Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32160
Docket No. MW-31416
97-3-93-3-407

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Hagan Construction Company) to build new walls, hang new panelling, install partitions, paint walls and install light fixtures and washroom fixtures at the Yard Office Building in Montgomery, Alabama on dates in December, 1991 and January, 1992 [System File 17(2) (92)/12(92-537) LNR].

(2) This 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 Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman I. W. Owens and B&B Carpenters H. W. Wright and E. A. Ward shall each be allowed eight (8) hours' pay, at their respective straight time rates of pay, for December 20, 23, 24, 25, 26, 27, 30, 31, 1991 and January 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16 and 17, 1992."

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.

As is familiar to all concerned, Article IV of the May 17, 1968 Agreement states in pertinent part as follows:

> "In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto."

In this instance, the Organization protests the Carrier's assignment of outside forces to "build new walls, hang new panelling, install partitions, paint walls and install light fixtures and washroom fixtures at the Yard Office Buildings in Montgomery, Alabama." The Board is persuaded that, as argued by the Organization, work of this nature is "within the scope of the applicable agreement."

The Board finds each of the Carrier's defenses without merit, as follows:

1. The Carrier and the Organization disagree as to whether the General Chairman received oral notification of the proposed contracting in "December 1991" (particular date in December not specified) for work which commenced December 20, 1991. However, there is no dispute that the Carrier failed to provide written notice, as required by Article IV, as quoted above.

2. The Carrier raises the argument of "exclusivity"; that is, the Organization did not show that employees it represents have performed the work to the exclusion of all others. This argument has been shown repeatedly and convincingly to be non-determinative in contracting matters (appropriate as it may be in disputes between various crafts and classifications).

3. The Carrier states the Organization failed to show that it "had available the necessary employees" to do the work. This is not the Organization's responsibility. Had written notice been given and a conference requested and held thereafter, it would have been the Carrier's initial burden to demonstrate that employees were not available within the time required.

4. The Carrier argues that, in any event, the Organization failed to identify "any employee who was actually deprived of earnings or harmed in any way by the contractors performing the work." This contention also is without merit, by itself and particularly in view of the absence of written notice. By the contracting, the work was lost beyond recovery for Carrier forces. Monetary remedy is not a penalty measure; rather it is a reasonable recovery for the Carrier's Rule violation.

5. The Carrier suggests Claimants on vacation at the time the work was done would not be entitled to remedy. In certain circumstances, this might be valid. Here, absent written notice and conference, it is entirely speculative whether employees selected for the work would have been unavailable because of vacation.

Under the proper procedures and circumstances, the right of the Carrier to contract work has been amply preserved. Here, however, there is an absence of the required procedure and a failure to demonstrate the necessary circumstances.

AWARD

Claim sustained.

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 13th day of August 1997.