Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32600
Docket No. MW-31698
98-3-93-3-715

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(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 the Carrier assigned outside forces (Tweedy Contractors) to build and install switches on the Hoxie Sub between Newport and Bald Knob, Arkansas beginning October 2 through 22, 1992 (Carrier's File 930016 MPR).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work and the reasons therefor.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. R. N. Duncan,. R. Tosh, B. D. Clark, Jr., J. W. Zachary, G. Piker, J. R. Anderson, R. W. Tosh, W. Jones, J. L. Tosh, J. L. Hillery, B. G. Hooks, J. C. Ridling and E. L. Harris shall each be allowed pay at their respective overtime rates for all wage loss suffered."

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 is one more in a long series of contracting cases involving this Carrier and the Organization. From October 2, 1992 through October 22, 1992, the Carrier, in its own words, "utilized a contractor to assist System Gang 9108 with building and installing switches." The Board gives some significance to the work dates herein.

The Carrier's argument emphasizes the Organization's failure to provide proof of its "exclusive" past performance of the work. The Board has dealt too frequently with the inapplicability of this argument to require further review here.

Third Division Award 31272 reviewed the contracting in 1986 of "switch and grade crossing maintenance work" by this Carrier. The Award stated:

> "The record . . . supports the Carrier's contention that in the past contractors have been used by the Carrier [to perform this specific work] without protest from the Organization. Thus, although the work fell within the scope of the Agreement, the Organization's acquiescence in the Carrier's practice of utilizing contractors precludes a finding that the Carrier was contractually prohibited from contracting out the work. . . .
>
> As found, the work involved in this matter fell within 'the scope of the applicable agreement'. The Carrier was therefore obligated to notify the Organization of its intent to contract out the work. The Carrier did not do so. The function of the notice is to allow the Organization the opportunity to convince the Carrier to not contract out the work. That opportunity was prevented by the Carrier's failure to give notice."

The reasoning in Award 31272, quoted above, is found to be directly applicable to the dispute here under review and of proper guidance to the Board. In sustaining the

claim, Award 31272 limited monetary remedy to those of the Claimants who were in furlough status at the time (1986).

Here, the contracting occurred in October 1992. As to notice, the Carrier states as follows:

> "The Carrier acknowledges that if failed to provide the Organization with the requisite 15 days notice."

The Carrier relies on its "right to contract for the heavy equipment and [accompanying] operators," but there is no necessity for the Board to review this, given the basic issue of lack of notice.

As to remedy for lack of notice, the Carrier notes that all but one of the Claimants were "fully compensated" for other work, and the exception was a Claimant in the process of exercising seniority. Given a host of previous Awards to the same effect, the Carrier argues that no monetary remedy is appropriate.

The Organization disagrees, looking to the lost work opportunity which conceivably was caused by failure to give notice and provide the opportunity for a conference to determine if the work could have been performed by Carrier forces.

The Board, of course, is not empowered to impose "damages," but there is need to provide a remedy for the proven Rule violation. This is especially true, given the history of the Carrier and the Organization in previous contracting cases. Repeating for emphasis, the Carrier failed to give notice for work performed in October 1992. Third Division Award 22849, issued on June 25, 1991, stated as follows:

> "On these instant facts, we find that the Carrier has violated the Agreement by failure to notify the General Chairman. The record demonstrates thirty years of allegedly similar subcontracting involving backhoes and other equipment which was unchallenged by the Organization. . . . The Carrier is <u>hereafter</u> required to provide notice of plans to contract out. . . ." (Emphasis added).

Third Division Award 29021, issued on October 29, 1991, stated as follows:

"The underlying requirement of Article IV concerns the necessity of advance notice, which was not provided here. The Carrier does not convincingly argue that the work was not 'within the scope of the applicable agreement.'" (Emphasis added).

Award 29021 sustained the monetary remedy sought by the Organization, although the single Claimant therein was on furlough.

As will be seen, these two Awards, and possibly others, had fully alerted the Carrier to the notice requirement in 1991, well before the 1992 incident here under review. Since then, many Awards have sustained claims involving this Carrier, based on failure to give notice, but have limited remedy only to those on furlough or otherwise available but not working. There has been and may continue to be full justification for such approach, given the appropriate circumstances. This reasoning is followed in Third Division Award 31835, concerning failure to give notice on or before March 1992, in which no monetary compensation was awarded. However, Award 31835 recognized conflicting views as to whether an "emergency" existed.

To find endlessly with the same Carrier that notice was ignored but remedy is limited to the rare instances where eligible employees are on furlough is, in effect, to provide little reason for compliance with the notice procedure and, more significantly, to defeat the opportunity for conference and resolution of the matter. Review of many other Awards shows, however, that the Carrier apparently is now convinced of the fundamental Rule violation of failure to provide notice.

Only the virtually unbroken succession of Awards (with sparse exception) prevents the Board from sustaining the claim in full. On this basis alone, the claim for pay will be denied for those employees otherwise under compensation. One of the Claimants was not under pay, and the Carrier has not demonstrated any Rule violation in this Claimant's procedure in exercising his seniority. The claim for this Claimant will be sustained, except that pay is to be at the straight time rate, since his assignment to the work would not have involved overtime work.

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 22nd day of May 1998.