Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31996
Docket No. MW-30060
97-3-91-3-472

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Maryland Office Relocation, Inc.) to move the Carrier's office furniture from its General Office to the REA Building in Washington, D.C. on January 26, 27 and 28, 1990 (System File NEC-BMWE-SD-2695 AMT).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B employes J. A. Lewis, B. Shaffer, L. Pretty, R. Ellsworth, R. Montour, M. Kramer, E. McMahan, P. Colliere, D. McCadden and P. McDonough shall each be allowed twenty (20) hours' pay at their respective time and one-half rates."

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 were given due notice of hearing thereon.

This dispute centers on Carrier's decision to contract out the moving of furniture in connection with the relocation of its General Offices in Washington, D. C. It is not disputed that on January 26, 27 and 28, 1990, Carrier utilized Maryland Office Relocation, Inc. (MOR) to relocate the General Office to the REA building. MOR utilized 15 men to perform this work for four hours on January 26, eight hours on January 27, and eight hours on January 28, 1990. The 15 men had a total of 20 hours apiece for the three days.

On March 20, 1990 the Organization submitted a claim alleging that Carrier had violated the Agreement, particularly the Scope and Work Classification Rule, when it "elected to contract with a private company to move the Carrier's office furniture and did not offer the work assignment first to the Claimants." The Organization went on to submit that: "The Claimants have performed this work in the past, in fact, many of the Claimants are the individuals who relocated the General Office to the building it was in before this relocation described above." Finally, the Organization noted that Carrier had failed to notify the Organization of its intent to contract out the work claimed, maintaining that: "This action in itself requires payment of the claim as presented."

Carrier denied the claim asserting:

> "You have failed to produce any evidence to support your contention that the B&B department employees have performed the work of moving office furniture for the company on a system wide basis or that the work is reserved exclusively for these employees by agreement or practice as is required in a claim of this nature.

The work of moving furniture is not reserved contractually to B&B Mechanics, or any other class or craft by virtue of the contract language, practice or agreement, and has in fact, been historically performed by virtually every class and craft of Amtrak employee. The most recent use of contractors to perform said work was during the move into refurbished office space at 30th Street Station, Philadelphia, PA. Quaker Moving Company handled that move.

Claimant J. A. Lewis is not a proper claimant in this matter. Mr. Lewis was on military leave of absence on January 26 through 31, 1990, and was therefore, not available as alleged.

Finally, there is nothing in the Agreement that requires Amtrak to notify the Organization of its intent to use private contractors to move office furniture."

On August 27, 1991, the Organization sent Carrier the following:

"The Organization filed a claim and subsequent appeals citing violation of the Scope and several work related rules of the respective agreement. Organization also cited past practice was violated in the case at hand. The Scope of the agreement was clearly violated when the Carrier failed to give the required notice to the Union of its intent to contract the disputed work. For this reason alone the claim should be sustained.

Without retreating from above, the Organization has just recently been forwarded additional information regarding the instant case. The information is statements from the B&B employees at Washington. There are seven statements and they are attached for your information. The statements clearly sustain the Organization's position.

It is our intention to include this information in the record and list it with the Third Division of the NRAB. We understand the time limit to progress the case to the NRAB expires on August 28, 1991, which is near at hand. However, as the information was only recently furnished to us it has also been expediently relayed to your office as well.

Being aware of the short time for your office to respond, the Organization is agreeable to extending the time period for progressing the case to the NRAB if you should desire additional time in which to respond or discuss this new information."

On that same date, Carrier responded to the Organization "objecting to the inclusion of these handwritten statements at this late date. We will respond in more detail in the near future. However, we do not believe that it is necessary to extend your August 28, 1991 time limit for progression of this dispute in order to allow us an opportunity to respond." Carrier went on to state: "Numerous decisions of the NRAB have held that neither party is entitled to gain procedural advantage through the manipulation of the record and that the carrier is entitled to respond to information submitted to it immediately prior to the submission of the dispute to the Board." Finally, Carrier stated that this Board lacks proper jurisdiction to hear this dispute.

As the moving party, with the burden of proof with respect to Scope Rule coverage of the disputed work, the Organization appropriately submitted in handling on the property, seven written statements bearing on the work at issue. Carrier's assertion that the statements were "too late" to be considered is contrary to a host of Awards holding that any evidence submitted on the property prior to the date of the Notice of Intent to file a Submission may be considered by the Board. See Third Division Awards 20773 and 22762 for example. We see no no reason to disbelieve the Organization's representation that it provided the evidence to Carrier as soon as possible on the property prior to filing its Notice of Intent and no showing of prejudice to Carrier. Nor did Carrier submit any probative evidence with respect to its assertions of "sharpshooting" or manipulation of the record. Finally, Carrier's argument that primary jurisdiction in Special Board of Adjustment No. 1005 deprives this Board of concurrent jurisdiction and authority to hear and decide this dispute is not persuasivly established on this record.

On the merits of the dispute, the Organization made out a prima facie case of violation of the notification and conferencing requirement. With respect to remedial damages for the proven violation, it is undisputed that Claimant Lewis was on military leave at the time of this dispute and his claim is dismissed. The Organization submitted that the remaining Claimants, Messrs. Shaffer, Pretty, Ellsworth, Montour, Kramer, McMahan, Colliere, McCadden and McDonough are entitled to be compensated at the overtime rate of pay for the lack of overtime opportunity. Despite the logic of this argument, it has long been held on this property that, even in such situations, damages are paid at the straight time rate. Therefore, Carrier is directed to compensate the Claimants, other than Mr. Lewis, for 20 hours each at their respective straight time rates of pay.

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 6th day of May 1997.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 31996, DOCKET MW-30060
(Referee Eischen)

This dispute was argued before the Referee on June 22, 1993, about four years ago.

One of the issues involved was whether the Board had jurisdiction over subcontracting disputes between AMTRAK and the Brotherhood of Maintenance of Way Employes. At the time, there were no prior Awards dealing with the issue. As the years rolled by, however, the Third Division issued Awards 31481, 31482, 31484 and 31485, all of which found that Special Board of Adjustment No. 1005 had exclusive jurisdiction over the subject matter.

The Awards were mailed to the Referee on June 10, 1996. The Referee's Award here disposes of the issue with the terse comment that the Carrier's jurisdictional argument "...is not persuasively established on this record." No mention is made of the four Awards that were mailed to the Referee almost one year earlier. The only logical conclusion that can be reached is that the Referee did not receive the Awards or somehow misplaced them after receiving same, prior to turning to the case almost a year later.

This Referee's prior Awards make it clear that only such misadventure would explain his failure to dismiss the instant claim.

By way of example, we cannot help but remember the Referee's opinion as memorialized in Third Division Award 29612:

> "For reasons not apparent on its face, Third Division Award 28269, rendered February 28, 1990, rejected the precedential value of the holding in Public Law Board No. 2807, Award 55 with the following dismissive statement:
>
> > 'Carrier's reliance on Awards 10 and 55 of Public Law Board 2807 is misplaced; those Awards dealt with circumstances prior to the May 22, 1981 Agreement.'
>
> We do not find the approach followed in Third Division Award 28269 appropriate in the present case. **A decent respect for stability in labor relations and predictability in contract interpretation and application compels us to treat Public Law Board No. 2807, Award 55 as authoritative precedent.**" (Emphasis added)

The Referee's opinion as set forth in Third Division Award 29230 further convinces us that something went awry:

> "It has long been recognized and accepted in labor-management arbitration generally, and in railroad industry arbitration specifically, that prior decisions involving the same facts, issues and Parties should be considered authoritative precedent. The legalistic common-law doctrines of res judicata and stare decisis do not technically apply in arbitration. But considerations of stability, predictability and good faith relations generally support the principle that final and binding decisions interpreting and applying a contract provision should be honored. If that doctrine causes 'the shoe to pinch,' the proper forum for obtaining relief is the bargaining table, not continual adjudication of ostensibly settled matters. In following such reasoning, the Board held in Third Division Award 2526 as follows:
>
> > 'Whatever may be said of the soundness of our construction of the contract, our conclusion is impelled by Award No. 1852. That involved a dispute between the same parties under the same contract and upon essentially indistinguishable facts. A different conclusion than we have reached would, in effect, overrule the decision in that Award. To do this would be subversive of the fundamental purpose for which this Board was created and for which it exists: settling of disputes. When a contract has been construed in an award the decision should be accepted as binding in subsequent identical disputes arising between the same parties under the same agreement.'

To like effect the Board held in Third Division Award 3229:

> > 'This identical question has been decided in accordance with the views which were here expressed in two well reasoned opinions of this Board. Award 813 and 2205. We have no question of the correctness of those decisions. Even if we did have, we would doubt the advisability of deciding the matter

> differently today. A construction of a rule which is not unreasonable should be maintained. **For it is important that neither the carrier nor the employes should be left in uncertainty as to their rights.**'" (Emphasis added)

Clearly the same Referee who composed the above decisions would never have dismissed the four prior Awards involving the same issue as not persuasive.

Given the foregoing, this Award should be accorded no precedential effect. This Award causes the same kind of mischief so roundly, and appropriately condemned by the Referee here.

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga

June 26, 1997