Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35850
Docket No. MW-34845
01-3-98-3-433

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside concern (Perrin Construction) to load ballast from the Carrier's Pontiac Pit and haul same to Flint Yard on October 11, 13, 14, 20, and 27, 1996 (Carrier's File 8365-1-584).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice prior to contracting out the work as prescribed in Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Class 2 Machine Operator W. Franklin and Truck Drivers G. Coleman and B. Rathbun shall each be allowed fifty (50) hours of pay at their respective straight time rates."

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 the incidents in question, Claimant W. Franklin held seniority as a Class 2 Machine Operator and Claimants G. Coleman and B. Rathbun held seniority as Truck Drivers. On the dates that the instant dispute arose, they were regularly assigned to positions within their designated classifications.

On October 11, 13, 14, 20 and 27, 1996, the Carrier assigned three employees from Perrin Construction to load and haul ballast from the Carrier's stone pit in Pontiac, Michigan, to the Carrier's yard in Flint, Michigan. The outside contractor's employees possessed no seniority or work rights under the Agreement, expended a total of 50 hours each and used a John Deere JO-644-D end loader and two tandem trucks to accomplish the subject work. The Carrier did not notify the General Chairman in writing of its plans to contract out the work involved here. These facts do not appear to be in dispute.

The Organization takes the position that pursuant to Article IV of the May 17, 1968 National Agreement and the interpretations and amendments thereto in the December 11, 1981 Letter of Understanding, the Carrier was obligated to give 15 days written notice to the Organization of such contracting. However, it did not do so in this case. Further, the Organization claims that its work forces have historically, traditionally and customarily performed all of the subject work involved in this matter. According to the Organization, the Claimants were fully qualified, willing and available to perform all work involved in this dispute and would have done so if the Carrier had assigned them.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. First, the Carrier contends that the work involved has not been performed exclusively by BMWE - represented employees and the work in question is therefore not exclusively reserved to the Organization. While the Carrier admits that it did not give 15 days advance notice to the Organization, it argues that it was relieved from this obligation because the work was part of a continuing project in which no Organization employees were involved. Finally, while the Organization claims that no emergency existed that would preclude the required 15 day written notice, it was

imperative for the Carrier to complete the work with minimal disruption to its normal operations. This precluded the necessity of the 15 day written notice.

After a review of the evidence, the Board finds that the Organization has sustained its burden of proof in this matter. We note that the Carrier admittedly failed to give notice to the Organization of its intent to subcontract this work. This is a clear violation of Article 1V of the May 1968 National Agreement and the interpretations and amendments thereto in the December 11, 1981 Letter of Understanding. While there are exceptions where such notice need not be given, none were present in this case. Because there was no valid reason not to give notice, the Carrier was obligated to give the written notice. When it did not do so, it violated the Agreement. The reason for the written notice is so that the parties may discuss the proposed contracting. Without such notice, no discussion can take place. Thus, we find that the Organization sustained its burden and the Carrier violated the Agreement. (See Third Division Awards 25697, 30526, 30746.)

While the Carrier also raised the issue of exclusivity, such is not a proper defense in a contracting case. (See Third Division Awards 31386, 31777, 32160.)

Having determined that the Carrier violated the Agreement, an appropriate remedy must be fashioned. We note that there are five days in question - October 11, 13, 14, 20 and 27, 1996. It is uncontested that three employees of the contractor worked a total of 50 hours each on these three days hauling ballast from the Carrier's stone pit in Pontiac to the Flint Yard. As noted above, the Claimants were qualified to do this work. However, there was a question as to whether the Claimants were each available on all five days. To the extent that the Claimants were available for work on the relevant dates, but were not working, they shall be compensated at the relevant rate for those dates. However, if any of the Claimants were working on those dates, they shall not be compensated. For example, we note that according to the records in this case, Claimant Franklin was working on October 11, 1996. Thus, he should not be compensated for that date.

Thus, the claim is sustained in accordance with the Findings.

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 18th day of December, 2001.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 35850, DOCKET MW-34845
(Referee Bierig)

Inasmuch as the award was 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 monetary remedy for the Carrier's violation based solely on the assertion that the Claimants were working elsewhere and therefore "unavailable". While the able neutral recognized that the Board has the authority to fashion a remedy, it shirked its responsibility to do so. The availability of the Claimants is determined by the Carrier. If the Carrier chose to assign the Claimants to perform work elsewhere while outsiders performed their work, the Claimants should not have suffered the consequences of the Carrier's actions. The work at issue here was forever lost to the Claimants when the Carrier knowingly and with malice chose to ignore the advance notification provisions of the Agreement. Insofar as failure of the Majority to award a monetary remedy in this case is concerned, I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member