Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32338
Docket No. MW-32034
97-3-94-3-380

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Missouri
(Pacific 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 (Acme, KCI, E. A. Holder, H. P. Adams and Western Hauler) to haul various materials (crossties, switchties, cement crossings, rails, crossing boards, anchors, frogs, angle bars and welding materials) from Fort Worth, Texas to Apache, Lawton, Warner and Enid, Oklahoma and Elkhart, Van Horn, Abilene, Gastrop, Paradise, Kilgore, Bagdad, Hodge and Grand Saline, Texas beginning April 26, 1993 and continuing (Carrier's File 930571 MPR).

(2) The Carrier also violated 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 violations referred to in Parts (1) and/or (2) above, 6-Ton+ Operators C. Light and R. E. Howard shall each be compensated at their appropriate rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the work in question beginning April 26, 1993 and continuing until the violation ceases."

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.

This dispute arises out of the Carrier's use of outside forces to operate heavy duty trucks to transport Carrier's track material between various points in Texas and Oklahoma commencing in April, 1993 without first giving written notice to the General Chairman of its intent to contract out the work.

The Organization contends that the work in issue was scope-covered work under Rules 1 and 2 of its Agreement, as well as the July 19, 1990 6-Ton+ Truck Operator Agreement entered into between the parties, in part, to establish a seniority roster for 6-Ton+ Truck Operators and permit them to travel across District lines in the performance of their hauling work. The Organization argues that its employees have customarily and historically performed this work, no evidence was presented by Carrier to the contrary, and that Carrier's violation of the Article IV advance notice requirements is sufficient to justify monetary relief since it has been found to be a "repeated violator" of this section and warned of the financial consequences previously.

Carrier contends that the Organization failed to establish that the work in question was scope-covered work or exclusively performed by its employees, thereby negating any obligation on its part to give advance notice. Carrier asserts that it has consistently contracted out this type of work and the Organization has failed to take prompt action in protesting such contracting under the 1990 6-Ton+ Truck Operator Agreement, and thus is precluded by the doctrine of laches and the time limit rule from doing so herein. Carrier further argues that in the absence of a substantive contracting violation, the Board has failed to premise a monetary remedy on this property solely on

an allegation of procedural failure to comply with a notice obligation, especially when all Claimants were fully employed, as here.

A review of the record reveals that the Organization primarily rests its claim of entitlement to the work in question upon the language of the scope provisions of the Agreement and the negotiation and existence of the 6-Ton+ Truck Operator Agreement, which establishes a specific classification and seniority rights for heavy truck drivers. The Organization notes that Carrier presented no evidence to contradict its assertion that its employees have customarily and historically performed this type of work, relying upon Third Division Awards 31012 and 31260. The record supports the conclusion that Carrier repeatedly claimed that it has continuously contracted long haul work of this type, but provided no specific evidence of such contracts based upon numerous prior cases establishing its right to contract.

Regardless of whether this record in fact establishes a mixed practice on the property concerning the work in issue thereby permitting Carrier to engage in the contracting itself, it is clear from prior Awards between these parties that Carrier has repeatedly been informed that the Organization need not prove exclusive performance of the work to establish a violation of the notice requirement of Article IV. See Third Division Awards 31012, 29825, 29792, 29791, 29560, 29474, 29023, 29021, 29007, 28849. Despite this fact, Carrier rests its sole argument on why it did not have to serve notice on its contention that the Organization failed to prove that this was scope-covered work exclusively performed by it, an argument repeatedly rejected by this Board. We are of the opinion that the Organization satisfied its burden of proving that the work was arguably encompassed within the scope provisions of its Agreement as amended by the 6-Ton+ Truck Operator Agreement, to fall within the coverage of Article IV's notice requirements. We are unable to accept Carrier's argument that laches and the time limit rule foreclose the Organization from insisting on receipt of notice in this case.

We have carefully considered the Awards cited by Carrier in support of the proposition that monetary compensation is normally only awarded to furloughed employees or those suffering a loss of work opportunity or a difference in pay rate as a result of contracting on this property, See e.g. Third Division Awards 31835, 29021, 29023. However, we believe that under the circumstances of this case, monetary relief is appropriate for the following reasons. First, Awards on this property have denied such relief when the dispute arose prior to Carrier being put on notice in June, and again in October, 1991 that such notice was required, and have stated such as the basis for

denying monetary relief. Third Division Awards 29560, 29474, 29792, 29791. This dispute arose in April, 1993, over two years after the principle of the requirement of notice was established. Second, this Board has subsequently warned Carrier that "future failure to comply with the notice provisions of Article IV... will likely subject [it] to potential monetary damage awards, even in the absence of a showing of actual monetary loss by Claimants." Third Division Award 29825 and Awards cited therein. See also Third Division Award 29792.

Third, we adopt the following rationale of the Board in Third Division Award 28513 as being applicable to the facts of this case:

> "With respect to the remedy, we are satisfied that although some Claimants may have been working, on vacation, observing rest days or away from the gang on the dates in issue, this case nevertheless requires the imposition of affirmative relief. We recognize that in situations where a failure to notify of an intent to subcontract has been demonstrated but where the affected employees were fully employed, no affirmative relief has been required. [citations omitted] However, those Awards do not address the situation presented in this case where the Carrier failed to the degree demonstrated by this record to follow the previous admonitions of this Board over the requirement to give notice. The Carrier's continued failure to abide by the terms of the 1968 National Agreement and its advancement of arguments that this Board has previously and repeated rejected require us to do more than again find a contractual violation with no affirmative relief. As a result of the Carrier's failure to give notification to the General Chairman in this case as required by the 1968 National Agreement, the Carrier again frustrated the purpose of Article IV. Although Article IV of that Agreement does not require assignment of the work to Claimants and does permit the Carrier to subcontract that work, notification and discussions (if requested by the Organization) further contemplated by that Agreement could have resulted in increased work opportunities through an agreed-upon assignment of the work to Claimants as opposed to the subcontracting of the work to an outside concern. By the failure to give the required notice, the Carrier did not give the negotiated procedure set forth in Article IV an opportunity to unfold. Claimants therefore clearly lost a potential work opportunity as a result of the Carrier's failure to follow its contractual mandate to give the Organization timely notice."

For these reasons, the Board deems it appropriate to order a monetary remedy, and remands the case to the parties to determine the appropriate number of hours involved in the hauling specified in Paragraph (1) of the claim.

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.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 32338, DOCKET 32034
(Referee Newman)

The referee in this case has had numerous opportunities to consider the contracting out provisions of the Agreement between the parties to this dispute. In each case, the referee demonstrated a commendable respect for prior Board Awards involving these parties and contracting out issues. (At present count, there are about 100 prior Awards.) For some unexplained reason, the referee did not follow precedent in this case.

The fact of the matter is that the instant dispute is not the first one that has arisen which considered the effect of a failure to provide notice where work was performed after the 1991 Awards. The first case resulted in Third Division Award 31835. In that dispute, the work was begun in March 1992. The Board found that the Carrier failed to provide notice of its intent to contract out the work. It concluded, however, that there was no reason for departing from prior Awards between the parties which held that a monetary remedy would be appropriate "only to furloughed employees or employees who were working in lower paid classifications and were qualified to perform the higher rated work done by contractor forces."

The referee was furnished a copy of Award 31835 but, for some unexplained reason, decided not to rely upon that precedent. Instead, the referee turned to Third Division Award 28513 for its rationale, apparently oblivious to the fact that Award 28513 involved a different Carrier, and has no precedential value here.

Fortunately, while the referee in this case failed to recognize the precedential value of Award 31835, other Awards have not suffered from similar myopia. On the same day this Award issued. Third Division Award 32352 issued as well. The Board in Award 32352 was confronted with the same parties and issues in this case. It too found that the Carrier violated the notice requirements of the Agreement but, unlike this Award, the Board concluded: "However, we deny Part (3) of the claim for compensation as the Claimant was fully employed and we can find no evidence in this record of any wage loss suffered. (Third Division Awards 31835, 31273)." (Parenthetically, it is noteworthy that Award 31273, cited in Award 32352, was decided by the same referee who wrote Award 31835, relied heavily upon by the referee in this case. Award 31273 concerned the same parties and the same issue involved here. In Award 31273, the referee found that the Carrier had violated the notice provisions of the Agreement but refused to award any compensation to named Claimants fully employed at the relevant time. While Award 31273 involved work performed prior to the 1991 Awards, there is nothing in the Award which even suggests that such fact in any way influenced the Board's decision on the issue of damages.)

It is clear that this Award, which failed to follow precedent, has no precedential effect.

Martin W. Fingerhut

Michael C. Lesnik

Paul V. Varga

November 13, 1997