

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31012
Docket No. MW-30712
95-3-92-3-504

The Third Division consisted of the regular members and in addition Referee Margo R. Newman, when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)

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

- (1) The Agreement was violated when Carrier assigned outside forces (Marlatt Contracting) to haul/move ties, ballast and rail in the vicinities of Stella, Verdon, Straussville and Falls City, Nebraska on the Old Omaha Division from March 1 through 20, 1991 (Carrier's File 910460 MPR).
- (2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operators K.D. Eichelberger, M.L. Fitzgerald, T.D. Clark, M.W. Schmidt and Trackman Driver M.D. Hennigh shall each be allowed pay at their respective rates of pay for eight (8) hours per day plus any overtime pay from March 1 through 20, 1991."

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 waived right of appearance at hearing thereon.

The Organization has raised a timely objection to evidence offered by the Carrier de novo in its Submission. None of the evidence so offered will be considered by this Board. The Board's findings are based solely upon the record established on the property.

This claim protests Carrier's use of three backhoes, one dozer and one truck with long haul bed and five employees supplied by Marlatt Contracting between March 1 and 20, 1991 to haul and move ties, ballast and rail in support of Gangs 4707 and 4703. Notice was sent to the General Chairman on March 19, 1991 expressing Carrier's intention to contract equipment support necessary to assist company forces in the rehabilitation and renewal of road crossings in connection with 1991 Tie and Rail Relay Programs, and a conference was held thereon on March 25, 1991.

The Organization argues that the work of operating machines in connection with routine track maintenance and repair has historically and customarily been performed by employees, is reserved to them under the Scope provisions of the agreement, and the equipment needed could have been leased or rented for employees to operate. The Organization also contends that Carrier exhibited its bad faith in failing to furnish proper advance notice, requiring a remedy to Claimants, who it contends were not fully employed since three worked at lower-rated classifications, one was furloughed between March 1 and 18, 1991, and none worked during rest days when contractor employees performed disputed work.

Carrier argues that under the general Scope clause, the Organization has failed to show either exclusive performance or a reservation of this work to employees, and its past practice of contracting out similar work and precedent supports its continued ability to do so under Article IV in this case. Carrier also notes that no monetary remedy is appropriate even if the notice provisions were violated since Claimants were fully employed, and prior awards protect Carrier from any adverse consequences of a failure to provide notice prior to the issuance on this property of Third Division Award 28849 on June 25, 1991, first holding that notice was required, citing Third Division Awards 29474, 29475, 29477, 29532, 29560, 29791, 29792 and 29825.

The application of the notice and meeting requirements of Article IV to this case, as well as its protection of "existing

rights" in connection with contracting out, is best set forth in the following excerpt from the Board decision in Third Division Award 29825:

"As has been enunciated in greater detail in Third Division Award 29640, if the work at issue is work previously performed by Organization employees, the Organization need not prove exclusive performance to establish a violation of the notice requirement in Article IV. Evidence on the record before this Board clearly establishes that the work in question had been previously performed by maintenance of way employees. Accordingly, parts (1) and (2) of the Claim are sustained. The Organization has not proven, however, that the work has been reserved exclusively to maintenance of way employees. The Scope Rule contained in the Agreement between the Parties cites employee classifications, not work reserved to those employees. Accordingly, there is no basis for this Board to find that the Carrier is precluded from contracting out the work in question."

With respect to the appropriate remedy, this Board is not convinced that the rationale utilized in the cases cited by Carrier finding that no backpay remedy should be awarded for notice violations prior to the June 25, 1991 effective date of Third Division Award 28849 is applicable herein. In those cases, no notice was served by Carrier, who argued that it was unaware of its obligation to do so relying upon its longstanding practice of contracting out without objection. In this case, Carrier did not argue that it was unaware of its obligation to serve notice, but, rather, that its March 19, 1991 notice satisfied its Article IV responsibility, as did the March 25, 1991 conference resulting from said notice. It is not surprising that Carrier may have been aware of its notice obligation, since Third Division Award 28559 was issued on this property in September, 1990, and found that Article IV required the serving of notice in cases where work to be performed by a contractor is of the nature which has been assigned to employees under this Agreement, a fact admitted by Carrier during the handling of the claim on this property.

Carrier incorrectly states that its notice and conference were accomplished prior to the work in question being performed. If the March 19, 1991 notice relates to the disputed work, as alleged by Carrier, then it clearly was served after the work had commenced, and the conference occurred after all work had been completed. This untimely notice clearly violates the specific provision of Article IV requiring notice to be served "not less than 15 days" prior to the contracting. In its April 17, 1990 [sic] letter confirming the

holding of the March 25, 1991 conference, Carrier argues that the March 19 notice met the required "rule of reason" by providing sufficient specificity to enable the parties to discuss the matter fully in conference, and served its intended purpose. Clearly, a notice and conference occurring after the fact does not establish the requisite good faith attempt to reach an understanding concerning the contracting under Article IV. Under such circumstances, this Board has sustained a monetary award regardless of whether claimants were otherwise working. See Third Division Award 29472. We see no reason to depart from accepted principles concerning damages reflecting lost work opportunities in notice violation cases. Accordingly, we direct that the Claim be sustained with respect to those Claimants who actually suffered a wage loss on the dates worked by the contractor during the claim period as a result of either not working (including any rest days where work was performed), working in a lower-rated job classification, or being furloughed.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders the 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 26th day of July 1995.