Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32162
Docket No. MW-31439
97-3-93-3-421

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
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside contractor (M&M Construction Company) to perform Maintenance of Way work (digging out old roadbed, pulling out old panels and hauling away old materials from the crossing) at Mile Post 360 at Cisco, Texas on February 7 through 21, 1992 (Carrier's File 920418 MPR).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work.

(3) The claim* as presented by General Chairman L. W. Borden on April 7, 1992 to Superintendent J. Heavin shall be allowed as presented because the claim was not disallowed by Superintendent J. Heavin in accordance with Rule 12.2(a).

(4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Machine Operators R. G. Maples and J. L. Stutts shall be compensated, at the applicable machine operator's rate of pay, for an equal proportionate share of the total number of man-hours expended by the contractors forces.

*The initial letters of claim will be reproduced within our initial submission."

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.

Without prior notice to the General Chairman, the Carrier states it employed a contractor to "perform backhoe and hauling work in the general vicinity of Cisco, Texas" during the period from February 7, 1992 through February 21, 1992. As will be seen below, the dates involved are of particular significance. The claim cited violation of the Scope Rule and of Article IV of the May 17, 1968 National Agreement.

Rule 12, Section 2 reads in pertinent part as follows:

"(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) *in writing of the reasons for such disallowance. If not so* notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances.

(b) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver."

On April 7, 1992, the Organization initiated a claim, contending that the work could have and should have been performed by Carrier forces. This claim was received by the Carrier on April 9, 1992.

According to the Carrier, a reply to this claim was issued on June 2, 1992. This denial response stated, among other considerations, that "the 60-day time limit for this claim has expired and the claim, therefore, must fail."

In a further appeal dated August 24, 1992, the Organization contended that it never received the June 2 response, thus requiring the claim to be allowed for failure of the Carrier to respond within 60 days.

The Carrier then sent the Organization a copy of the initial June 2 response, alleging that it had indeed responded in timely fashion and adding that the August 24 appeal was also untimely.

Finally, in its Submission, the Carrier argues the claim should be rejected not only for lack of timeliness, but because the claim as presented to the Board protests lack of notice to the General Chairman concerning the contracting and "[d]uring the handling on the property, the Organization never raised the issue of the Carrier failing to serve notice."

The Board finds all these allegations without determinative significance, as follows:

1. Leaving aside whether April 7 or April 9 is the operative date for a timely claim, the Carrier appears to believe that the claim must be filed within 60 days from the first day (February 7) of the alleged Rule violation. When the incident came to the Organization's notice is not

known, but the fact is that the contracting continued until February 21, making a claim timely within 60 days of this latter date.

2. The Board cannot determine whether, as argued by the Organization, there is no proof of a June 2 reply, or whether, as argued by the Carrier, the reply was mailed and either was lost in transit or misplaced by the recipient. Thus, no decision on this is possible.

3. The Carrier's contention that the August 24 appeal was untimely carries no weight, since the Organization has asserted that, regardless of who might have been at fault, it was awaiting a response to its original claim.

4. The claim as submitted to the Board is clearly not changed. The claim refers to violation of Article IV, which in turn discusses both notice and contracting conditions.

As to the merits, the Carrier asserted that it had regularly contracted this type of work for many years, without protest from the Organization. Attached to its *Submission was an extensive list of such occasions, although the Organization points out* that this was not produced on the property during the claim handling procedure and must be ignored as "new" argument. Nevertheless, the Board is satisfied that there was knowledge of such previous contracting. Thus, the Organization's protest in this instance is properly treated as stated in Third Division Award 28849 (and in numerous subsequent Awards):

"The Carrier is hereafter required to provide notice of plans to contract out. The record contains no evidence submitted by the Organization that the Carrier's actions were ever protested [in many previous instances]. As the Carrier has come to rely upon its procedure, *it cannot now be held responsible for compensation. We deny that part of* the Claim."

It must be noted, however, there is no Rule support for the Carrier's assertion that the Organization must show it has performed the work "exclusively." This, too, has been determined in many previous Awards.

In this instance, the Carrier did fail to give notice, as required by Article IV and thus was in violation of the Agreement. However, this occurred, as specified above, in February 1992. Previous Awards, such as Third Division Awards 28849, 29474 and others, required this Carrier to provide notice even in instances where contracting has been previously undertaken without protest. These Awards, however, were issued after February 1992, when the instance here under review occurred. Thus, monetary remedy is not appropriate.

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 13th day of August 1997.