on the MacArthur Bridge, the Merchants Bridge and Bridge B, we find that the Carrier's notice failed to comply with the good faith requirements to fully and fairly disclose its subcontracting intentions. Since a mere conversation without a complete written confirmation is inadequate notice as established by Third Division precedent. the Carrier was obliged to more fully disclose in writing the full extent of its intended work to be performed by the subcontractor.

Any waiver of the 15 day notice requirement by the Organization can only be made upon a full disclosure of all facts. While we find that the Carrier adequately notified the Organization of its intention to perform emergency repairs on Bridge A, the level of detail in referring to the Bridge A project is absent in the other subcontracting situations.

Therefore, the Organization could not have made a fully informed waiver of the 15 day notice requirement. Since we find that the Carrier failed its prenotification requirement as required by Article IV, we find that the Agreement was violated with respect to all projects except the work performed in an emergency nature on Bridge A.

Next, we must determine the level of penalty.

There has been a divergence of opinion concerning whether to compensate fully employed claimants. The rule on the Third Division has developed to the point where the Division will compensate fully employed claimants regarding Scope Rule violations if it can be shown that the particular carrier has repeatedly violated the prohibitions against subcontracting.

We will note for the record that this particular Carrier has been found to violate the subcontracting provisions of the Agreement in *Third Division Awards 23928 and 28998.* Consequently, an award of money damages is appropriate in this matter.

Therefore, since we have found the Carrier violated the Agreement only with respect to parts of the initial claim, we will remand the matter to the property for the parties to determine the number of hours performed by the contractor on the projects other than the emergency work performed on Bridge A. Once the determination is made as to the amount of damages, we further order that the amount of damages be equally divided among the Claimants.

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 24th day of October 1996.