Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35646
Docket No. MW-34764
01-3-98-3-429

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
(
(National Railroad Passenger Corporation (Amtrak) -
(other than Northeast Corridor

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside contractor to repair the soffit (overhang) and guttering on Building 10 at the Beech Grove facility, Beech Grove, Indiana on September 19, 1996 and continuing (Carrier's File BMWE-304 NRP).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its intent to contract out the work cited in Part (1) above.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, ' . . . we request that Claimants K. Geis and D. Gates be paid for eight (8) hours straight time at the B&B Mechanic rate of pay and K. Kress be paid at the B&B Foreman rate of pay, for all the claim days listed and to continue until the contractor is removed from the property.'"

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 claim raises the issue of sufficiency of the notice given by the Carrier to the General Chairman concerning the contracting out of soffit and gutter repairs to Building 10 at the Beach Grove facility in September 1996.

The record reflects that on May 20, 1991, the Carrier sent the following notice to then General Chairman Cassese:

> "We have recently learned of Amtrak's intent to contract out certain work in the project to modernize its Beech Grove, Indiana Maintenance Facility. . . .
>
> A five-phase program is planned to accomplish a variety of changes. The implementation strategy is to do the projects first that will do the most to improve the efficiency of the overhaul work. Highly critical facility improvements and repairs such as roofs, cranes and waste systems are to be done during the first three phases, however, the majority of the projects are to be implemented in phases three, four and five. The attached Exhibit 'A', Planned Implementation Schedule, and Exhibit 'B', Work To Be Performed By Contractor, describes the planned work in more detail. The total cost of this project is estimated $34,900,000.
>
> This major construction project requires skill, manpower, equipment and construction expertise not available to Amtrak for a project of this magnitude. Further, the maintenance forces at the facility are and will be fully engaged in their regular maintenance, project and support work. Finally, no Amtrak employees will be furloughed as a result of the contracting of work in this project. . . ."

The planned implementation schedule set forth a tentative date for commencement in July 1991, with work to continue through 1995. One of the projects slotted into phases 1, 2 and 5 included roof replacements, with the work to be performed by the contractor to include replacement of roofing joists and installation of roofs with an insulation and drainage system.

A conference was held on this notice on June 27, 1991, with a follow-up letter stating that Phases 2 and 3 were not yet funded, and that track forces at Beech Grove would not increase. The Beech Grove modernization project commenced in 1991 and continued when funding became available for the different phases.

On September 27, 1996, the Carrier sent then General Chairman Geller the following notice:

> "We have recently learned of Amtrak's intent to contract certain re-roofing installations on four (4) buildings at our Beech Grove Mechanical Facility.
>
> In general, the work involves manufacturer certification for installation of the new roofing product on three (3) buildings. The fourth building requires extensive repairs to the substrate. Contractor will install vertical steel siding on sections of two (2) buildings. Lastly, one (1) building requires extensive soffit and gutter work.
>
> Work To be Performed by Contractor
>
> * All roof installation and repairs.
> * Installation of vertical siding where needed.
> * Repairs to soffits and gutters where required.
>
> Work To Be Performed by Amtrak
>
> * Removal or relocation of roof mounted equipment.
> * Repair of roof drains below roofs to ground.
> * Inspection and protection when required."

The notice went on to estimate that the project would cost approximately $1.6 million and take five months. It also states that the limited time frame required to finish the project precludes hiring new employees for it.

The work involving the repair of soffits and gutters to Building 10 commenced on September 19, 1996, over one week prior to serving the second notice, and the contract was entered into by purchase order dated June 11, 1996. In its claim filed on November 6, 1996, the Organization protests the subcontracting on the basis that the work is scope-covered, has been performed by employees at this facility in the past, was not emergency in nature, and that the Carrier violated Rule 24 by failing to serve a timely notice and permit a conference prior to the work being contracted. On the property the Organization argued that the May 1991 notice did not cover this work, as it did not indicate soffit and gutter repair, such work was not the subject of the conference, and the contracting occurred after the time period covered by the prior notice. It offered proof by way of project memos and employee statements that they had performed roof drain, sewer and gutter work in the past. The Organization avers that the Carrier's notice violation shows its bad faith and alone merits a monetary remedy regardless of the Claimant's fully employed status, citing Third Division Awards 29121, 26770, 28611, 28612, 29513, 29912, 29979, 30182 and 30944.

The Carrier initially raised a timeliness argument concerning the processing of this claim to the Board, but such argument was shown to be without merit by proof of receipt of the claim in a timely fashion. The Carrier argues that the soffit and gutter replacement were part of the overall Beech Grove modernization project which was covered by the May 1991 notice and June 1991 conference. It notes that it inadvertently prepared and mailed a duplicated part of the prior notice in September 1996, arguing that such action does not remove the coverage of this work from the May 1991 notice. The Carrier asserts that roofing replacement work on these buildings was part of phase five of the original project which was delayed due to funding issues and which could not be accomplished with the Carrier forces. The Carrier avers that the Organization is not permitted to piecemeal its protest of a large project, and that this claim only involves a minuscule part of the roofing work on only one of the four buildings involved. The Carrier contends that, in any event, there can be no monetary relief ordered for a notice violation when the Claimants were fully employed during the claim dates as there was no proven lost work opportunity, citing Third Division Award 22884.

A careful review of the record convinces the Board that the Organization has met its burden of proving a notice violation herein. While the Carrier contended that the May 1991 notice covered this gutter and soffit work begun in September 1996, a review of the language of the September 1996 notice nowhere revealed any mention of this work being part of the Beech Grove modernization project dealt within the prior notice. Nor does it refer to the prior notice or indicate that this was a duplicate notice. In fact, the record reveals that the contract for the roofing work in issue was entered into in June 1996, not as part of the original 1991 project. Further, the September 1996 notice language may well have led the Organization to believe that it was a different project, for it specifies its intended duration (five months) and estimated cost ($1.6 million) and makes no reference to phase five of the original modernization project. All of these facts, coupled with the sending of a different notice, support the Organization's contention that it was the September 27, 1996 notice that the Carrier intended to cover the particular work in issue. There is no dispute that such notice was sent after the contract was entered into and the work had commenced. In such situation, the Carrier has clearly violated the language and intent of Rule 24.

What remains to be considered is the appropriate remedy for such violation. Neither the Organization's nor the Carrier's cases dealing with monetary relief for proven bad faith or a notice violation originate on this property. The Board is conscious of the fact that not only is there a divergence of views concerning the appropriateness of a monetary remedy for a fully employed claimant, but that a body of precedent may exist on one property supporting one result while a different result may be appropriate elsewhere. That being said, we are aware of one on-property Award, Third Division Award 27614, which contains a vigorous dissent by the Carrier. In that case, the violation of Rule 24 found by the Board was a result of the Carrier's failure to prove its affirmative defense of an emergency situation requiring the contracting. There was advance notice and conferencing concerning the overall nature of the issue of contracting the disputed work prior to the actual contract protested. Thus, the monetary remedy ordered to fully employed Claimants was not for a notice violation, but for a contracting violation itself, and based upon the rationale that such nature of a violation merits payment.

We are unaware of any precedent on the property for awarding monetary compensation to fully employed claimants for a notice violation. See Third Division Award 35645. Under the factual circumstances of this case, the Board is unable to support a finding that the Claimants suffered a lost work opportunity or that the nature

of the violation requires monetary relief. This is especially true where the parties disputed throughout the handling of the claim on the property whether the 1991 notice covered the work in issue, and whether the conference which occurred encompassed this part of the overall project. Accordingly, we conclude that the Carrier violated Rule 24 by failing to give the General Chairman advance written notice of the contracting in issue, but that no monetary relief is 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 28th day of August, 2001.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 35645, DOCKET MW-34523
AND
AWARD 35646, DOCKET MW-34764
(Referee Newman)

Inasmuch as the awards were sustained in part, a concurrence is required only to the extent that the Carrier violated the Agreement when it failed to issue notice in accordance with Article IV of the May 17, 1968 National Agreement.

The DISSENT is directed towards the Majority's erroneous finding that there was no basis to award a remedy for the Carrier's violation due to lack of on-property precedent concerning this issue. The able neutral obviously struggled with this finding and a fine line was walked to arrive at this decision. The justification found by the Majority here is based on the dissection of Award 27614. In that case, the Board found that the monetary remedy was allowed for the contracting issue itself and not the notice violation. It is the Organization's position that such is a distinction without a difference. This Board has held that Article IV is a nationally negotiated rule and, as such, it should be treated with the same respect as any other rule of the Agreement. To do so otherwise effectively reduces the significance of the rule to second class status. This was recognized by the Board in Award 19899, cited and attached as an exhibit within our submission to the Board. In said award, the Board held:

> "We have difficulty in hypothicating (sic) many instances more imperative to loss of opportunities than a proposed contracting out of bargaining unit work - which may well result in a severe deprivation amounting to a substantial tangible

> "loss of work and pay. Article IV is mandatory in concept. We wonder then if, as noted by the Fourth Circuit it may become a 'worthless scrap of paper' if it may be unilaterally ignored. Accordingly, we favor the rationale of the Fourth Circuit as properly applied to violations of Article IV. For these stated reasons, the Board holds that a claim for damages may be sustained for a violation of Article IV of the 1968 National Agreement even though employees in question were fully employed at all relevant times. This result does not compel Carrier to agree to anything or to do anything other than what it previously agreed to i.e. give notice and bargain in good faith. While it is urged by Carrier that damages may be speculative, it is Carrier itself, by its failure to comply with its agreement, who places the matter in that posture - not the employees."

The Organization must take some responsibility for not stressing the utmost importance of Article IV and the ramifications of the Carrier's failure to comply therewith. We too do not wish to have the significance of Article IV reduced to a "worthless scrap of paper". Insofar as the failure of the Majority to award a monetary remedy in these cases is concerned, I dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member