Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31720
Docket No. MW-31159
96-3-93-3-110

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former
(Western 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 (Johnson Equipment and Scaffolding and Con Seal) to hang scaffolding and repair bridge seats and cracked bridge piers on Bridge 317.43 on the Feather River Division on September 24 through October 13, 1990 (Carrier's File No. 910244 WPR).

2. The Agreement was further violated when the Carrier failed to give the General Chairman fifteen (15) days' proper advance written notice of its intent to contract out the work and failed to afford the General Chairman a timely conference prior to contracting out the work in Part (1) above, as required by Article IV of the May 17, 1968 National Agreement.

3. As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants J. L. Bye, G. D. Josephson, G. A. Baland and G. W. Legg, shall each be paid an equal proportionate share of five hundred ninety-seven (597) hours, at their respective straight time rates and forty-three (43) hours at their respective time and one-half rates, for the total number of hours worked by employes of Johnson Equipment and Scaffolding."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of 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 were given due notice of hearing thereon.

On September 11, 1990, Carrier gave the Organization notice of its intent to solicit bids for concrete repairs consisting of epoxy injection on Bridge 317.43, Canyon Subdivision, Feather River Service Unit. The Organization objected and requested a conference. The contractor began work on September 24, 1990. Conference was held on September 27, 1990.

The Organization filed a claim on November 20, 1990, alleging that the Claimants should have performed the work and that Carrier failed to give proper notice of its intent to subcontract. On January 11, 1991, Carrier responded denying the claim but did not address the notice issue. On April 1, 1991, the Organization appealed the denial, reiterating its position, including its position regarding Article IV's notice requirement. Carrier responded on May 31, 1991, denying the appeal and attaching documentation of the notice that was given and the conference that was held. The parties maintained their positions in conference and the matter was appealed to this Board.

The Organization contends that Carrier violated the Agreement by contracting out work which, in the Organization's view, was reserved to the employees. The Organization observes that bridge repair work is at the heart of the work within the scope of the Agreement, and asserts that the employees had traditionally and customarily performed the work in question. The Organization maintains that it need not establish that the employees exclusively performed the work to trigger Carrier's obligations under the Agreement.

The Organization contends that Carrier had the burden of proving its justifications for contracting out the work. The Organization argues that Carrier failed to prove a past practice of contracting out the work and failed to prove that it did not have the equipment to perform the job or that the employees were incapable of performing the job. Moreover, the Organization cites a December 11, 1981, letter from Carrier to the Organization assuring that it "will assert good-faith efforts to reduce the incidence of subcontracting . . . including the procurement of rental equipment and operation thereof by carrier employees." The Organization maintains that Carrier failed to prove that it could not procure rental equipment for the job.

Furthermore, the Organization contends that Carrier violated Article IV of the May 17, 1968, Agreement which required at least fifteen days notice of intent to subcontract. The Organization accuses Carrier of bad faith in an attempt to "squeeze" its maintenance of way forces.

The Organization urges that a monetary remedy be imposed, even though the Claimants were fully employed during the period in question. The Organization argues that Carrier did not demonstrate that the Claimants could not have performed the work by rescheduling other work or on an overtime basis. In the Organization's view, the Claimant's should be compensated for their lost work opportunity.

The Organization further maintains that a monetary remedy is appropriate because Carrier is a repeat violator of the notice requirements. The Organization accuses Carrier of acting in bad faith and urges that this Board require Carrier to compensate the Claimants to deter future violations.

Carrier contends that the Scope Rule is general in nature and that the Organization had the burden of proving that it has exclusively performed the work in question. Carrier argues that, not only did the Organization fail to prove exclusivity, but that Carrier has contracted out such work frequently over the years. Consequently, in Carrier's view, neither Article IV nor the 1981 letter apply to this matter.

Carrier maintains, however, that it did comply with Article IV. Carrier contends that it gave the Organization substantial notice of its intent to subcontract and urges that if the Organization had sought a conference in a more timely manner, one would have been held sooner. Carrier contends that it contracted out for reasons of efficiency and lack of equipment and that it did so in good faith.

Finally, Carrier argues that if it did violate the Agreement, no monetary remedy is in order. Carrier contends that the Claimants were fully employed during the period in question and, therefore, suffered no monetary losses.

This Board does not write on a clean slate. The issue of subcontracting has been the subject of numerous awards between the parties over the years. Carrier has consistently argued that Article IV's notice requirement does not apply unless the Organization can prove that it has exclusively performed the work in question. This Board has just as consistently rejected this argument. See, e.g., Third Division Awards 31171, 30281, 29825, 29792, 28849, 29023, 29021, 28849, 28559, 28733. There was no dispute that the employees have, at times, performed the work in question. Under our consistent precedents, Carrier was required to give at least fifteen days' notice of its intent to subcontract and, upon request, confer with the Organization prior to subcontracting.

The record reveals that Carrier failed in both respects. Its notice was issued September 11, 1990. Subcontracting began on September 24, 1990. The conference was held on September 27, 1990. Thus, Carrier's notice did not comply with the time lines set forth in Article IV and violated the Agreement. See, e.g., Third Division Awards 31171, 29023.

We next consider whether Carrier was precluded from subcontracting the work or was required to justify its decision to subcontract. We note that the Scope Rule is general in nature and that no express language reserves the work exclusively to the employees or otherwise prohibits or restricts Carrier from subcontracting. Under these circumstances, many awards require that the Organization prove that its employees performed the work to the exclusion of others. Even those awards that do not require a showing of exclusivity do place on the Organization an initial burden of proof of the extent to which the employees have performed the work. For example, in Third Division Award 29007, we stated:

> "The Organization has the burden of proving by a preponderance of the evidence that the disputed work is of a character customarily and historically performed by the employees it represents. While, as described earlier, we do not find this burden to require a showing of exclusive performance, it does require proof of more than a shared or mixed practice."

In the instant claim, we are presented only with assertions by the Organization that its employees historically have performed the work. Assertions, however, cannot substitute for evidence or proof. We are forced to conclude that the Organization has failed to carry its burden of proof. In the absence of such proof, we will not require Carrier to prove its justifications for the decision to subcontract.

Thus, we find that Carrier violated the Agreement by failing to give adequate notice of its intent to subcontract, but did not violate the agreement by subcontracting out the work. We are not persuaded that a monetary remedy for the notice violation is appropriate.

Although there is precedent between the parties for a monetary remedy for lost work opportunity where the subcontracting itself violates the Agreement, See Third Division Award 30827, numerous Awards between these parties consistently restrict monetary relief for notice violations to furloughed employees. See, e.g., Third Division Awards 31171, 30281, 29825, 29792, 28849, 29023, 29021, 28849, 28559, 28733.

Third Division Award 28513 did grant monetary relief to fully employed claimants for a notice violation by a different Carrier. We justified the relief as follows:

> "[T]hose awards [denying monetary relief for notice violations] 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."

We do not find Award 28513 to control the instant case. First, the instant case does not present a total failure by Carrier to give notice. Carrier's notice was a few days late, but Carrier did give substantial, albeit inadequate, notice and did meet with the Organization, albeit again in an untimely manner. Second, this incident arose prior to this Board's admonitions to this Carrier to give Article IV notice in circumstances similar to those present in this case. In Third Division Award 29825, we stated:

> "With respect to the Organization's claim for punitive monetary damages (Claimant was employed during the dates in question), . . . , the Board finds that Carrier has been on notice since the issuance of Third Division Award 28849 involving these parties that it is "hereafter required to provide notice of plans to contract out." The events precipitating the instant case evolved prior to issuance of that Award on June 25, 1991. Therefore, the Board does not sustain paragraph (3) of the present claim.

Future failure to comply with the notice provisions of Article IV, however, will likely subject Carrier to potential monetary damage awards, even in the absence of a showing of actual monetary loss by Claimants (See Third Division Awards 29034, 29303, 28513)."

Similarly, the instant case arose in 1990, i.e., prior to the Awards placing Carrier on notice of its potential liability for monetary damages to fully-employed claimants for notice violations. Accordingly, under all of the circumstances, we conclude that monetary relief in the instant claim should not be awarded.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an 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 25th day of September 1996.