Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28513
THIRD DIVISION Docket No. MW-26785
90-3-85-3-541

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
(
(Louisiana and Arkansas Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces to cut brush at Mile Posts T-4 and T-6 on June 13, 14, 15, 18, 19, 20, 21 and 22, 1984 (Carrier's File 013.31-305).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) Section Foreman R. A. Norwood and Trackmen C. W. Archield, E. L. Black and C. B. Garrett shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work described in Part (1) hereof."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

At the time this dispute arose, Claimants were assigned to Section Gang 204 headquartered at Karnack, Texas, which gang maintained trackage including Mile Posts T-4 and T-6. The record shows that on six dates set forth in the claim the parties agree that the Carrier contracted brush cutting for that section of trackage to A. K. Gillis and Sons without first giving written notice to the General Chairman of its intent to contract out the work.

Article IV of the May 17, 1968 National Agreement provides, in pertinent part:

"In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto."

In Third Division Award 23560, decided on this property, a dispute arose over the failure of the Carrier to give prior notice to the Organization concerning the Carrier's intended use of a subcontractor to perform certain bridge spraying functions. The Board held:

"This Board has been called on many times to review claims wherein covered work is subcontracted and Carrier has failed to notify the General Chairman that subcontracts are to be entered into. In each of these cases, this Board has expressed its displeasure at the failure of Carrier to notify the General Chairman when such subcontracts are entered into. We are again faced with the same situation.

Article IV of the May 17, 1968, Agreement requires that Carrier notify the General Chairman when it plans to contract out work within the scope of the applicable Schedule Agreement.

***

Article IV requires that Carrier notify the General Chairman when such work is contracted out. Carrier's position that it must notify the General Chairman of subcontracting only when the work in question is exclusively reserved to the Organization by contract is not appropriate. That is not what Article IV says.

It is the opinion of this Board that Carrier has violated Article IV of the May 17, 1968, National Agreement by failing to notify the General Chairman in writing of its intention to contract out the fire proofing of the wooden bridges between Baton Rouge and New Orleans, Louisiana. For Carrier to ignore this requirement because it thinks the work is not exclusively reserved to the Union or because it claims that it does not have the equipment to do the job is unacceptable. The language of Article IV was written to give the General Chairman an opportunity to discuss these

> aspects of the situation with Carrier. Proper notification under Article IV is a prerequisite to subcontracting of covered work. Carrier failed to meet that requirement in this instance and consequently has violated Article IV of the May 17, 1968, National Agreement."

Notwithstanding the clear holding in Award 23560 between these parties (which issued two years before this dispute arose) that "Carrier's position that it must notify the General Chairman of subcontracting only when the work in question is exclusively reserved to the Organization by contract is not appropriate" and "unacceptable," the Carrier argues in its submission:

> "In summary, the Carrier contends that (1) Article IV, May 17, 1968 National Agreement has no bearing on the instant case in any way as Article IV only covers work that is 'within the Scope of the Applicable Schedule Agreement' and (2) the Scope Rule is general in nature and does not provide exclusive rights to the work in question. The right-of-way mowing and clearing of brush has never been exclusively performed by Maintenance of Way employees on this property."

Although perhaps not exclusively so, under the terms of the 1968 National Agreement, brush cutting work falls "within the scope of the applicable schedule agreement." See the Carrier's denial letter dated October 1, 1984 ("The railway company does utilize its own forces in the operation of the on-track brush cutters...."). Thus, and again, the Carrier has failed to notify the General Chairman as required by Article IV of the 1968 National Agreement and has failed to do so in this case after "this Board has expressed its displeasure at the failure of Carrier to notify the General Chairman when such subcontracts are entered into." Award 23560, supra. To compound matters, in this case the Carrier once again advances the exclusivity argument after this Board held in Award 23560 that such an argument "is not appropriate" and is "unacceptable."

Contrary to the Carrier's assertion, the requirement to give notice to the Organization of the intent to subcontract under Article IV of the 1968 National Agreement does not place the Carrier in a "Catch 22" situation. See Third Division Award 25370 ("The giving of such notice is simply a procedural requirement.... It does not establish affirmatively or negatively, that the disputed work is exclusively covered under the Scope Rule."). By once again failing to give prior written notice of its intent to subcontract work that is "within the scope of the applicable schedule agreement," the Carrier continues to violate its contractual obligation to give the required notice. In light of Award 23560, in this case we are faced with yet another identical violation by the Carrier and are further faced with the same arguments that this Board has clearly rejected in prior matters between the parties. We must therefore again find a violation of the Carrier's obligation under Article IV of the 1968 National Agreement to notify the Organization of its intent to subcontract work within the scope of the Agreement.

With respect to the remedy, we are satisfied that although some Claimants may have been working, on vacation, observing rest days or away from the gang on the dates in issue, this case nevertheless requires the imposition of affirmative relief. We recognize that in situations where a failure to notify of an intent to subcontract has been demonstrated but where the affected employees were fully employed, no affirmative relief has been required. See e.g., Third Division Awards 26673, 26481, 26422 and the remedy portion of Award 23560. However, those Awards do not address the situation presented in this case where the Carrier failed to the degree demonstrated by this record to follow the previous admonitions of this Board over the requirement to give notice. The Carrier's continued failure to abide by the terms of the 1968 National Agreement and its advancement of arguments that this Board has previously and repeatedly rejected require us to do more than again find a contractual violation with no affirmative relief. As a result of the Carrier's failure to give notification to the General Chairman in this case as required by the 1968 National Agreement, the Carrier again frustrated the purpose of Article IV. Although Article IV of that Agreement does not require assignment of the work to Claimants and does permit the Carrier to subcontract that work, notification and discussions (if requested by the Organization) further contemplated by that Agreement could have resulted in increased work opportunities through an agreed-upon assignment of the work to Claimants as opposed to the subcontracting of the work to an outside concern. By the failure to give the required notice, the Carrier did not give the negotiated procedure set forth in Article IV an opportunity to unfold. Claimants therefore clearly lost a potential work opportunity as a result of the Carrier's failure to follow its contractual mandate to give the Organization timely notice. Given this Board's previous admonitions to the Carrier to comply with the terms of the 1968 National Agreement and the Carrier's failure to do so and further considering that the awarding of monetary relief to employees for violations of contracting out obligations even when the affected employees were employed is not unprecedented (see Third Division Award 24621 and Awards cited therein), on balance, we believe that given the circumstances of this case, such affirmative relief is required in order to remedy the violation of the Agreement. To do otherwise would ultimately render Article IV of the 1968 National Agreement meaningless.

The Awards cited to us by the Carrier do not change the result. Third Division Awards 26711, 26565, 26434, 26225, 25370, 25088, 24853, 23423, 23303, 19903 and 16459 involved disputes over the merits of the right to subcontract and not, as here, a dispute over the contractually required obligation to give notice of the intent to subcontract. In light of the unique facts presented by this case, Third Division Awards 26676, 26084, 25276, 24508, PLB 3445, Award 10 and Fourth Division Award 4350 are factually distinguishable.

However, the Organization's assertion that the contractor worked on June 13 and 14, 1984, is disputed by the Carrier. Because the Organization has not sufficiently demonstrated that work was performed by the contractor on June 13 and 14, 1984, those dates shall not be included in the compensation awarded in this matter.

Award No. 28513
Docket No. MW-26785
90-3-85-3-541

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of August 1990.