Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40506
Docket No. MW-40172
10-3-NRAB-00003-070413
(07-3-413)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(Union Pacific Railroad Company (former Chicago and North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier utilized outside forces (Alpine Tree Service) to perform Maintenance of Way and Structures Department work (cut brush and vegetation on the right of way) at crossings from Nelson to Barr, Illinois on the Peoria Subdivision beginning on March 20 and continuing through April 20, 2006 (System File 3SW-2168T/1453947 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. Wiseman, W. Hodgkins, J. Goodin and R. Boncouri shall now each be compensated at their applicable time and one-half rates of pay for an equal proportionate share of the nine hundred thirty (930) man-hours expended by the outside forces in the performance of the aforesaid work beginning March 20 and continuing through April 20, 2006."

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 Organization filed the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it used outside forces to perform certain Maintenance of Way work and when it failed to provide the General Chairman with proper advance notice of its intent to contract out this work.

The Organization initially contends that the Agreement Rules clearly encompass Maintenance of Way and Structures Department work of the character involved here. Rule 1(b) specifically provides that employees included within the scope of the Agreement shall perform all such work. The Organization asserts that Agreement Rules also establish the classes of employees within the Track Sub-Department required to perform the work specifically stipulated within the Scope Rule. The Organization argues that Rule 1(b) clearly and unambiguously reserves work of the character involved here to Maintenance of Way forces.

Citing prior Awards, the Organization argues that it is fundamental that work of a class belongs to those for whose benefit the contract was made and delegation of such work to others not covered thereby is in violation of the Agreement. The Organization goes on to contend that the Board also has consistently held that where, as here, the Claimants have customarily, traditionally and historically performed the subject work throughout the Carrier's property, there is no relevance to the question of whether the work is reserved to them by the Scope Rule. The Claimants have established and hold seniority in accordance with

Rule 4, and there is no dispute that the assignment of work is governed by Rule 4(d). In accordance with prior Awards, the Organization emphasizes that it is well established that employees need not request to have their seniority respected for work, even if the work is only overtime service or temporary work.

The Organization goes on to contend that the Board also has consistently held that where, as here, seniority is confined, work is also confined. The Organization submits that among the classes listed in Rule 7 is the Machine Operator class, which entitles employees to operate, among other machines, brush cutters, weed mowers, and weed sprayers. Rule 7 also lists the class of Trackman, which performed track maintenance work on and around the right-of-way. The Organization points out that the claim letter clearly identifies the equipment used by the contractor as chain saws and a bobcat with a mower attachment, and witness statements confirm that this was the only equipment that the contractor used. The Organization therefore asserts that there can be no doubt that the Claimants were qualified and entitled to operate all of the equipment used by the contractor, and they would have done so had they been so assigned.

The Organization argues that it established a prima facie case in this matter, and there can be no question that the work involved here is encompassed within the scope of the Agreement. The Organization points out that it is well established that the character of the work reserved to various classes of employees covered by the scope of the Agreement is that which they traditionally and historically have performed.

The Organization further argues that pursuant to Rule 1(b) the Carrier was obligated to notify and confer with the General Chairman about its intent to contract out the subject work. The Organization contends that the Carrier failed to fulfill its obligation in this matter. The Organization asserts that there is no evidence whatsoever that the Carrier notified the General Chairman of its intent to contract out the subject work, and the Carrier never asserted that it provided such notice.

The Organization insists that the Carrier's failure to provide proper advance notice is no small matter. The Organization suggests that this failure goes to the very heart of the instant dispute, and it serves as a basis for questioning the Carrier's good faith in handling this matter. The Organization points out that the

Carrier's action effectively precluded any possibility of making a good faith attempt to reach an understanding concerning the intended contracting, and it prevented the General Chairman from having the opportunity to persuade the Carrier to assign this scope-covered work to its own employees instead of to outsiders. The Carrier simply assigned the subject work to outside forces without first giving proper advance notice and discussing the matter in good faith as required by Rule 1(b). The Organization maintains that these actions precluded a good faith attempt to reach an understanding concerning the intended contracting. The Carrier's actions constituted a direct and serious violation of the Agreement. Citing a number of prior Awards, the Organization argues that the Carrier's failure to provide proper notice and engage in good faith discussions require a sustaining award.

The Organization emphasizes that because carriers had shown an inclination to disregard such notice provisions, the parties reaffirmed the intent of their notice provisions in the December 11, 1981 Letter of Understanding. This Letter of Understanding states that such advance notice requirements be strictly adhered to, yet the Carrier simply failed to comply with either the letter or spirit of Rule 1(b). Citing prior Awards, the Organization maintains that the Carrier's failure to provide the required proper notice is evidence of its dereliction to act with the requisite good faith, requiring a sustaining award.

Pointing to prior Awards, the Organization submits that the fundamental and overriding concern here is the Carrier's failure to operate and conduct its actions with the requisite degree of good faith. The Organization contends that the Carrier's failure to comply with its obligations under Rule 1(b) is a serious matter that cannot be treated lightly. The Organization insists that the entire sanctity of the Agreement is at stake, and the Carrier historically has been a repeat violator of these obligations. The Claimants must not be made to suffer the loss caused by the Carrier's failure to comply with its obligations under the Agreement.

As for the Carrier's defenses in this matter, the Organization contends that the Carrier waived exception to the bona fides of the instant claim when it failed to provide notice, precluded good faith conference discussions, and relied solely on unsubstantiated assertions and allegations as defenses to the instant claim. The Organization reiterates that the overriding concern here is the Carrier's failure to operate and conduct its actions with the requisite degree of good faith. The Organization suggests that the Carrier sought to escape its violations by raising

defenses and excuses for its lack of good faith. The Organization asserts that the Carrier's defenses can only be construed as disingenuous, procedurally invalid, and baseless; these defenses warrant no serious consideration by the Board.

With regard to the Carrier's assertion that the Organization failed to allege a verifiable fact scenario, the Organization emphasizes that the Carrier did not deny that the contractor performed the claimed work. The Organization also argues that the details of the instant claim are easily verifiable. The Organization submits that the Carrier must have some record of the work performed by the contractor and the hours consumed in the performance of that work.

The Organization then addresses the Carrier's position that it did not contract with Alpine Tree Service, but instead contracted with DeAngelo Brothers, Inc., who subcontracted with Alpine Tree Service for the claimed work. DeAngelo Brothers, therefore, was acting as an agent on the Carrier's behalf. The Organization maintains that numerous Board Awards have held that the Carrier is liable for the actions of its agents, and the name of the contractor is irrelevant, particularly when the Carrier has admitted that the contracting took place. The Organization additionally asserts that there is no evidence that the Carrier provided advance notice of its intent to contract with DeAngelo Brothers for the claimed work or any other work on the Carrier's property. The Organization therefore contends that the Carrier's violation of the notice and conference provisions of the Agreement is obvious and inescapable, regardless of which contractor the Carrier hired.

As for the Carrier's belated contention that the work included the application of chemical herbicides which "required equipment and skills not possessed by Claimants," the Organization emphasizes that the claimed work did not include the use or application of chemical weed/brush control. Moreover, the Carrier provided no evidence to support this defense, and two Claimants who witnessed the work confirmed that the contractors used only chainsaws and a bobcat. The Organization therefore asserts that this contrived defense is not worthy of any serious consideration. The Organization additionally asserts that even if this defense is given any consideration, the proper forum for discussing such issues was during discussions with the General Chairman following proper advance notice, not as a defense to a claim. The Organization points out that it was precluded from

requesting a conference in this instance because the work was completed before the notice was given and a conference could be requested.

The Organization then submits that the question of exclusive reservation of work does not come into consideration under any circumstance involving outside contractors. The Organization points out that the Board repeatedly has considered whether the Organization is required to prove exclusive reservation of scope-covered work when the dispute involved the assignment of work to outsiders, and the Board consistently has held that the proper application of the exclusivity doctrine was to disputes over the proper assignment of work between different classes and crafts of the Carrier's own employees, not to disputes involving outside contractors.

The Organization maintains that although numerous Awards support payment of the instant claim, the Organization nevertheless is cognizant of the fact that a number of Awards involving this Carrier have sustained monetary payments in claims of notice violations only for furloughed claimants. The Organization suggests that the abundance of these Awards makes it apparent that the Carrier has no intention of discontinuing its practice of not properly notifying the Organization of its intent to contract when its monetary liability is limited only to furloughed claimants.

The Organization insists that despite repeated admonishments from the Board that the Carrier is required to provide advance notice, as well as the Carrier's reaffirmation of strict adherence to the advance notice requirements embodied in the December 1981 Letter of Understanding, prior Awards nevertheless demonstrate that this Carrier has continued to ignore these provisions when required to pay remedy only to furloughed claimants. The Organization maintains that a review of the prior Awards establishes that the Carrier has no intention of complying with the Agreement's notice provisions, even after repeated warnings from the Board. The Organization submits that unless the Board reinforces its position by adopting the sound reasoning of those Awards that have ordered a monetary remedy for claimants whether or not they were on furlough during the claim period, the Carrier will continue to ignore its contractual obligations.

As for the Carrier's assertion that there was no loss of work opportunity because the Claimants either were fully employed or voluntarily absent during the claim period, the Organization notes that there was no urgency to perform the subject work, so it could have been rescheduled for a time when the Claimants could have been made available to do the work. In the alternative, the work that the Claimants were performing could have been postponed or delayed to make time to do the claimed work. The Organization argues that the Board consistently has held that a carrier's failure to assign employees to a particular project does not mean that the employees were unavailable to perform that work.

The Organization additionally asserts that whenever the Carrier violates the Agreement by assigning work to outside forces that customarily and historically has been performed by its own employees, there is a loss of work opportunity. Moreover, the Board overwhelmingly has held that a so-called "fully employed" claimant is entitled to receive compensation when a carrier violates the contracting out of work provisions of the Agreement. The Organization submits that the Board plainly has rejected the Carrier's contentions regarding compensation for "fully employed" claimants.

The Organization points out that the requested remedy simply would make the Claimants whole for the loss of work opportunity due to the Carrier's violation of the Agreement. The Organization suggests that Awards fashioning make-whole remedies are legion, recognizing that an employee should not be made to suffer any loss when the Agreement is violated. The Organization also notes that prior Awards have found that an employee's vacation status is not detrimental to entitlement for monetary reparations in the event a violation of the Agreement is found.

The Organization emphasizes that the Carrier did not dispute that the contractor's employees expended 930 man-hours or that the appropriate remedy was at the time and one-half rate. The Organization therefore contends that the instant claim must be sustained in its entirety.

The Carrier initially contends that the Organization failed to provide accurate information, and it also failed to meet its burden of proof. Citing prior Awards, the Carrier asserts that for these reasons alone, the instant claim should be denied in its entirety.

The Carrier argues that if the Organization's claim had merit, then the Organization would have provided specific information as to the identities of the alleged Claimants. Without such proof, the instant claim must fail and be denied in its entirety.

The Carrier asserts that prior Awards establish that the Organization is responsible for providing detailed and accurate information regarding the claim. The Carrier submits that because of the Organization's failure to meet this burden, the Carrier has no opportunity to address the Organization's allegation that there were qualified employees able to perform the alleged work. The Carrier insists that the instant claim is improperly before the Board, and it should be dismissed.

The Carrier goes on to argue that there is no Agreement provision that assigned the work of cutting trees to BMWE-represented employees. The Carrier asserts that the Scope Rule does not grant specific job duties or activities. There is nothing in the Scope Rule's language that mandates that the subject work was covered by this Rule. The Carrier contends that because the work allegedly contracted was not scope-covered work, there was no requirement to provide the Organization with any notice.

The Carrier points out that even if the subject work was scope-covered, the Carrier's forces did not have the specialized equipment to accomplish this work, nor did the Carrier's forces have the training or skill levels required to safely remove trees of this magnitude. The Carrier suggests that the instant work was not normal brush-cutting along the right-of-way.

The Carrier goes on to contend that the Scope Rule is general in nature, and it does not grant the disputed work to BMWE-represented employees. The Scope Rule does not mention the cutting of trees, nor has the Organization shown that it historically has performed tree-cutting services for the Carrier. The Carrier points out that the Organization also failed to show a nexus between tree cutting/vegetation control and the construction, maintenance, repair and dismantling of track, structures, and other facilities used in the operation of the Carrier.

The Carrier insists that the Organization failed to show that the Scope Rule pertains to the work in question. Pointing to prior Awards, the Carrier submits that just because work might take place on or near tracks does not make it track

maintenance as defined in the Scope Rule. The Carrier argues that the Claimants have no enforceable claim to the subject work.

The Carrier asserts that where, as here, the Scope Rule is general and non-specific, the Organization bears the burden of establishing its right to this work by "custom, tradition and practice on a system-wide basis." The Carrier suggests that, at best, the Organization might argue that there was a mixed practice, but this would not make the work exclusive to the craft. Citing the standards established in prior Awards, the Carrier asserts that there has been no violation of the Scope Rule in this instance, and the Organization failed to meet its burden of proof by showing that its members had any Agreement rights to perform the work of cutting trees.

The Carrier reiterates that there is no language in the Agreement that specifically gives the subject work, exclusively or otherwise, to the Organization. Moreover, numerous Awards reaffirm the Carrier's right to contract work. The Carrier submits that if the Board finds that trees are included in the Agreement, this would be tantamount to writing a Rule, which is not within the Board's power to do.

The Carrier insists that there was no notice deficiency, nor was there any violation of the Agreement. The work was not scope-covered, so there was no requirement to provide any notice to the Organization.

The Carrier goes on to maintain that the Organization has not met its burden of proving a bona fide violation of the Agreement. The Carrier notes that the mere citation of Rules does not constitute an Agreement violation. The Carrier argues that mere unsupported allegations or a listing of Rules devoid of any pertinent language do not constitute proof. The Carrier submits that because the Organization failed to show how the Agreement has been violated, prior Awards support the denial of the instant claim. The Organization made unsupported allegations in a blatant attempt to pad its constituents' wallets with additional, undeserved pay to which they are not entitled.

The Carrier additionally argues that the remedy sought by the Organization clearly is excessive. The Organization is claiming pay for unidentified employees. The Carrier suggests that because the Organization failed to identify specific Claimants, the Organization cannot state that the unidentified employees were

qualified to perform the alleged work. The Carrier asserts that the Organization failed to demonstrate that there has been a monetary loss. The Carrier further contends that the Organization failed to provide evidence to support the number of hours worked by the contractors.

The Carrier emphasizes that the Board has established standards granting compensation only to qualified employees who lost a work opportunity as a result of being furloughed as a direct result of the contracting action. The Carrier contends that even if the Organization had established that the Agreement was violated, there is no basis for awarding monetary relief. There is nothing in the record to substantiate a loss of wages. Pointing to prior Awards, the Carrier insists that no payment is due in circumstances such as those in the instant case.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record evidence and concludes that the Organization met its burden of proof that the Carrier failed to furnish the General Chairman with an advance written notice of its intent to contract out the work at issue and the Carrier also did not make a good-faith attempt to reach an understanding concerning the subcontracting as is required by the Rules. Therefore, the claim must be sustained in part.

The Rule is clear that when the Carrier plans to contract out work that is within the scope of the Agreement, it is required to give the General Chairman a 15-day advance written notice of its plans to contract out the work; and if that General Chairman requests a meeting, the Carrier must discuss the matters related to the intended contracting transaction with the Organization representative. Rule 1(b) states, in part:

> "In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and, in any event, not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to

> the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representative shall make a good-faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith."

Moreover, as far back as December 11, 1981, a Carrier representative notified the Organization that:

> "The Carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by Carrier employees.
>
> The parties jointly reaffirm the intent of Article IV of the May 17, 1968, Agreement that advance notice requirements shall be strictly adhered to and encourage the parties locally to take advantage of the good-faith discussions provided for to reconcile any differences. In the interest of improving communications between the parties on subcontracting, the advance notice shall identify the work to be contracted and the reasons therefore."

It is clear from the facts of this case that the Carrier failed to issue any notice to the Organization that it would be contracting out the brush cutting and vegetation clearing work that is in dispute in this case. Although the Carrier contends that it was not required to give such notification to the Organization or enter into any discussions about the subcontracting, the Board disagrees. Interestingly, the Carrier relies on Third Division Award 37480 to support its position in this case. A review of that Award makes clear that, in that case, the Carrier did provide advance notice to the Organization. In the Award, the Board stated the following:

"At the August 29, 2000, conference on this matter, the Carrier provided the service order which demonstrated that a proper contracting notice was issued on October 29, 1998."

Consequently, that case is inapposite to the one in dispute here.

The record contains evidence that the Organization-represented employees of the Carrier have performed similar, if not the same, work that was subcontracted in this case. The Carrier's failure to provide any advance notice to the Organization precluded the possibility of a good-faith effort to reach some understanding regarding the subcontracting. Because the Carrier failed to give the appropriate notice it did not satisfy its obligations under Rule 1(b) and the December 11, 1981 Letter of Understanding.

Once we have determined that the Carrier failed to comply with the Rule and that the Organization met its burden of proof, we next must turn our attention to the remedy sought by the Organization. In this case, the Organization appears to be requesting that the four named Claimants divide 930 man hours of pay between them. The Board finds that to be an excessive amount of relief with no basis. Clearly, the four Claimants are entitled to some relief; and it is evident that if the Carrier does not have to afford relief to those Claimants, the Carrier has no incentive to comply with the Rules in the future. Therefore, the Board orders that the Claimants each be awarded 20 hours of pay at the time and one-half rate for the missed work opportunity. It is true that it is not clear that those Claimants would have received that work opportunity; but the fact that the Carrier failed to meet with the Organization to discuss the subcontracting makes it impossible to make any determination in that regard. Some type of award must be made so that the Carrier will pay attention to the clear-cut notice provisions in the future.

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 15th day of June 2010.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 40506, DOCKET MW-40172
(Referee Meyers)

One school of thought adhered to by certain railroad industry advocates is that writing dissents is an exercise in futility because they are neither read nor considered by subsequent referees. This Organization does not belong to that school. For, to accept the theory that dissents are meaningless, is to necessarily accept the conclusion that reason does not prevail in railroad industry arbitration. Despite all the faults built into this system, the Organization Member of this Board is not ready to conclude that reason has become meaningless. Therefore, the Organization Member has no alternative but to file this emphatic dissent to the remedy portion of the claim.

The Organization Member whole-heartedly concurs with the Referee's finding that the Carrier violated the Agreement in this case. However, the Referee's decision to reject the Organization's request for complete compensation is just plainly and simply wrong.

In this case, there can be little question that if the Carrier had not assigned outside contractors to perform the basic brush cutting work at issue here, the Claimants would have performed the work. Hence, the inexorable conclusion is that the Claimants were damaged when they lost the opportunity to perform the work and receive the concomitant reparations.

In this case, the Majority arbitrarily adjusted the remedy requested, without showing how the prayer for damages was excessive. Moreover, according to the Neutral Member, the Carrier alleged that the monetary remedy was for unnamed Claimants. Clearly Part 3 of the "Statement of Claim" reveals that Claimants L. Wiseman, W. Hodgkins, J. Goodin and R. Boncouri are prominently listed on Page One of the award. The Neutral Member of this Board has been performing work at the National Railroad Adjustment Board (NRAB) for nearly twenty-five (25) years. For him to allege, out of whole cloth, that the claimed hours are excessive, clearly oversteps his authority here. The authority to award a monetary remedy could be found within the awards attached to our submission and to the awards presented to the Board during panel discussion. For instance, we cited recently adopted Awards 35735, 35736, 36854, 37022 and 37376 involving these same parties wherein a monetary remedy was allowed for a notice violation and a lost work opportunity.

As a matter of fact, this very Neutral Member has previously held that the monetary relief can be achieved through the joint check of the Carrier's records, not by just arbitrarily limiting the amount of hours. For instance, we invite attention to Awards 1, 2, 3 and 4 of Public Law Board No. 6671 wherein this very Neutral Member held:

AWARD 1 – PLB NO. 6671:

"The claim is sustained. Amtrak violated its May 19, 1976, Agreement with the BMWE (as amended) when it contracted out the carpet installation work. The Carrier is ordered to return the carpet installation work to the BMWE forces covered by the May 16, 1976, Agreement (as amended) and compensate the appropriate BMWE sub-department forces at their applicable rates of pay for an equal proportionate share of the man hours expended by the contractor's forces in performing the work identified in the claims. The case shall be remanded for a joint check of the Carrier's records to determine the number of man hours worked by contractor employees and the appropriate claimants from the BMWE seniority rosters."

AWARD 2 – PLB NO. 6671:

"The claim is sustained. Amtrak violated its May 19, 1976, Agreement with the BMWE (as amended) when it subcontracted out the welding work identified in its letter dated September 12, 2003. The track welding work should be returned to the Track Department welders represented by the BMWE and covered by the May 16, 1976, Agreement (as amended) and the Carrier must compensate the appropriate track sub-department welders at their applicable rates of pay for an equal proportionate share of man hours expended by the contractor's forces in performing the work identified in Amtrak's letter dated September 12, 2003. This case is remanded for a joint check of the Carrier's records to determine the number of man hours worked by the Holland employees and the appropriate claimants from the BMWE welder seniority rosters."

AWARD 3 – PLB NO. 6671:

"The claim is sustained. Amtrak did violate its May 19, 1976, Agreement with the BMWE (as amended) when it contracted out the track material handling work identified in its letter dated August 20, 2003. The tie handling work must be returned to the Track Department forces represented by the BMWE and covered by the May 16, 1976, Agreement (as amended). The appropriate Track Department forces represented by the BMWE must be compensated at their applicable rates of pay for an equal proportionate share of the man hours expended by the contractor's forces in performing the work identified in Amtrak's letter dated August 20, 2003. This case shall be remanded for a joint check of the Carrier's records to determine the number of man hours worked by the Georgetown employees and the appropriate claimants from the BMWE Track Department rosters."

AWARD 4 – PLB NO. 6671:

"The claim is sustained. The Carrier violated the agreement when it arranged for persons other than its own Track and B&B Department forces to perform tree trimming and brush removal for the purpose of maintaining its right of way. The Carrier is required to reimburse at the straight-time rate the applicable maintenance of way employees for the work that they should have been allowed to perform but was instead performed by the outside contractor."

Moreover, Referee Klein held in Award 39141, that the Carrier's have recognized that if they are found to be in violation of the Agreement then the referee has authority to fashion a remedy. In that connection, we invite attention to Award 39141, wherein the Board held:

AWARD 39141:

"It is well established that compensatory remedies have been awarded by numerous Boards in the past in order to preserve the integrity of the Agreement, notwithstanding arguments by the Carrier that the claimants were fully employed during the period at issue. The Board concurs with the reasoning set forth in those Awards. The result of such a remedy effectively requires the Carrier to pay twice for the same work. The Board notes that the Carrier is fully aware of such a consequence for its decision to contract out work, which work is subsequently determined to be scope covered work reserved to BMWE-represented employees. The Carrier specifically acknowledged so in its Opposition to Motion for Preliminary Injunction (Brotherhood of Maintenance of Way Employes vs. CSX Transportation, Inc., Case No. 3:00-cv-264-J-21B) which provides, in pertinent part, as follows:

> 'The standard remedy in arbitration is not, as BMWE suggests, to have work which was done by the contractor "redone with BMWE members." BMWE at 26. The standard arbitration remedy is that CSXT must, in effect, pay for the work twice. The arbitrator could order that CSXT pay BMWE-represented employes as if they had done the work in question.' (Employee's Exhibit R.)

"Therefore, as a result of the Carrier's violation of the Scope Rule in this case, the Claimants shall each be compensated at their straight time rates of pay for an equal proportionate share of all hours worked by employees of the outside contractor in the construction of the office building at mile post QC 15.0 in Selkirk, New York. See Third Division Award 36092.

AWARD

Claim sustained in accordance with the Findings."

Indeed, as the afore-cited awards involving this referee reveals, he knows how to fashion a remedy when he wants to. The problem here is that there was no reason whatsoever for this Neutral Member to cut the hours down from 930 hours to 96 hours because there is nothing in this record to justify amending the monetary remedy is such a Draconian manner.

This Board has consistently held that fully employed claimants are entitled to monetary relief when the Carrier violates the Agreement. A sample of these awards are Third Division Awards 685, 2277, 12374, 17523, 21751, 27614, 28185, 28241, 28513, as well as, Awards 34 and 41 of Special Board of Adjustment No. 1016.

For all of these reasons, I concur with the findings of this award insofar as the findings of an Agreement violation is concerned but emphatically dissent with respect to the damages finding in this award.

Respectfully submitted,

Timothy W. Kreke
Labor Member