Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35859
Docket No. MW-34765
01-3-98-3-430

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)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside contractor (Annex Railroad Builders) to perform work of rehabilitating the East Ladder track at the Beech Grove facility, Beech Grove, Indiana from September 16 through October 17, 1996 and continuing (Carrier's File BMWE-305 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, furloughed Trackmen J. McCullough, M. White and W. Fox be paid for eight (8) hours straight time at the Trackman rate of pay for all the claim days listed and to continue until the contractor is removed from the property and the remaining Claimants, active Trackmen W. Williams, E. Jinks, L. Lyster and J. Butcher be compensated eight (8) hours straight time at their current rate of pay, when the contractor used more than three employees then starting at the top of the track seniority roster and continue down in seniority order to fill the places used by the contractor."

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 work involving the rehabilitation of the East Ladder track at the Beach Grove facility commencing 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. The capacity of the facility must be increased to accommodate approximately 400 cars and 90 locomotives annually. . . .
>
> 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 2 and 3 included track work, with the work to be performed by the contractor to include yard track renovation (the most heavily used ones to be done in Phase 2) and upgrading the remaining trackage (in Phase 3).

A conference was held on this notice on June 27, 1991, with a follow-up letter stating that the Carrier did not anticipate creating additional Trackmen positions for this project, that the track work would not be performed until Phases 2 and 3 which were not yet funded, and that contractors forces would be used to supplement the Carrier's forces to complete the track work. 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 install nine (9) new Turnouts and rehabilitate the East Ladder Track at our Beech Grove Mechanical Facility in Indiana.

In general, the work involves the removal and reinstallation of 1400 feet of track and the installation of nine (9) turnouts.

Work To be Performed by Contractor

All Track removal and reinstallation
Installation of new Turnouts.

Work To Be Performed by Amtrak

Track re-alignment and connections of new ladder track to existing track in facility."

The notice went on to estimate the project would cost approximately $400,000 and take 150 days. It also states that the limited time frame required to finish the project precludes hiring new employees for it, and that no Amtrak employees will be furloughed as a result of this contracting.

The work involving the removal and reinstallation of track commenced on September 16, 1996, over ten days prior to serving the second notice. 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, and that the contracting occurred after the time period covered by the prior notice. The Organization avers that the Carrier's notice violation as well as its untrue assurances that no employees would be furloughed shows its bad faith and alone merits a monetary remedy first to furloughed employees, and next to fully employed active Claimants where contractor forces exceeded three employees on any given day, citing Third Division Awards 26770, 28611, 28612, 29513, 29912, 29979, 30182, 30944, 32160 and 32748.

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 yard rehabilitation work was 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 duplicate 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 there can be no remedy for the three furloughed Claimants, because they had been terminated in accordance with the provisions of Rule 6 in May 1996 and were no longer employees available to perform the work which commenced in September 1996. The Carrier contends that there can be no monetary relief ordered for a notice violation to the Claimants who were fully employed during the claim dates as there was no proven lost work opportunity, citing Third Division Awards 24884 and 35646.

A careful review of the record convinces the Board that this case is a companion to the one presented in Third Division Award 35646, where we found that the Organization met its burden of proving a notice violation under similar facts. While the Carrier contended that the May 1991 notice covered this track rehabilitation work begun in September 1996, a review of the language of the September 1996 notice nowhere reveals 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. 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 (150 days) and estimated cost ($400,000) and makes no reference to any phase of the original modernization project. It is hard to believe that the modernization project was only at Phase 2 or 3 in September 1996, when its original completion year for all 5 phases was 1995. In Third Division Award 35646, the Carrier had claimed that the soffit and roofing work which was part of phase 5 of the original modernization project was occurring in September 1996, yet in this case it would have us believe that the track work referenced in the May 1991 notice as slotted for phases 2 and 3 was the same work at issue herein. 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 work had commenced. In such situation, the Carrier clearly violated the language and intent of Rule 24.

What remains to be considered is the appropriate remedy for such violation. As noted in Third Division Award 35646, 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 two on-property Awards, Third Division Award 27614, which contains a vigorous dissent by the Carrier, and Third Division Award 35646. In the former 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. In Third Division Award 35646, the Board noted that it was 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 Organization asserts that three Claimants were furloughed at the time of the instant contracting, thereby suffering a true

loss of work opportunity. The Carrier argues that they had already been discharged in May 1996, and were therefore not employees at the time covered by this claim. Based upon the record before us, we are unable to conclude that the Organization sustained its burden of proving that Claimants McCullough, White and Fox were furloughed as a result of this contracting, or would have been employed at the relevant time but for the contracting of the work in dispute. Absent such proven correlation between their furlough status and the contracting, we are unable to direct that the Carrier provide a monetary remedy to individuals no longer employed during the claim dates. Further, for the reasons set forth in Third Division Award 35646, the Board is unable to support a finding that the active Claimants suffered a lost work opportunity or that the nature of this violation requires monetary relief. 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 18th day of December, 2001.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 35859, DOCKET MW-34765
(Referee Newman)

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 remedy for the Carrier's violation due to lack of on-property precedent concerning this issue of making such a remedy for a notice violation. The underlying issues and arguments before the Board in this case are essentially identical to those contained in the record before the Board in Awards 35645 and 35646 adopted on August 28, 2001. For the sake of brevity, our Dissent to those awards are incorporated herein by reference.

Respectfully submitted,

Roy C. Robinson
Labor Member