Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32748
Docket No. MW-31859
98-3-94-3-171

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Stephens Trucking) to perform Maintenance of Way and Structures Department work (hauling rock) to the West Belt Main Line at Grand Avenue in St. Louis and to the Madison Yard on November 17, 19, 24 and 25, 1992 (System File 1993-4/013-293-14).

(2) The Carrier violated the Agreement when it assigned outside forces (Barcom Tree Trimmers) to perform Maintenance of Way and Structures Department work (cutting trees and removing brush) at the West Approach, West Belt Main Lines and other locations on November 20, 1992 and continuing (System File 1993-5/013-293-14).

(3) The Agreement was further violated when the Carrier failed to notify and discuss with the General Chairman its intent to contract out said work as required by Article IV of the 1968 National Agreement.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, furloughed Track Subdepartment employes J. J. Wilson and W. Bailey shall each be allowed pay, at the truck operator's rate, for eight (8) hours on each of the dates the outside forces performed the work in question.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, furloughed Track Subdepartment employes R. Gartner, R. Gower, J. West, J. Wilson, W. Bailey and J. Headrick shall each be allowed pay, at the applicable machine operator's rate, for eight (8) hours on each day the outside forces performed the work in question beginning November 20, 1992 and continuing until the violation ceased."

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.

On the four dates set forth in the claims, and without prior notice to the Organization, the Carrier contracted with outside concerns for the hauling of rock, cutting of trees and removal of brush. These claims followed.

Article IV of the 1968 National Agreement obligates the Carrier to give notice to the Organization "[i]n the event a carrier plans to contract out work within the scope of the applicable schedule agreement." As demonstrated by the record, the work involved (hauling of rock, cutting of trees and removal of brush) is work these employees have previously performed on a regular basis. That work is therefore "work within the scope of the applicable agreement." The Carrier was thus obligated to give notice to the Organization of its intent to contract out that work. Notices were not given by the Carrier. A violation of Article IV has been demonstrated.

With respect to the remedy, Claimants (some on furlough) lost work opportunities as a result of the Carrier's failure to comply with its obligations under Article IV. They

shall therefore be made whole computed on the basis of the number of hours worked by the contractor's forces. Make whole relief has been fashioned in similar disputes between the parties. See Third Division Award 31756:

> "... The rule on the Third Division has developed to the point where the Division will compensate fully employed claimants regarding Scope Rule violations if it can be shown that the particular carrier has repeatedly violated the prohibitions against subcontracting.
>
> This particular Carrier has been found to violate the subcontracting provisions of the Agreement in Third Division Awards 23928 and 28998. Consequently, an award of money damages is appropriate in this matter."

The Carrier's arguments do not change the result.

First, while the Scope Rule is general in nature, the Organization need not demonstrate that employees previously performed the work on an exclusive basis. While exclusivity of performance of work is a necessary element for an assignment dispute between crafts or groups of employees under a general Scope Rule, in contracting out disputes the Organization need not demonstrate that employees have performed the work on an exclusive basis. See e.g., Third Division Award 32699 citing Third Division Award 31777 - "The Carrier's reference to the Organization's need to prove its 'exclusive' right to the work has been repeatedly found inappropriate in reference to contracting claims." Indeed, under this Agreement, if exclusivity had to be shown, once the Carrier legitimately contracted work under Article IV, the Organization could never again claim protection under that provision because a contractor once legitimately performed the work and the employees could not thereafter claim performance of the work on an "exclusive" basis. The result of such an interpretation would read Article IV out of the Agreement.

Second, the Awards cited by the Carrier are not on point. Third Division Awards 30688, 30264, 30217, 29973, 29721, 29610, 29569, 29532, 28680 and 26225 involve different carriers. Contracting disputes often have unique histories on specific properties. The Organization has pointed us to several Awards on this property between the parties under Article IV where improper notice by the Carrier resulted in sustaining Awards. See Third Division Awards 31756, 23928, supra. Further Awards cited to us by the Carrier involving the parties are distinguishable. In Third Division

Awards 31663, 29938 and 29932 notice was given by the Carrier of its intent to contract work. Again, that was not done in this case. The point of the notice obligation on the Carrier under Article IV is for the parties to be given the opportunity to meet and "discuss matters relating to the contracting transaction. . . ." By not giving the Organization required notices in this case, the Carrier prevented that process from going forward.

Third, this is a failure to give notice case. The Organization does not dispute that there are times when the Carrier has legitimately contracted work - for example, "when the Carrier's trucks/truck operators were being fully utilized" but not, as here asserted by the Organization, when "the Carrier's trucks were 'parked.'" The threshold consideration under Article IV in this case is whether the Carrier gave notice that it was going to contract "work within the scope of the applicable schedule agreement." The Carrier did not do so and thus defeated the purpose of Article IV. The Carrier's assertions that it has contracted similar work in the past therefore do not change the finding that it violated the notice provisions of Article IV.

Fourth, the Carrier's procedural argument concerning the rock hauling claim is not persuasive. The record shows that the claim concerning rock hauling was denied by the Carrier by letter dated March 11, 1993. The Organization appealed that denial by letter dated May 9, 1993. In that letter, the Organization states that it received the March 11, 1993 denial on March 13, 1993. The May 9, 1993 appeal was not received by the Carrier until May 14, 1993. Rule 42(b) requires that "[i]f a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance. . . ." Under the plain reading of Rule 42(b), the crucial dates are March 13, 1993 (the date the Organization received the Carrier's denial) and May 9, 1993 (the date the Organization took the appeal). Less then 60 days transpired "from receipt of notice of disallowance" and the date "such appeal . . . be taken." The Organization took the appeal 57 days after receipt of the denial. Without further authority from the Carrier, on the basis of what is before us, the appeal was therefore timely under Rule 42(b).

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 23rd day of September 1998.

SERIAL NO. 378

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 32748

DOCKET NO. MW-31859

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (Terminal Railroad Association of St. Louis

On September 23, 1998, we issued a sustaining Award in this matter. On the question of remedy, we found:

> "With respect to the remedy, Claimants (some on furlough) lost work opportunities as a result of the Carrier's failure to comply with its obligations under Article IV. They shall therefore be made whole computed on the basis of the number of hours worked by the contractor's forces. Make whole relief has been fashioned in similar disputes between the parties. See Third Division Award 31756:
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> > '. . . The rule on the Third Division has developed to the point where the Division will compensate fully employed claimants regarding Scope Rule violations if it can be shown that the particular carrier has repeatedly violated the prohibitions against subcontracting.
> >
> > This particular Carrier has been found to violate the subcontracting provisions of the Agreement in Third Division Awards 23928 and 28998. Consequently, an award of money damages is appropriate in this matter.'"

In implementing the remedy, the Carrier did not compensate certain Claimants for periods in which they were on vacation or working. Those offsets were not permitted by the Award. In the Award, we found that "Claimants (some on furlough) lost work

opportunities as a result of the Carrier's failure to comply with its obligations under Article IV." We further found that based on Third Division Award 31756 "the Division will compensate fully employed claimants regarding Scope Rule violations if it can be shown that the particular carrier has repeatedly violated the prohibitions against subcontracting" [emphasis added]. This was such a case. Therefore, in order to be made whole, Claimants--all of them--are to be compensated for lost work opportunities caused by the Carrier's violation irrespective of whether they worked or were on vacation.

To hold otherwise and allow the offsets taken by the Carrier would not compensate Claimants for the lost work opportunities and would permit the Carrier to benefit from its Rule violation. That was not our intent. As stated in the Award, the total number of hours to be used for the remedy shall "be computed on the basis of the number of hours worked by the contractor's forces."

Referee Edwin H. Benn who sat with the Division as a neutral member when Award 32748 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of December 1999.