Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36541
Docket No. MW-35874
03-3-99-3-884

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and 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 (Young's Salvage and Transfer) to perform routine Maintenance of Way and Structures Department work (ditching and related placement of rip rap) in the vicinity of Mile Post 335 on the Kansas City Subdivision beginning March 10 and continuing through March 19, 1997 (System File C-12-97-C080-02/8-00228-015 CMP).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract said work as required by Rule 1 and failed to enter good-faith discussions to reduce the use of contractors and increase the use of Maintenance of Way forces as set forth in Appendix I.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. M. G. Connell shall now be compensated for fifty-two (52) hours' pay at his applicable time and one-half rate of pay."

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.

The Claimant established and held seniority in the Roadway Equipment and Machine Subdepartment as a Crane Operator. On the claim dates, he was assigned and working as the operator of Material Truck No. 632 on Crew No. 907.

It is not disputed that on the claim dates the Carrier engaged Young's Salvage and Transfer, a contractor, to perform drainage excavation services including replacing rip rap in the area of MP 335. The parties disagree, however, whether an emergency situation required the use of a contractor as opposed to a Carrier employee. In any event, it appears the parties agree that the contractor spent 52 hours doing the work.

The Organization asserts that the work performed by the contractor is contractually reserved to the Claimant and has been "historically, traditionally and customarily" performed by Maintenance of Way forces pursuant to Rules 1, 4 and 46. The Organization also argues that the Claimant was qualified, available, willing and possessed the requisite seniority to perform the work, and therefore, should have performed it according to Rules 2, 3 and 5.

Furthermore, the Organization purports that the Carrier failed to provide the Organization with a proper notification of the Carrier's intention to contract out the disputed work, as required by the Note to Rule 1 and Appendix I thereto. The Organization states that such failure resulted in the instant Agreement violation and that the Claimant, therefore, is entitled to the compensation claimed as a result of his lost work opportunity. Finally, in support of all aspects of its claim, the Organization cites Third Division Awards 35326, 35378, 35571, 36225, and 36227 involving contracting issues between these same parties.

During its on-property handling of the case, the Carrier asserted that a rock slide required that the Carrier undertake emergency measures to stabilize the area and to

allow the lifting of a ten m.p.h. slow order. In addition, the Carrier argued that it contracted for similar work in the past. The Carrier stated that previous Awards support the Carrier's position that there is no penalty for not serving a 15-day notice when, in cases such as this, the Organization never proved that the Carrier's practice of contracting out violated the Agreement. The cited Awards include Third Division Awards 28574, 28786, 30115, 31889 and 32351. Finally, the Carrier contends that if a violation is found to have occurred here, the Claimant would not be entitled to compensation at the penalty rate of pay, based on Third Division Awards 35378 and 36255.

During its review of the extensive record, the Board took note of the exhibit statements submitted by several senior heavy equipment operators. Their statements assert that they have performed ditching work on the Soo Line in the past using various types of ditching equipment. In addition, a 1997 statement by the Claimant states that in 1991 he used a crane to perform virtually the same work as that in dispute here. The Board also points out that the Carrier's Submission reveals that members of the Organization have occasionally performed the work in dispute, and that the Carrier never denied that BMWE-represented employees had performed similar work in the past.

The Board finds ample evidence that the disputed work appears to be scope-covered, and that at the very least there is a mixed practice of such work being performed by both BMWE-represented employees and contractors. The NOTE to the Scope Rule reads:

> "In the event the Carrier plans to contract out work within the scope of this agreement, the Carrier shall notify the General Chairman 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."

Moreover, Appendix I reaffirmed the parties' understanding "that advance notice requirements be strictly adhered to," and that "the advance notices shall identify the work to be contracted and the reasons therefor."

In the instant case, it is clear that the Carrier did not supply the Organization with a 15-day notice of its intention to contract out the disputed drainage work. Moreover, the Board is not persuaded that an emergency condition existed that might

have relieved the Carrier from fulfilling its notice requirement. The June 16, 1997 letter from the Manager Structures states that, "The work was started on March 10th. The slide moved dramatically on the 3rd, prompting placement of a 10 MPH slow order and rapid organization of remedial efforts. The carrier considers such a situation to be of an emergency nature."

The fact that the Carrier seems to have waited seven days before stabilizing the slide indicates that the situation was not a real emergency. Therefore, given the circumstances of this case, the Carrier should have served the Organization with a 15-day notice of its intention to contract out for the scope-covered work and the fact that it failed to do so requires a sustaining Award here. See Third Division Awards 35378, 35571, 36225 and 36227, involving this same Organization and Carrier.

Finally, with respect to the Carrier's argument that Third Division Awards 28574 and 28786 provide unequivocal support for the Carrier's position that it was not required to provide the Organization with a 15-day contracting notice, the Board points out that differences in the cases do exist. Award 28574 held that the Organization did not demonstrate in the record that, in the past, its employees performed the disputed work of operating a heavy dump truck. Award 28786 determined that the work in dispute involved water line repairs within shop buildings under the jurisdiction of the Chief Mechanical Officer, not the Division Engineer. In addition, the facts and circumstances underlying Awards 30115, 31889 and 32351 are dissimilar to the instant case and cannot be deemed controlling.

Regarding the monetary damages to be awarded in this case, in view of the fact that the Claimant appears to have been fully employed during the claim period, he is entitled to the difference between the 52 hours worked by the contractor and the actual hours he worked. If any difference in hours is found, such difference will be payable at the applicable straight-time rate of pay. This case is remanded to the parties solely in order to determine how many hours are payable here, if any. In support of this Award for straight-time damages, see Third Division Awards 35378, 36225 and 36227.

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 8th day of May 2003.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 36541, DOCKET MW-35874
(Referee Goldstein)

Inasmuch as the award was sustained in part, a concurrence is required only to the extent that Majority recognized 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 an unabridged monetary remedy for the Carrier's violation based solely on the assertion that the Claimant was working at the time of the dispute. While the able neutral recognized that the Board has the authority to fashion a remedy, it shirked its responsibility to do so. The availability of the Claimant is determined by the Carrier. If the Carrier chose to assign the Claimant to perform work elsewhere while outsiders performed his work, the Claimant should not have suffered the consequences of the Carrier's actions. The work at issue here was forever lost to the Claimant when the Carrier knowingly and with malice chose to ignore the advance notification provisions of the Agreement.

As it was pointed out on the property and to the Board, this Carrier has such an abysmal record when it comes to complying with the notice provisions of the Agreement that it has nearly taken on the quality of bad theater. Indeed, this Carrier was the first to have a dispute decided by this Board involving a violation of the provisions of Article IV of the 1968 National Agreement, i.e. **Award 18305**. Since then no fewer than seventeen (17) awards have been rendered citing this

Carrier with a failure to comply with the notice and conference provisions of the Agreement. Again, by virtue of this award the Majority has become an enabler for this Carrier who has been shown to be a serial violator of the notice and conference provisions of the Agreement.

To make matters worse the Majority ignored the precedent cited in Awards **35738, 36225** and **36227**, just to name a few presented to the able neutral, that paid fully employed claimants for a blatant violation of the notice provisions of the Agreement. The Board was quick to point to the afore-cited awards as authority to pay the claim at the straight time rate for work performed during regular working hours, but ignored the fact that those awards **also** paid fully employed claimants. It is past time for this Board to allow the Carrier to violate the notice provision with impunity and escape paying a complete monetary remedy. By now, there should be no doubt but that the proper remedy for the violation notice provision is to pay fully employed claimants for all of the hours worked by the outside contractor. Insofar as the failure of the Majority to award the proper monetary remedy in this case is concerned, I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member