Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32862
Docket No. MW-31804
98-3-94-3-59

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 (Woods Contractors) to perform Maintenance of Way machine operator's work (stabilizing the roadway with rip rap) between Mile Posts 685.50 - 685.75, 697.75 - 698.0 and 699.50 - 700.0 on the Whitesboro Sub on September 12, 13, 14, 17, 18, 19 and 20, 1992 (Carrier's File 930005 MPR).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with a proper 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, Machine Operators T. G. Daniel and B. R. Johnson, Jr. shall each be compensated for an equal proportionate share of all hours worked by the outside forces during the period in question."

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 Organization, on the days set forth in the claim in 1992, the Carrier contracted for outside forces and the use of certain equipment in conjunction with track stabilization work. The stabilization work was required because of water seepage under the track located in close proximity to a lake constructed by the Corps of Engineers.

Article IV of the 1968 National Agreement states in relevant part:

> "In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.
>
> Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

As a result of the Carrier's failure to give notice, a violation of Rule IV has been demonstrated. Moreover, we find that this case requires the entry of a fully sustaining award.

First, the Carrier's assertion that the work constituted an emergency is not supported by the record. The burden rests with the Carrier to demonstrate the existence of the emergency. See Third Division Award 31835 ("It is . . . well settled that assertions of emergency circumstances are treated as an affirmative defense. As such, the burden of proving the nature, extent and duration of the emergency must be satisfied by the party asserting its existence.") This record only shows that track stabilization work was necessary due to water seepage. We are not satisfied that such a demonstration rises to the level of an emergency requiring immediate action. Rather, just as it can be asserted that an emergency existed, the argument can be made with equal strength that the problem existed as part of a large project and the stabilization work could have been foreseen and could be considered routine track work in conjunction with that project. But the burden is on the Carrier to show the existence of the emergency. The Carrier has not sufficiently done so.

Second, nor are we persuaded that the Carrier did not have sufficient control over the project because the Corps of Engineers was moving the track for the Carrier as a result of the Corps of Engineers' decision to construct the lake which ultimately caused the seepage of water under the track. Like the assertion of an emergency, the alleged lack of control over the project amounts to an affirmative defense requiring the Carrier to demonstrate the bona fides of that assertion. That has not been done. Rather, notwithstanding the Corps of Engineers' involvement in the project, the record leads to the conclusion that the Carrier had sufficient control over the project by the fact that it was the Carrier (and not the Corps of Engineers) that engaged the services of the contractor.

Third, under Article IV, exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims. See e.g., Third Division Award 29792 ("As explained more fully in Award 29007, however, a showing of less than 'exclusive' past performance of the disputed work by the employees is sufficient to establish coverage for purposes of Article IV notice and conference provisions") See also, Third Division Award 32338 and Awards cited therein (". . . [I]t 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").

Fourth, under Article IV, we are satisfied that the described work falls "within the scope of the applicable schedule agreement." The work involved was Machine Operators' work on a track project - the kind of work the employees have performed. We need not determine for notice purposes whether the equipment utilized by the contractor was specialized, necessary, whether alternative equipment could have been rented, or whether the employees were actually capable of operating the specific equipment utilized by the contractor. The threshold inquiry is does the work fall "within the scope of the applicable schedule agreement"? We find that it does. As such, Article IV mandated the Carrier to give the Organization notice.

Fifth, the Carrier's failure to give the Organization notice of its intent to contract the work frustrates the process of discussions contemplated by Article IV. See Third Division Award 31280:

> "The function of the notice is to allow the Organization the opportunity to convince the Carrier to not contract out the work. Therefore, that opportunity to convince the Carrier to not contract out the work was prevented by the Carrier's failure to give notice."

Sixth, on the issue of remedy, in the past where the Carrier has failed to give advance notice to the Organization in contracting disputes, this Board has often fashioned limited remedies. Some Awards have limited relief to employees in furlough status. See e.g., Third Division Award 31285. The rationale behind those Awards flows from the fact that notwithstanding the clear language of Article IV mandating the Carrier to give notice, for years the Organization allowed contracting to go on without objection. It was not until a change of leadership in the Organization on this property that Article IV became a focal point of hundreds of claims which served to put the Carrier on notice that the Organization thereafter intended to enforce the language in Article IV. For this Board to have required the Carrier to compensate non-furloughed employees after those initial claims were filed when the Organization previously allowed the wide spread contracting out of work falling "within the scope of the applicable schedule agreement" would have been manifestly unfair.

However, the language in Article IV concerning the Carrier's obligation to give notice to the Organization of its intent to contract work which falls "within the scope of the applicable schedule agreement" is clear. See Third Division Award 31285 ("'[S]hall notify' is mandatory"). Through the persistent filing of claims, the Organization has put the Carrier on notice that it intends to enforce that language. This Board has repeatedly

acknowledged that a point exists where the Carrier's reliance on the Organization's prior willingness to permit contracting of such work would no longer shelter the Carrier from liability in cases where the Carrier does not give the required notice. See Third Division Award 32338:

> "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."

The contracting of work in this case occurred after the 1991 admonitions from this Board that when the Carrier thereafter failed to give notice as required by Article IV, the Carrier could be liable for more than only compensation for furloughed employees. Award 32338 and the Awards cited therein therefore require the imposition of remedial relief irrespective of whether the involved employees were furloughed. See also Third Division Award 28513 quoted in Award 32338 (imposing such relief " . . . 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").

Third Division Award 31835 relied upon by the Carrier does not require a different result. Prior notice was not given in that case for work contracted in 1992 and yet the Board did not require monetary relief because no employees were on furlough. The Board in that case did not discuss the ramifications of the prior admonitions of this Board discussed in Third Division Award 32338 concerning the fact that the Carrier was

clearly informed by this Board that the remedy for failure to give notice in cases after 1991 would result in more extensive monetary liabilities.

Complete uniformity of decision did not exist as this Board developed its approach to the hundreds of cases presented to this Board arising from the parties' contracting disputes. Review of those decisions shows some inconsistencies - by this Board and sometimes even by individual referees sitting with the Board. But one very clear concept arose through that overall decisional process - the position taken by this Board discussed in Award 32338 that the Carrier's failure to give notice to the Organization after the 1991 admonitions by this Board that it had to do so would result in relief beyond compensation only for those employees in furlough status.

We recognize that the result in these cases where no notice is given may be anomalous. It may well be under Article IV that had the Carrier given notice, (and because of lack of skills of the employees, need for specialized equipment, etc.), the Carrier may have been able to contract the work. However, in failure to give notice cases, even though the Carrier may have ultimately been able to contract the work, even employees who were working could be compensated only because notice was not given. We are very conscious of that result. But, our function is to enforce language negotiated by the parties. In Article IV and as a result of negotiations, the parties set forth a process of notification and conference in contracting disputes. The Carrier's failure to follow that negotiated procedure renders that negotiated language meaningless. This Board's function is to protect that negotiated process. Our discretion for fashioning remedies includes the ability to construct make whole relief. The covered employees as a whole are harmed when the Carrier takes action inconsistent with the obligations of the Agreement (here, notice) to contract work within the scope of the Agreement. Relief to employees beyond those on furlough makes the covered employees whole and falls within the realm of our remedial discretion.

We are also cognizant of the specific result in this case. The record shows that Claimants worked at the site at the time the contractor's forces were present. The Carrier argues that granting relief to Claimants who were employed at the site is unfair. That argument is not persuasive so as to change the result. The remedy in this case seeks to restore lost work opportunities. It may well be that Claimants could have performed the contracted work (or the work they actually performed) on an overtime basis or could have resulted in more covered employees being called in to work on the project. Indeed, had the Carrier given notice, those questions could have been the subject for discussion

in conference between the parties. On balance, having failed to give the required notice, the Carrier cannot now argue that the result is unfair.

From the handling of the hundreds of claims presented to this Board between the parties on the issue of contracting work, we are also cognizant that the notice, objection by the Organization and conference procedure often is a pro forma exercise which ends up in a literal battle of word processors and copy machines as the parties posture themselves on the issues and put together the voluminous records in these cases. Our function is not to make certain that the process is a meaningful one - that is the obligation of the parties. Our function is to enforce the language the parties agreed upon. The Carrier's course of action now is a straight forward one - simply give notice where the work arguably falls "within the scope of the applicable schedule agreement." If it does so, the Carrier will not be faced with the kind of remedy imposed in this case because it failed to give notice.

This claim shall be sustained in its entirety. We shall remand this case to the parties to determine the number of hours worked by the contractor's forces on the dates set forth in the claim. Claimants shall be compensated accordingly.

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 21st day of October 1998.