Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36518
Docket No. MW-35900
03-3-99-3-910

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (formerly The Denver
(and Rio Grande Western 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 to perform Maintenance of Way work (removal and replacement of concrete steps) at the north end of the Back Shop of the Burnham Locomotive Shop Complex in Denver, Colorado beginning July 30 and continuing through September 1, 1998 (System File D-98-50C/1165468 DRG).

(2) The Agreement was further violated when the Carrier failed to provide a proper notice and when it failed to meet with the General Chairman regarding its intent to contract out the work in Part (1) above as required by Appendix D of the Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. E. Smith, G. L. Wiese, H. J. Deputy, III, J. A. Brainard and G. A. Van Damme shall now be compensated at their respective rates of pay for an equal and proportionate share of all hours worked by the outside forces in the performance of said work between July 30 and September 1, 1998."

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 May 20, 1998, the Carrier notified the Organization of its intent to contract out work consisting of the construction of improvements and modifications for safe drop pit access at the Burnham Locomotive Shop in Denver, Colorado. The notice concluded by stating that, in the event the Organization desired a conference in connection with the notice, they were to contact an individual in the Labor Relations Department. The telephone number of that individual was provided.

By letter dated May 27, 1998, the Organization responded in pertinent part as follows:

> "The Organization contends that the work referred to above is work coming under the scope of our Agreement. Further, the Carrier has the equipment and employes with the necessary expertise to perform the type of work described.
>
> We respectfully request that you arrange a time and place to conference this matter in accordance with Article IV of the May 17, 1968 National Agreement and advise."

On September 24, 1998, the Organization filed the instant claim, alleging that the disputed work had been contracted out beginning July 30, 1998. Following the Carrier's denial of the claim, the Organization appealed, stating that the Claimants had been performing the initial phases of the project before it was contracted out and that there had been no "prior and/or proper notice."

The Carrier responded on the property by pointing out that notice had been served on the Organization. The Carrier also acknowledged that it received the Organization's written response to the notice requesting a conference in accordance with

Article IV of the May 17, 1968 National Agreement. The Carrier asserted, however, that "a mere writing of a letter does not constitute a specific request with time and place for a conference and it is not the Carrier's responsibility to initiate the procedure. . . ."

Before dealing with the substantive issues, we first turn our attention to the Carrier's contention that the Organization did not allege that the Carrier failed to hold a conference and consequently any present reference to that argument is an attempt to raise new issues not properly considered on the property.

The Organization in its claim alleged that the Carrier violated the provisions of Article IV of the May 17, 1968 Agreement, set forth in Appendix D 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.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.
>
> Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.
>
> Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement. . . ." (Emphasis added.)

During the handling on the property, it would certainly appear that the Carrier was placed on notice of the allegation that work was contracted out prior to complying with the foregoing provisions. The Carrier in its response on the property indicated it clearly understood the implications of the alleged Article IV violation because it addressed both notice and conference issues. We find that those issues are properly before us and determine the outcome in this particular case.

Article IV of the May 17, 1968 Agreement contains shifting obligations on the part of both parties within a procedural framework intended to foster open communication and good faith attempts at resolution of subcontracting disputes. The Carrier is required to initiate the process by providing timely advance notice when it plans to contract out work arguably within the scope of the Agreement.

Upon receipt of that notice, the burden shifts to the Organization to request a meeting. The purpose of the meeting is to provide the Organization an opportunity to convince the Carrier that outside forces are not necessary. The Organization plainly complied with its obligations in its May 27, 1998 letter specifically requesting a conference.

It was at the next step that the communication faltered, the record shows. Once a proper request was made by the Organization for a conference, Article IV states that the Carrier's designated representative "shall" meet for that purpose. The language is mandatory, not permissive. That did not happen in the instant case.

Here, the Carrier concluded that its meeting obligation was negated by the fact that the Organization did not properly present its conference request. By so concluding, the Carrier acted at its peril. While the Carrier argued that the Organization should have made its request known by telephoning the Carrier's designated representative as directed, the Agreement does not specify the medium that must be used to convey the request for conference. The Carrier cannot escape its own Article IV obligations by attempting to modify the Organization's procedural responsibilities or by imposing requirements not specified in the Agreement. The Article IV language must be interpreted and applied as written. That being the case, we find that the failure of the Carrier to comply with the conference and discussion provisions of Article IV requires a sustaining Award.

The Carrier argued that it should not be held to the procedural requirements of Article IV because the work at issue is not scope-covered. In response to a similar argument raised in Third Division Award 31997, the Board stated: "The fact that Claimants performed the disputed work for several months until it was subcontracted out from under them obviates argument about whether the work was within the scope of the Agreement." Here, too, it is undisputed that the Claimants performed the initial phases of the work at issue before it was contracted out. Whether this would have been sufficient to establish a claim on the merits need not be decided. It is sufficient for purposes of notice that the claim arguably comes within the scope of the Agreement. Under these circumstances we find that lack of scope coverage is not a defense and that the Carrier was obligated to comply with its Article IV obligations upon receipt of a proper request for conference by the Organization.

Consistent with the rationale expressed in Third Division Awards 36292, 32862 and 31997, this claim will be sustained in its entirety, both as a means of enforcing the Agreement and to restore lost work opportunities.

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 April 2003.