Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35645
Docket No. MW-34523
01-3-98-3-161

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation (Amtrak) -
(other than Northeast Corridor

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside contractor to repair or remove and/or install doors and perform other work in conjunction therewith in various buildings within the Chicago Terminal yard limits, Chicago, Illinois on June 14, October 15, 23, November 1, 4, 5, 6 and 15, 1996 (System Files BMWE-295, BMWE-296, BMWE-297, BMWE-298, BMWE-299, BMWE-300, BMWE-301, BMWE-302 NRP).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out the work cited in Part (1) above.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Mechanic D. A. Mullenhoff shall be allowed sixty-four (64) hours' pay [eight (8) hours' pay for each date the outside contractor performed the work in question]."

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 a consolidation of eight claims protesting Carrier's use of contractors to perform door repair and replacement at its Car and Diesel Shops at the Chicago Maintenance Facility without advance written notice as a violation of Rule 24 of the parties' Agreement. The Carrier disputes the use of an outside contractor on one of the claim dates, June 14, 1996, but acknowledges the use of various contractors on the other claim dates.

The Organization contends that the work is scope covered, has been performed by employees in the past as evidenced by the Claimant's detailed hand-written statement, the Claimant was qualified to perform the work which did not require any specialized equipment. The Organization asserts that the Carrier's contentions concerning why it contracted the work cannot be considered because they were made expost facto, and the General Chairman was not afforded an opportunity to consider and address them at a conference prior to the work being contracted. The Organization avers that the Carrier's notice violation merits a monetary remedy regardless of the Claimant's fully employed status, citing Third Division Award 27614, and a multitude of additional Awards from other properties.

The Carrier argues that the Organization failed to meet its burden of proving that the door maintenance work at the Chicago Maintenance Facility was performed by employees, and that it was scope covered requiring advance notice of contracting. The Carrier asserts that it has proven a past practice in existence for over 15 years of contracting door work at this facility, which has been acquiesced in by the Organization, and thus that the work is not protected to employees under Rule 24, which permits the continuation of the practice of contracting, relying on Third Division Awards 29037 and 29802. The Carrier contends that, in any event, there can be no monetary relief ordered for a notice violation when the Claimant was fully employed during the claim dates as there was no proven lost work opportunity, citing Third Division Award 28610.

A careful review of the record convinces the Board that the on-property handling of the claims establishes that the Claimant has performed work of the nature here involved at the Chicago Maintenance facility and under the terms of the Agreement during his employment and that the Carrier has also contracted such work for a substantial period of time. Thus, a mixed practice exists concerning the door maintenance and repair work in issue. Accordingly, the work is arguably encompassed within the scope of the Agreement, and Rule 24 requires advance written notice to the General Chairman of Carrier's intent to contract it, to provide an opportunity for the parties to meet and discuss the reasons for the contracting and to attempt to work out a resolution of the matter prior to the actual contracting. There is no dispute that no notice was served in these cases, establishing a violation of the notice provisions of Article 24. However, the Carrier's prior and existing right to contract the work is also recognized by that provision.

What remains to be considered is the appropriate remedy for such violation. Of the multitude of cases cited by the parties in support of their respective positions, only one was on the property. The Board is conscious of the fact that not only is there a divergence of views concerning the appropriateness of a monetary remedy for a fully employed claimant, but that a body of precedent may exist on one property supporting one result while a different result may be appropriate elsewhere. That being said, we will consider on-property Third Division Award 27614, which contains a vigorous dissent by the Carrier concerning alleged inconsistencies in other Awards by the same neutral, but does not assert that those Awards occurred on this property. That Award, issued in 1988 (prior to much precedent involving the Carrier's knowledge of its advance notice requirements under Article IV of the National Agreement and potential monetary damages), held that the violation of Rule 24 occurred by the Carrier's failure to prove its affirmative defense of an emergency situation requiring the contracting. There was advance notice and conferencing concerning the overall nature of the issue of contracting the disputed work prior to the actual contract protested. Thus, the monetary remedy was not ordered for a notice violation, but for a contracting violation itself.

In the absence of precedent on the property for awarding monetary compensation to a fully employed claimant for a notice violation, the Board is unable to support a finding that the Claimant suffered a lost work opportunity in this case. Accordingly, we conclude that the Carrier violated Rule 24 by failing to give the General Chairman

advance written notice of the contracting in issue, but that no monetary relief is appropriate.

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 28th day of August, 2001.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 35645, DOCKET MW-34523
AND
AWARD 35646, DOCKET MW-34764
(Referee Newman)

Inasmuch as the awards were sustained in part, a concurrence is required only to the extent that the Carrier violated the Agreement when it failed to issue notice in accordance with Article IV of the May 17, 1968 National Agreement.

The DISSENT is directed towards the Majority's erroneous finding that there was no basis to award a remedy for the Carrier's violation due to lack of on-property precedent concerning this issue. The able neutral obviously struggled with this finding and a fine line was walked to arrive at this decision. The justification found by the Majority here is based on the dissection of Award 27614. In that case, the Board found that the monetary remedy was allowed for the contracting issue itself and not the notice violation. It is the Organization's position that such is a distinction without a difference. This Board has held that Article IV is a nationally negotiated rule and, as such, it should be treated with the same respect as any other rule of the Agreement. To do so otherwise effectively reduces the significance of the rule to second class status. This was recognized by the Board in Award 19899, cited and attached as an exhibit within our submission to the Board. In said award, the Board held:

> "We have difficulty in hypothicating (sic) many instances more imperative to loss of opportunities than a proposed contracting out of bargaining unit work - which may well result in a severe deprivation amounting to a substantial tangible

> "loss of work and pay. Article IV is mandatory in concept. We wonder then if, as noted by the Fourth Circuit it may become a 'worthless scrap of paper' if it may be unilaterally ignored. Accordingly, we favor the rationale of the Fourth Circuit as properly applied to violations of Article IV. For these stated reasons, the Board holds that a claim for damages may be sustained for a violation of Article IV of the 1968 National Agreement even though employees in question were fully employed at all relevant times. This result does not compel Carrier to agree to anything or to do anything other than what it previously agreed to i.e. give notice and bargain in good faith. While it is urged by Carrier that damages may be speculative, it is Carrier itself, by its failure to comply with its agreement, who places the matter in that posture - not the employees."

The Organization must take some responsibility for not stressing the utmost importance of Article IV and the ramifications of the Carrier's failure to comply therewith. We too do not wish to have the significance of Article IV reduced to a "worthless scrap of paper". Insofar as the failure of the Majority to award a monetary remedy in these cases is concerned, I dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member