Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38947
Docket No. MW-38225
08-3-NRAB-00003-040144
(04-3-144)

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
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(The Texas Mexican Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Frontera Construction) to perform Maintenance of Way and Structures Department work (operate weed mower) to shred and mow grass in the yards and right of way at road crossings between Laredo, Texas and Corpus Christi, Texas beginning July 1, 2003 and continuing, instead of Machine Operator T. Vasquez (System File EPTM-03-107/257).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a notice of its intent to contract out the work in question and failed to exert a good-faith effort to increase the use of Maintenance of Way forces and reduce the incidence of employing outside forces pursuant to Rule 29 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant T. Vasquez shall now be compensated for all straight time and overtime hours worked by the outside contractor beginning July 1, 2003 and continuing."

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 its January 28, 2004 letter on the property, the Carrier succinctly states the material facts in this dispute:

> ". . . Carrier utilized the services of a sub-contractor for weed mowing and a notice for such work was not issued to your Organization. This is not denied. Extensive weed mowing projects on this property has for several years been performed by a third party without complaint or claims from your Organization. Frontera Construction Company has provided this service for over two (2) years and prior to that time Carrier utilized the services of Haner Mowing Service."

The case is governed by Rule 29 of the parties' Agreement:

> "CONTRACTING OUT
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> When work coming under the Scope Rule of the Maintenance of Way agreement is found to be of such nature that it cannot be performed by the regular forces of the respective sub-departments, the General Chairman will be notified in writing at least fifteen (15) days in advance of any transaction for contracting out of such work. The carrier and organization representatives shall make a good faith attempt to reach an understanding on the contracting out of the

> work to be performed. In event no satisfactory agreement or understanding is reached, this rule will not affect the existing rights of either party in connection with the contracting of work and does not change, alter or modify any provisions of the Scope Rule or any rules of the applicable agreement in the handling of such matters."

With respect to the Carrier's admitted failure to give the Organization notice of the contracting out of the work in dispute, under Rule 29 the question is whether the work falls under the Scope Rule? If it does, then there is a contractual obligation by the Carrier to give the Organization notice of its intent to contract out that work ("When work coming under the Scope Rule of the Maintenance of Way agreement . . . the General Chairman will be notified in writing at least fifteen (15) days in advance of any transaction for contracting out of such work.") (Emphasis added.)

"[W]eed mowing" is ". . . work coming under the Scope Rule. . . ." As stated in Rule 2, Section 2, Machine Operators such as the Claimant are classified in the Machine Sub-Department and the Scope Rule (Rule 1) provides that "[t]he rules contained herein shall govern the hours of service, working conditions and rates of pay of all employees in any and all sub-departments of the Maintenance of Way and Structures Department and such employes shall perform all work in the Maintenance of Way and Structures Department. . . ." Further, statements from employees show that weed mowing has been performed by Maintenance of Way employees in the past. The work in dispute was therefore scope covered. Whether the Carrier contracted out the work in the past or not, Rule 29 still obligated the Carrier to give the Organization advance notice of the contracting out of that work. While this is a Rule 29 case, Board precedent developed under other contracting out Rules with similar language as found in Rule 29 is instructive. See Third Division Award 32862:

> ". . . [W]e 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."

See also Third Division Award 31285 ("'[S]hall notify' is mandatory"). So is the language in Rule 29 ("the General Chairman will be notified").

By not giving at least 15 days advance notice to the Organization of its intent to contract out the weed mowing work, the Carrier therefore violated the clear language in Rule 29.

The question now is what remedy is appropriate for the Carrier's failure to give notice as required by Rule 29? The contractual requirement for a carrier to give an organization notice of its intent to contract out scope covered work was explained in Third Division Award 32862, supra:

> ". . . [T]he 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:
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> > '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.'"

If all the Board had in this case was the Carrier's failure to give notice, we would sustain the claim and make the Claimant whole for lost work opportunities solely on the basis of the Carrier's failure to give the Organization advance notice of its intent to contract out the scope covered work as required by Rule 29. See e.g., Third Division Awards 32699, 32861 (where make whole remedies based on lost work opportunities were fashioned solely on the basis of the carrier's failure to give notice and irrespective of whether the disputed work had been exclusively performed by the employees in the past or whether the employees were working at the time of the contracting out).

But there is more.

In its March 31, 2004 letter, the Carrier stated that ". . . the use of sub-contractors for weed mowing has and continues to be a practice on this property and has not been an issue until this latest claim." The Carrier then cites the Board to Third Division Award 37961 between the parties decided September 19, 2006, where the Carrier contracted out state road crossing projects without notice to the Organization. The Board found a violation of the notice requirements in Rule 29, but imposed no remedy for the violation:

> "Part 2 of the claim asserts lack of a proper notice. There is no issue as to the notice provision of the Agreement. Any work belonging to BMWE-represented employees requires the Carrier to provide notice. The Carrier's argument is that it has performed state road crossing work for years without complaint from the Organization. The Carrier argues 'Organization acquiescence' on contracting out state road crossing work, stating that 'notices have never been served on work performed for state road crossings.' And further, 'While your Organization did not deny this fact, it still held that a notice should have been served and Carrier responded by agreeing that notices would be served for State work in the future. . . .' The Carrier's argument was not refuted. As such, while there are no exceptions in the language of the Agreement relating to state road crossing projects, damages are not applicable, and to that degree, Part 2 of the claim [the failure to give notice allegation] has merit."

Thus, on this property, because the Organization "acquiesced" to contractors performing scope covered work in the past, Third Division Award 37961 did not impose monetary relief for the Carrier's failure to give notice of contracting out work falling under the Scope Rule of the Agreement.

And that is precisely what happened here. As the Carrier established, for years prior to this claim (and even though the Organization states that employees have also performed the work) contractors have performed mowing work without complaint from the Organization. The fact that contractors have performed that work does <u>not</u> excuse the Carrier from giving notice to the Organization of its intent to contract out the work as required by Rule 29. But given that the Organization previously allowed that practice to occur without complaint and further given the

holding in Third Division Award 37961 that in such circumstances, monetary relief should not be imposed, it would be manifestly unfair for the Board to impose monetary relief in this case for the Carrier's failure to give notice.

However, the Carrier's obligation to give notice of contracting out ". . . work coming under the Scope Rule . . ." is nevertheless mandated by the clear language of Rule 29. That mandate exists whether or not contractors have performed the work in the past and arguments for the need of the Organization to demonstrate exclusivity in contracting out disputes are irrelevant to the obligation of a carrier to give notice if required by an agreement. See Third Division Award 32862, supra:

> ". . . [E]xclusivity 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 . . . notice and conference provisions'). See also, Third Division Award 32338 and Awards cited therein ('. . . the Organization need not prove exclusive performance of the work to establish a violation of the notice requirement. . . .')."

By the filing and processing of this claim, the Organization has now put the Carrier on notice that the Carrier must give notice under Rule 29 when it intends to contract out ". . . work coming under the Scope Rule. . . ." Now having that knowledge that the Organization is going to hold the Carrier to its notice obligations under Rule 29, if the Carrier fails to give the required advance notice in the future, full monetary relief may very well be awarded for lost work opportunities. Again, see Third Division Award 32862, supra:

> "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."

Because no affirmative monetary relief is ordered in this case as a result of the Carrier's failure to give notice, we must now look to the merits to ascertain whether the Organization's claim of improper contracting out yields affirmative monetary relief. We find it does not.

In Third Division Award 37008 between the parties, the Board found in a dispute over the Carrier's contracting out the installation of ties and related work, that the Organization's claim failed "[b]ecause the Organization was unable . . . to rebut the assertion that it [the disputed work] has been contracted in the past." On the merits, that is this case. Here, the Carrier asserted that "[e]xtensive weed mowing projects on this property has for several years been performed by a third party without complaint or claims from your Organization . . . [and] Frontera Construction Company has provided this service for over two (2) years and prior to that time Carrier utilized the services of Haner Mowing Service." That assertion was not refuted by the Organization. At best, this is a mixed practice case and the Organization has not demonstrated why the Carrier's contracting out of the mowing work which it has done for years now violates Rule 29 or the Scope Rule.

The Organization's assertion of bad faith on the Carrier's part that due to reduction of its forces the Organization is entitled to relief on the merits is not persuasive. The fact remains that over the years and in the face of the contracting language in Rule 29, the Organization allowed the Carrier to contract out the disputed work without objection. There is nothing in Rule 29 that allows the Organization to now recapture that work which it allowed to leave.

In sum, under Rule 29, the mowing work in dispute was ". . . work coming under the Scope Rule . . ."; the Carrier violated Rule 29 by not giving notice to the Organization that it intended to contract out the mowing work; because the Carrier has contracted out mowing work in the past without objection by the Organization, no affirmative relief will be fashioned in this case for the Carrier's failure to give notice; however, should the Carrier fail to give such advance notice as required by Rule 29 in the future after the date of this Award for the contracting out of ". . . work coming under the Scope Rule . . .", the affected employees shall be entitled to full remedial relief for lost work opportunities; and, on the merits, no

relief can be granted because the Carrier has contracted out similar work in the past without objection by the Organization.

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 29th day of February 2008.