Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36015
Docket No. MW-33157
02-3-96-3-587

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
(
(Burlington Northern Santa Fe Railway
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces (Saunders Construction Company) to haul dirt and level off and shape the right of way in the vicinity of Mile Post 116.6 at Randall, Minnesota on March 3, 4, 7 and 8, 1994 (System File T-D-748-B/MWB 94-07-07AB).

2. The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice of its plans to contract out said work as required by the Note to Rule 55 and Appendix Y.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Group 2 Machine Operator R. M. Otto, Jr. shall be allowed thirty-two (32) hours' pay at his straight time rate and Truck Divers K. M. Rieland and G. L. Anderson shall each be allowed sixteen (16) hours' pay at their 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.

In the winter of 1993, a Carrier train derailed at MP 116.6 in Randall, Minnesota. After the derailment was cleared, the City of Randall's sewer system remained affected. In March 1994, the Carrier utilized Saunders Construction to perform further work resulting from the derailment. Saunders delivered fill material to the site which, according to the record, was purchased "delivered" to the site (that is, title passed upon delivery at the site). Saunders employees, through use of a cat, established the rough grade in the reestablishment of ditches. Final work on the project was performed by Carrier forces.

The Organization was not given prior notice by the Carrier that Saunders would perform the work. This claim followed.

The relevant Agreement language provides in Rule 55 and its note:

> ". . . Employes included within the scope of this Agreement . . . perform work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service. . . .
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> * * *
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> By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only

> when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto except in "emergency time requirements" cases. . . ."

Our focus in this case is on the fact that work was contracted by the Carrier to Saunders without notice to the Organization. We find the Carrier violated the above language.

First, the kind of work contracted to Saunders (hauling and establishing grades) is work that is "within the scope of this Agreement" and is "customarily performed" by covered employees. The hauling and grading work described in this dispute is classic Maintenance of Way work.

Second, the Organization need not demonstrate that employees exclusively performed that work. See Third Division Award 32862 (". . . exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims."). See also, Public Law Board No. 4402, Award 21 and cases cited (". . . the Organization need not demonstrate that the work performed by outside forces had previously been 'exclusively' performed by the covered employees, but the Organization must show that work was 'within the scope' of the Agreement and 'customarily performed' by the employees.).

Third, under the Agreement language, "[i]n the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. . . ." [emphasis added]. Because the work falls "within the scope of the Agreement" and is "customarily performed" by those employees, the Carrier was obligated ("shall") to give notice. The Carrier did not do so.

Fourth, the Carrier's failure to give the Organization notice of its intent to contract the work frustrates the process of discussions contemplated by notification language. 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."

Fifth, the Carrier's assertions that there was an emergency and that it was required by the City of Randall to perform the work do not change the finding of a violation of the Agreement. Beyond those assertions, the Carrier has not factually established the existence of an emergency or conditions that the Carrier did not have control of the work so as to permit the Carrier to avoid its notice obligations under the Agreement. Third Division Award 32862, supra ("The burden rests with the Carrier to demonstrate the existence of the emergency . . . nor are we persuaded that the Carrier did not have sufficient control over the project. . . .").

A violation of the Agreement has therefore been shown.

In terms of the remedy, make whole relief is within the bounds of our discretion. See Third Division Award 32862, supra:

> ". . . 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."

The Claimants lost potential work opportunities as a result of the Carrier's failure to give the required notice. They shall therefore be made whole.

However, the Carrier has sufficiently demonstrated that the fill used for the project was purchased from Saunders "delivered" and that the material was not the Carrier's property until it was, in fact, delivered at the site. Any hours attributable to work performed by Saunders' employees in the delivery of that material shall therefore not be part of the remedy in this case. The matter is now remanded to the parties to determine the hours or work performed by the contractor's employees in the other work covered by the claim for which the Carrier did not give notice. The 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 May, 2002.