Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29332
Docket No. MW-29061
92-3-89-3-495

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Kansas City Southern 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 (Herzog Construction) to perform bridge work (remove rock, build forms and pour concrete) on the Brazil Creek Bridge at Mile Post 319 from February 9 through 27, 1987 [Carrier's File 013.31-320(221)].

(2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intention to contract out said work as required by Addendum No. 9 (Article IV of the May 17, 1968 National Agreement).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Bridge and Building Sub-department employes D. G. Brown, T. V. Foresee, C. L. Briggs, B. D. Stafford, B. J. Cagle and W. S. Clinton shall each be allowed pay at their respective rates for an equal proportionate share of the four hundred forty-eight (448) man-hours expended by the outside contractor performing the work identified in Part (1) above."

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.

Carrier contracted out bridge maintenance work on its Bridge 319A located at Brazil Creek during February 1987. The Claim asserts the contractor "... took out rock from a bridge abutment and built forms and poured concrete..." No further specifics about the work emerge from the record.

The Organization alleges violations of the Scope Rule, Seniority Rule, Addendum No. 9, which contains Article IV - Contracting Out of the May 17, 1968 National Agreement, and, finally, the good faith requirements of the December 11, 1981 National Letter of Agreement regarding the contracting of work. The Organization asserts Carrier failed to provide proper notice of its intent to contract the work, that such work was within the scope of the Agreement and was, thereby, reserved to the employees, and that the Claimants suffered a future lost work opportunity as a result. It cites several prior Awards in support of its positions.

Carrier denies any alleged violation of the Agreement. It says the type of work involved has customarily and regularly been done by other than employee forces. It contends that notice of the contracting of the disputed work is not required where the work is not within the scope of the Agreement. Carrier also asserts that all Claimants were fully employed during the dates of the Claim and suffered no lost work opportunity. It also cites prior Awards in support of its positions.

In reviewing the instant dispute, we have confined our consideration, as we must, to those matters raised by the parties on the property.

Because of the record developed by the parties and the nature of the precedent cited from prior Awards, the issues are postured somewhat uniquely in this dispute. We will address them in the order they were submitted by the Organization.

The first part of the Claim raises the question whether the work was within the scope of the Agreement and reserved to the Organization. In view of such a dispute, the Organization has the burden of proving, by either explicit Agreement language or by persuasive evidence of traditional and historic performance, that the work is reserved to its members. The Rules cited by the Organization are general in nature. Its burden, therefore, is to demonstrate traditional and historic performance of the type of work in dispute.

The Carrier cited Third Division Award 22367, involving these same parties, as an endorsement of the exclusivity doctrine on this property. Whether the exclusivity doctrine remains a viable standard of proof, in light of Article IV of the 1968 Agreement and the December 11, 1981 National Letter of Agreement on contracting of work, is a matter of some controversy. As a minimum, however, proof that a type of work has been traditionally and historically performed requires substantially more than a mere demonstration of past performance.

Detailed review of the Organization's evidence of past performance establishes only that repair work on concrete bridge substructures as well as a wide variety of unrelated work has been performed by the employees in the past. The evidence also contains references to performance of the same work

by contractors. The six statements in the record do not, in our view, demonstrate, on a system-wide basis, the requisite regularity, consistency and predominance in the performance of the disputed work necessary to support a finding that the Organization has traditionally and historically performed the work. On this record, therefore, we find the Organization has not established a prima facie case of scope coverage for reservation of work purposes. Accordingly, the first part of the Claim must be denied.

The second part of the Claim alleges that Carrier failed to provide the General Chairman advance notice of its intention to contract out the work. Carrier relies heavily on Third Division Award 26084 for the proposition that notice is not required where scope coverage has not been established. This Award, involving grade crossing renewal work, is a 1986 decision which was issued approximately six months prior to the events in dispute here. While we do not have the record before us for precise analysis, the language of the decision convinces us that the Organization provided no probative evidence of past performance of the disputed work there. It relied totally on assertions which were challenged by the Carrier. Absent any evidence of past performance, it was not inappropriate for the Board to find no notice was required. The record here is different.

Many decisions of the Board, too numerous to cite, stand for the proposition that past performance of the disputed work by the employees is sufficient to trigger the advance notice requirements of Article IV of the May 17, 1968 National Agreement when the type of work is to be contracted out. Indeed, Third Division Award 23560, a 1982 decision involving these parties, followed that standard. Moreover, the language of the December 11, 1981 National Letter of Agreement strongly reflects a negotiated intent that doubts about the need to provide notice in a given situation be resolved in favor of providing notice. While the Carrier contends that the Letter of Agreement is not applicable, the Organization's evidence establishes that it is. On this record, therefore, we find that Carrier was required to provide notice of its intention to contract out the disputed work and failed to do so.

The monetary damages portion of the Claim remains for determination. After consideration of all of the circumstances bearing on this portion of the Claim, we do not find a monetary remedy to be warranted for two primary reasons. First, Carrier's violation of the notice provisions, in this dispute, is technical in nature. Carrier had an arguable right to rely on the decision in Third Division Award 26084 although a careful reading of it shows its rationale is not on point given the record here. In addition, despite the Organization's assertions to the contrary, there is no persuasive evidence that Carrier acted in bad faith or otherwise willfully disregarded its notice obligations. If such evidence was convincingly present, we would have given consideration to fashioning an appropriate monetary award. Second, the record contains no evidence of actual loss by any of the Claimants. In the absence of unusual circumstances, which are not present in this record, the entitlement to a monetary claim is a separate issue requiring independent proof of loss. It does not automatically flow from a finding that the Agreement has been violated. Such loss has not been established herein.

Instead of a monetary award, our remedy is to recognize the technical violation of the Agreement and direct Carrier to comply with its obligations under Addendum No. 9 and the December 11, 1981 Letter of Agreement. These obligations require, where appropriate, providing notice and undertaking good faith efforts to reduce the incidence of subcontracting work and increase the use of its maintenance of way forces to the extent practicable.

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 24th day of July 1992.