Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29202
Docket No. MW-29291
92-3-90-3-189

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

PARTIES TO DISPUTE: (CSX Transportation, Inc. (Formerly The Seaboard Coast Line Railroad Company)
(
(Brotherhood of Maintenance of Way Employes

STATEMENT OF CLAIM:

"(1) The Agreement was violated when the Carrier, without concurrence of the General Chairman assigned outside forces (Lewis Construction Company) to perform work of painting stripes, placing and painting four rails around fire hydrants and painting light poles in a parking lot at Taft Yard, sometime in June 1989. [Carrier's file 12 (89-731), Organization's file CARP-89-31].

(2) As a consequence of the aforesaid violation, Carpenter Foreman C. Roberts, Carpenters D. V. Gilbert, H. G. Davies, D. L. Stanaland, Carpenter Helpers M. W. Rauh, J. L. Bathe and B. J. Moore shall each be paid an equal proportionate share of 700 man hours consumed in performing referred to in part one (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.

In June 1989, Carrier employed the services of the Robert Lewis Construction Company. The Organization describes the work as installing guard rails and painting in the parking lot area at the Taft Yard in Taft, Florida. Carrier characterizes it as paving road crossings, patching asphalt paving, and reshaping parking areas. The Organization alleges a violation of Rule 2, Contracting, of the Agreement and seeks compensation for an equal proportion of 700 man hours for each of the named Claimants, all of whom were members of the Maintenance of Way and Structures Department (Bridge and Building Subdepartment).

While Carrier argues that the work in question is not covered by Rule 2, it also notes that it convened a conference to discuss the subject work with the General Chairman. At the same time, on March 3, 1989, it sent advance notice of its intent to contract out the Taft Yard work. By its actions, Carrier in effect acknowledged that the disputed work was rightfully subject to Rule 2.

Carrier further alleges that the General Chairman elected not to attend the conference scheduled for April 18, 1989, and that, consequently, it is not at fault. The Organization counters that Carrier made no mention of its intent to discuss the Taft Yard work on that date, and that an earlier meeting that day (that ran long) prevented the General Chairman from attending the conference.

This Board is not convinced that Carrier fully complied with the spirit of Rule 2 by electing not to discuss the matter further with the appropriate Organization representative. Rule 2 requires a good faith effort on the part of both groups to reach a general understanding.

While there is a basis for sustaining this claim, we note that Claimants were employed at the time. As this Board pointed out in Third Division Award 26174, the position that no compensation is warranted where Claimants are fully employed and suffer no loss has long been applied in the industry. We have considered the Organization's arguments for overriding this general standard (flagrant abuse and the like) and find no basis, under the facts present here, for altering our position.

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 7th day of May 1992.

CARRIER MEMBERS' CONCURRING
AND DISSENTING OPINION
TO
AWARD 29202, DOCKET MW-29291
(Referee Gold)

Although the Majority was not convinced that the Carrier fully complied with the spirit of Rule 2 by electing not to discuss the matter further with the appropriate Organization representative, the decision nevertheless properly upheld the longstanding principle that no compensation is warranted where Claimants are fully employed and suffer no loss.

What is troublesome about this Award, however, is the Majority's erroneous conclusion that Carrier's willingness to convene a conference to discuss the subject work with the General Chairman, in combination with its March 3, 1989 notice of intent to contract out the Taft Yard work, constituted an acknowledgment "...that the disputed work was rightfully subject to Rule 2."

Previous Awards of this Board have held that such is not the case. See, for example, the following:

Third Division Award 28543

> "As a final matter, we reject the Organization's assertion that, by notifying the employees of its intent to contract out the cleaning and painting work, Carrier implicitly admitted that the work was specifically covered under the Scope Rule. That argument has been rejected in several prior Awards. Third Division Awards 25370, 20920. The rationale generally given is that such notice is a procedural requirement and does not establish, either affirmatively or negatively, that the disputed work is exclusively covered under the controlling Agreement."

Third Division Award 25370

> "Fourth, we do not agree that by notifying the Organization of its intent to contract out the roofing repairs, Carrier was admitting that the work was

specifically covered under the Scope Rule. The giving of such notice is simply a procedural requirement pursuant to Article 36. It does not establish, affirmatively or negatively, that the disputed work is exclusively covered under the Scope Rule (see our Award 20920)."

Third Division Award 20920

"Additionally, Petitioner contends that the giving of notice as to the contracting constituted an admission by Carrier that the disputed work was covered by the Scope Rule.

We cannot agree. Such notice is required under the Agreement in the event Carrier plans to contract out work. The giving of such notice, therefore, merely serves as formal compliance with the Agreement; it does not of itself establish exclusive Scope Rule coverage of the disputed work, negatively or affirmatively. For example, had the Carrier elected not to give notice it would not logically follow that the work was not within Scope Rule coverage."

In view of the above precedent, that aspect of the Award is erroneous and without precedential value.

Michael C. Lesnik
M. C. LESNIK

M W Fingerhut
M. W. FINGERHUT

Robert L Hicks
R. L. HICKS

P V Varga
P. V. VARGA

James E. Yost
J. E. YOST

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' CONCURRING AND DISSENTING OPINION
TO
AWARD 29202, DOCKET MW-29291
(Referee Gold)

The remarks in the "OPINION" are misleading and, as usual, represent only one side of the coin.

It will be noted that the Carrier Members correctly observed that the Majority found the Carrier failed to comply with the spirit of Rule 2 in this case. However, what the Carrier Members, along with the Majority, apparently overlooked was that the Carrier's violation of the spirit of Rule 2 was a violation of **GOOD FAITH**, i.e., the good-faith mandate to notify and confer to reach an understanding setting forth the conditions under which covered work will be performed. What the Carrier Members, along with the Majority, further overlooked is that the finding of such a violation is a precedent, threshold matter which precludes examination of other issues, such as exclusivity or full employment and which requires a sustaining award in full (see Awards 26770, 28943 and 29121). In addition, the Carrier Members apparently fail to recognize the precedent on this property, i.e., Award **18287**, as well as Award 26182, which fully supports the Majority's finding that notice and conference pursuant to Rule 2 demonstrates that the work fell within the rubric of the Agreement.

Notwithstanding, the Carrier Members, this time in concurrence with the Majority, again eschew prior precedent involving this

Carrier and this property concerning full employment. In this connection, we are impelled to point out that the "longstanding principle that no compensation is warranted where Claimants are fully employed and suffer no loss" is at best a divided principle. Awards too numerous for citation herein exist that properly compensate "fully employed" Claimants for contract violations. Nevertheless, typical thereof are Awards **6109, 6199, 6200, 18287, 18365, 18366, 22591, 23498, 28430** and **29059** involving this Carrier and contracting out of work disputes which paid fully employed Claimants but which were apparently ignored. Suffice it to say there is no industry standard with regard to full employment and the precedent involving this Carrier and identical contracting provisions is diametrically opposed to the position of the Carrier Members.

In any event, the awards which denied compensation for employes who were working at the time of a proven violation clearly missed the point. The employes affected clearly suffered a loss since the work performed by the contractors was no longer available for them to perform. While most Agreement employes endure a furlough each year of varying duration, such greatly reduces their ability to earn a sustainable wage. Hence, "full employment" becomes little more than a relative theory to escape monetary liability **AFTER** the Carrier was found to have violated the Agreement. By allowing the Carrier this device to reduce the

amount of work customarily assigned to its own employes, the work force will be reduced, eventually, to the point where no collective bargaining Agreement employes exist. By disallowing the remedy requested for the proven Agreement violation in this case, the Board is in effect allowing the Carrier to reduce its forces and sanctioning the use of contractor forces. Because the claim process under the Railway Labor Act is essentially the ONLY vehicle by which the integrity of the Agreement can be protected, the Board's disallowance of the remedy here countenances the destruction of the Agreement. Such was obviously **NOT** the intent of the Board or of the parties when they negotiated the Agreement.

The remainder of the award is correct and by no means "troublesome".

Respectfully submitted,

D. D. Bartholomay
Labor Member