Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28654
Docket No. MW-28794
91-3-89-3-196

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific 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 to perform bridge repair work on the bridge located at 198.7 on the River Sub, Old Eastern Division beginning September 8, 1987 through October 30, 1987 (Carrier's File 870954 MPR).

(2) As a consequence of the aforesaid violation, B&B Carpenters J. C. Boyer, C. R. Caton, J. W. Penrod, D. L. Fall and B&B Motorcar Operator S. Parastar shall each be allowed:

> '... eight (8) hours per day, per Claimant and including any overtime and Holiday pay, and any additional expense incurred by these furloughed employees that would normally be covered by benefits paid by the Carrier. ***'"

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.

On April 20, 1987, Carrier advised the Organization of its intent to contract one deck girder span and one truss span on Bridge No. 198.7. The parties conferred on the matter but reached no agreement. They could not agree that the work was within the exclusive scope of the basic Agreement and when Carrier proceeded with its plans, the instant Claim was submitted.

Carrier denied that the work in question was reserved exclusively to the members of the Organization and recited that contractor's forces have performed such service without protest.

We do not agree that giving notice under the May 17, 1968 Agreement is a concession that the work in question is solely within the exclusive province of the Organization. The very wording of the Agreement militates against such a conclusion. If a Carrier plans to contract out work of a type which may arguably come within the Organization's jurisdiction of work, it has agreed to notify the General Chairman so that he may request a meeting in the hopes of reaching an understanding. In the absence of such an understanding the Carrier may proceed with the contracting and the Organization may file and progress claims. Nothing in the Agreement "...shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice...."

If the giving of notice were an automatic concession, there is a lot of excess verbiage in the Agreement since it would be, in essence, a total contracting out prohibition. Further, failure to give notice would be a basis for a finding of a violation of the basic Scope Rule, rather than just a violation of the notice requirement. We are aware that the bulk of Board Awards are to the contrary.

Here, Carrier gave notice and conferred. Thus there is no violation of the May 17, 1968 Agreement, nor do we find an actionable disregard of the December 11, 1981 Letter of Understanding.

Turning to the question of a violation of the basic Scope Rule, we have noted the conflicting assertions of job possession. We do not deny, from our review of the record, that the type of work in question may be within the capabilities of the Claimants. But that is not the test under a general Scope Rule. Carrier presented documentation, on the property, that it has contracted out this type of work in the past, without objection by the Organization. The allegation by the Organization that it was not aware of any such contracting out does not aid it in its requirement to show that it has performed this type of work historically and traditionally to the exclusion of all others.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1991.

LABOR MEMBER'S
DISSENT
TO
AWARD 28654, DOCKET MW-28794
(REFEREE SICKLES)

In the first sentence of the first paragraph of the award, the Majority correctly determined that the Carrier had given the Organization written advance notice of its intent to contract out certain bridge work and that a conference was held. The remainder of the award misrepresents the record and incorrectly applies a theory of exclusivity. Hence, the award is palpably erroneous and of no precedential value.

From a reading of the award, the impression is given that the Organization argued that its members had performed this work to the exclusion of all others, including contractors. Nothing could be further from the truth. The Organization argued that work of the character involved in this dispute had been customarily and traditionally performed by the Carrier's Bridge and Building Subdepartment employes and presented evidence thereof through statements of former and present employes. The Majority tacitly admits that, i.e., "*** We do not deny, from our review of the record, that the type of work in question may be within the capabilities of the Claimants. ***" However, it then asserts that under a general Scope Rule, the Organization must show that it has performed this work historically and traditionally to the exclusion of all others. That theory, if it has any validity at all, has

been applied to class or craft disputes, i.e., "*** The exclusivity doctrine, however, applies when the issue involves a challenge to the Carrier's right to assign work to different crafts and/or classes of employees." Third Division Award 28692.

Therefore, I dissent.

Respectfully submitted,

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE
TO
ORGANIZATION MEMBER'S DISSENT
TO
AWARD 28654, DOCKET MW-28794
(Referee Sickles)

It is remarkable that at this late date the Organization would express surprise, and disappointment, and disagreement at the Board finding that the so-called "exclusivity" doctrine is applicable in disputes involving the issue of whether a Carrier has the right to contract out work. The following are only some of the Awards and Referees agreeing with the Majority in this case. Third Division Awards: 28468 (Goldstein), 27626 (Roukis), 27608 (Benn), 27040 (Zusman), 26676 (Lieberman), 26711 (Suntrup), 26565 (Meyers), 26301 (Vernon), 25370 (Scheinman), 24853 (Cloney), 23423 (LaRocco), 23303 (Dennis).

It also is remarkable that Third Division Award 28692 cited by the Organization for the contrary proposition involved the issue of the Carrier's failure to provide notice of its intent to contract out work. It did not involve the right of the Carrier to contract out work where notice is not an issue. Thus, Award 28692 has nothing to do with the Majority finding in this case.

M. W. Fingerhut

M. C. Lesnik

R. L. Hicks

P. V. Varga

J. E. Yost

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' RESPONSE
TO
ORGANIZATION MEMBER'S DISSENT
TO
AWARD 28654, DOCKET MW-28794
(Referee Sickles)

In the second paragraph of their response, the Carrier Members point out that Third Division Award 28692 involved the issue of a Carrier failing to provide notice of its intent to contract out work and as a consequence, that award has nothing to do with the Majority finding in this case. However, in the first paragraph, the Carrier Members cite twelve awards which they contend support the position that exclusivity applies to contracting out of work disputes. Of the twelve, two are "notice cases", seven do not mention or have the work exclusive in them (customarily, historically or traditionally are used) and the remainder involve situations where the Organization was unable to establish that the work had ever been performed by members of the Organization. While many factors were considered in each of those awards, the Carrier Members appear to be painting all denial awards on the issue of contracting with the same brush, i.e., exclusivity. This concept is not relevant to contracting cases and as far as this Member is concerned, has no place in deciding any cases at the NRAB.

At Page 2 of Award 28692, the Majority held that:

> "This Board has consistently rejected the proposition that a Carrier must notify the General Chairman only when the work in question is exclusively reserved to the Organization. The language of Rule 41 and like provisions was written to provide the General Chairman an

"opportunity to discuss the circumstances of the contemplated assignment of work to outside contractors. In this matter, the Carrier has cited a number of Awards dealing with the jurisdictional right to a type of work. The exclusivity doctrine, however, applies when the issue involves a challenge to the Carrier's right to assign work to different crafts and/or classes of employees.

Rule 41 cannot be read so as to infer that work within the scope means work reserved exclusively to the Organization by history, custom, or tradition. This record indisputably establishes the Organization has performed the work in question. Additionally, the Carrier ignores the obvious implication of Rule 35 1/2, therefore, this Board finds the Carrier violated the Agreement when it failed to notify the General Chairman of its plan to contract out the blacktopping performed on October 14, 15, and 16, 1987."

The last sentence of the first paragraph clearly states that "*** The exclusivity doctrine, however, applies when the issue involves a challenge to the Carrier's right to assign work to different crafts and/or classes of employees." What could be clearer? When the Carrier chooses to assign a particular craft or class of employes to perform a certain task, there is no Agreement requirement of prior notification or advisement to Organization prior to the work being performed. Hence, Award 28692 clearly supports the Organization's position that the exclusivity theory does not apply to contracting out of work cases.

Respectfully submitted,

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER MEMBER'S RESPONSE
TO
CARRIER MEMBERS' RESPONSE
TO
ORGANIZATION MEMBER'S DISSENT
TO
AWARD 28654, DOCKET MW-28794
(Referee Sickles)

Without further belaboring the issue of the industry-wide applicability of the so-called "exclusivity doctrine" in contracting out disputes, suffice it to say that this Award decides the issue with finality insofar as the parties to this dispute are concerned.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost