Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32296
Docket No. MW-31133
97-3-93-3-51

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(*The Kansas City Southern Railway Company*

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Austin Bridge) to perform Bridge and Building Subdepartment work on Bridges 754.2, 755.2, 755.5 and 755.6, working ten (10) hour days, Monday through Saturday, beginning May 7, 1991 and continuing [Carrier's File 013.31-320 (470)].

(2) The Carrier also violated Addendum No. 9, Article IV of the May 17, 1968 National Agreement, when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, B&B Foreman H.H. Hoose, B&B Mechanics E. Jackson, Jr., C. D. Love, B&B Helper H. J. Mayeaux, Composite Operator C. D. Muse and Pile Driver Operator R. T. Arnold shall each be allowed an equal proportionate share of the seventy (70) hours' pay at their respective straight time rates, for each of the four (4) regularly assigned workdays and seventy (70) hours' pay, at their respective time and one-half rates, for each of the two (2) workdays outside of the regularly assigned workweek expended by the outside forces in the performance of said work."

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.

At the time of this dispute arose, Claimants held assignments in their respective classifications within the Bridge & Building (B&B) Subdepartment. Commencing May 7, 1991, Carrier contracted with the Austin Bridge Company to replace certain wooden bridges with concrete bridges. The contractor completed the work on July 1, 1991.

On July 2, 1991, the Organization submitted a claim on behalf of Claimants maintaining that Carrier violated Rules 1, 2, and 22 when contractor Austin Bridge performed "B&B" work." According to the First Vice Chairman, Claimants could have performed the work at issue on "an overtime basis or on assigned rest days", and could suffer a "future loss of work opportunity" due to Carrier's use of contractors. Further, the Organization asserts that Carrier violated Addendum No. 9, Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

Carrier denied the claim alleging that:

"Claimants did not suffer any loss of work opportunity, as documented by the attached work sheets. Claimant H. Hoose requested, and was granted personal leave on June 5, 1991, and therefore, cannot be considered a proper claimant for that date. Claimant E. Jackson was off for reason unknown on June 24, 1991, and therefore, cannot be considered a proper claimant for this date. Claimant H. Mayeaux requested and was granted

personal leave on June 19, 1991, and therefore, cannot be considered a proper claimant for that date. Claimants all worked their assigned shifts plus overtime on the dates claimed and they were duly compensated at the appropriate rates of pay.

The Carrier does not have any interest in Austin Bridge Company, nor do we have any jurisdiction or control over their company policy. The purchase of a prefab bridge from this source is not any different than purchasing track materials from ABEX, CF&I, etc.

Additionally, this type of work has not been assigned exclusively to any members of your organization, but has historically and traditionally been performed by other Maintenance of Way forces, as well as non-company personnel and equipment.

I do not agree that Rule 1 of the Agreement was violated in as much as that Rule merely delineates track sub-department as to category of employees. I do not agree that Rule 2 was violated as that Rule establishes the procedures for seniority of employees, ranking of employees on seniority rosters and establishing seniority rosters of various categories. I do not agree that Rule 22 was violated. I do not agree that Addendum No. 9 was violated. I have researched the current Agreement and I am unable to locate an article 'Letter of Understanding of December 11, 1981', nor any reference to such."

As a threshold issue, the Organization assertion that Carrier violated the notice and consultation requirements of Addendum No. 9, Article IV of the 1968 Agreement is well-placed. Carrier's assertion that it was unaware of that obligation, supra, appears disingenuous, given the history of arbitration precedent on that issue on this property. In Third Division Award 29332, involving these same Parties, contract language and substantially similar bridge-building work, this Board found that Carrier was obligated to give notice, meet and confer with the General Chairman before subcontracting the work at issue because of "past performance of the disputed work"; mentioning as authority "many decisions of the Board to numerous to cite, but citing specifically citing as authority Third Division Award 23560, involving the same issue, Parties and contract language.

In Award 29332, the Board also held that the December 11, 1981 "Berge-Hopkins" Letter Agreement "reflects a negotiated intent that doubts about the need to provide notice in a given situation be resolved in favor of providing notice." The carefully reasoned analysis of the Board in Award 29332 is persuasive and dispositive of the claim that Carrier violated the notice and consultation requirements of Addendum No. 9 and the December 11, 1981 letter in the present case. (Third Division Award 31829 is of no material value on that aspect of the case, since that decision failed altogether to consider or address, let alone decide, the Addendum No. 9 notice and consultation issue.)

Careful consideration of the record evidence reveals that the Organization did not make out a persuasive case that the Scope Rule, per se, was violated in this case when employees of Austin Bridge performed the work at issue. Award 29332 stands for the proposition that a while evidence of "mixed practice" is sufficient to trigger the advance notice requirements of Article IV (Addendum No. 9) and the December 11, 1981 Letter Agreement, it is not sufficient to make out a prima facie violation of a general-type Scope Rule. As the moving party, it was incumbent upon the Organization to prove that the work at issue accrues exclusively to its members, either through a showing of explicit contract language, or through a showing of tradition and past practice. The Scope Rule is general in nature, and does not designate or assign the work in dispute to any particular group of employees. Further, there is no evidence on this record which convinces us that these B&B employees have historically or traditionally performed the work in dispute to the practical exclusion of others. Therefore, that portion of the Organization's claim is without merit.

It remains only to determine an appropriate remedy for the proven violation of Addendum No. 9. In Award 29332, dated July 24, 1992, the Board admonished Carrier to abide by the requirements of Addendum No. 9 in the future, but declined to award monetary damages because of mitigating factors described in detail in that Award. We note that the violation in the instant matter occurred more than one (1) year prior to the issuance of Award 29332, before this Board put Carrier on notice to comply with Addendum No. 9 in the future. Had the instant violation occurred after the issuance of Award 29332, an inference of bad faith and necessity to stimulate compliance might well have justified a monetary remedy for even "fully-employed" claimants. However, the rationale of Award 29332 militates against a monetary recovery for Claimants in the particular facts and circumstances of the instant case predating that seminal decision.

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 November 1997.