Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40763
Docket No. MW-41347
10-3-NRAB-00003-100136

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 Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union 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 (Anvil Fence Co.) to perform Maintenance of Way and Structures Department work (fence construction) on Carrier property in Nampa, Idaho on December 16, 2008 through December 22, 2008 (System File D-0952U-202/1516039).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Newby, R. Payne, J. Paz and W. Wallace shall now each be compensated for forty (40) hours at their respective straight time rates 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.

By letter dated December 5, 2008, the Carrier advised the Organization's General Chairman as follows:

> "This is a 15-day notice of our intent to contract the following work:
>
> Location: 1313 1st Street North, Nampa ID
>
> Specific Work: Purchasing and installing 2000 feet of 5 foot 11 gauge chain link fence with a bottom tension wire with one 15 foot side gate and repairing of one existing 30 foot slide gate and 10 foot of the 6 foot tall fence."

Through its General Chairman, the Organization requested a conference by letter dated December 8, 2008 ("I am, therefore, requesting that, in accordance with the provisions of Rule 52, a conference be scheduled and held prior to the work being assigned to and performed by a contractor . . ."). In that letter, the General Chairman also advised the Carrier that "[Vice Chairman] Dave Scoville is designated as my representative to meet with the Carrier to discuss matters relating to the contracting transaction in a good faith attempt to reach an understanding concerning said contracting. Contact him at . . . for dates and times to conference."

The record shows that prior to the Carrier's issuance of the December 5, 2008 notice, Vice Chairman Scoville advised the Carrier by e-mail on November 30, 2008 that "I will be out of the office after Tuesday [December 2, 2008] noon my time, not returning until December 16."

On December 17, 2008, Vice Chairman Scoville contacted the Carrier requesting a conference, advising ". . . I am available now through 12/23 and again 12/26 through 12/30." A conference was held on December 23, 2008, but the parties

were unable to resolve the Organization's objection to the Carrier's stated intent to contract the work. The subcontracted work began on December 16, 2008, and continued through December 22, 2008.

Although the Carrier has the right to subcontract out fencing work (see Third Division Award 40755 and Awards cited therein, it must nevertheless first comply with Rule 52.

Rule 52 is clear:

> ". . . [W]ork customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' forces. . . . In the event the Company plans to contract out work because of one of the criteria described herein, it will notify the General Chairman of the Organization 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. . . ." (Emphasis added)

While contractors have performed fencing work in the past (see Award 40755) it is not disputed that fencing work is the kind of work which falls under the scope of the Agreement and also has been performed by BMWE-represented employees. Rule 52 is therefore applicable.

The relevant facts therefore show that the Carrier's notice is dated December 5, 2008; by letter dated December 8, 2008, the General Chairman requested a conference pursuant to Rule 52; and the work began on December 16, 2008 - 11 days after the Carrier's notice. However, Rule 52 clearly provides that the Carrier ". . . will notify the General Chairman of the Organization 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. . . ." There is no evidence to establish that this was an emergency situation so as to allow the Carrier to avoid the 15-day notice requirement. The work therefore began prior to the 15-day period required in Rule 52. A violation of Rule 52 has been shown.

The fact that the General Chairman designated the Vice Chairman in his December 8, 2008, letter to conduct the conference and that the Vice Chairman previously notified the Carrier that he would be out of his office returning on

December 16, 2008, does not change the result. Putting aside the fact that the Vice Chairman notified the Carrier on November 30, 2008, that he would be out of his office and would be unavailable commencing December 2, 2008, (a date which pre-dated the Carrier's December 5 notice) the Vice Chairman returned on December 17, 2008, and advised the Carrier on that date ". . . I am available now through 12/23. . . ." Therefore, the Vice Chairman returned before the 15-day period in Rule 52 had run from the Carrier's December 5, 2008, notice and he was available for conference for several days within that 15-day period.

But the discussion must return to Rule 52's clear requirement that the Carrier is obligated to ". . . notify the General Chairman of the Organization 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 . . ." and the fact that the work began prior to expiration of that 15-day period. Rule 52 was violated.

As a remedy, the Claimants shall be made whole for the lost work opportunities. See Third Division Award 32862 between the parties concerning the Carrier's failure to follow notice requirements in subcontracting disputes:

> "Complete uniformity of decision did not exist as this Board developed its approach to the hundreds of cases presented to this Board arising from the parties' contracting disputes. Review of those decisions shows some inconsistencies - by this Board and sometimes even by individual referees sitting with the Board. But one very clear concept arose through that overall decisional process - the position taken by this Board discussed in Award 32338 that the Carrier's failure to give notice to the Organization after the 1991 admonitions by this Board that it had to do so would result in relief beyond compensation only for those employees in furlough status.
>
> We recognize that the result in these cases where no notice is given may be anomalous. It may well be under Article IV that had the Carrier given notice, (and because of lack of skills of the employees, need for specialized equipment, etc.), the Carrier may have been able to contract the work. However, in failure to give notice cases, even though the Carrier may have ultimately been able to contract the work, even employees who were working could be compensated only because notice was not given. We are very conscious of that

result. But, our function is to enforce language negotiated by the parties. In Article IV and as a result of negotiations, the parties set forth a process of notification and conference in contracting disputes. The Carrier's failure to follow that negotiated procedure renders that negotiated language meaningless. This Board's function is to protect that negotiated process. Our discretion for fashioning remedies includes the ability to construct make whole relief. The covered employees as a whole are harmed when the Carrier takes action inconsistent with the obligations of the Agreement (here, notice) to contract work within the scope of the Agreement. Relief to employees beyond those on furlough makes the covered employees whole and falls within the realm of our remedial discretion.

* * *

From the handling of the hundreds of claims presented to this Board between the parties on the issue of contracting work, we are also cognizant that the notice, objection by the Organization and conference procedure often is a pro forma exercise which ends up in a literal battle of word processors and copy machines as the parties posture themselves on the issues and put together the voluminous records in these cases. Our function is not to make certain that the process is a meaningful one - that is the obligation of the parties. Our function is to enforce the language the parties agreed upon. The Carrier's course of action now is a straight forward one - simply give notice where the work arguably falls 'within the scope of the applicable schedule agreement.' If it does so, the Carrier will not be faced with the kind of remedy imposed in this case because it failed to give notice.

This claim shall be sustained in its entirety. We shall remand this case to the parties to determine the number of hours worked by the contractor's forces on the dates set forth in the claim. Claimants shall be compensated accordingly."

See also, Public Law Board No. 7096, Award 1 between the parties:

> "The end result was that because of the Carrier's failure to give timely notice under Rule 1(B) and the frustrating of the notice and conference provisions in that rule, Claimants lost overtime opportunities. With the frustrating of the notice and conference procedures resulting from the Carrier's failure to give timely notice, make whole relief for those lost work opportunities is therefore appropriate. Claimants shall be made whole for the lost work opportunities based upon the number of hours worked by the contractor on the dates in dispute."

Further, see Public Law Board No. 7096, Award 14 ("Because Claimants were deprived of potential work opportunities they shall therefore be made whole for those lost work opportunities.") and Award 15 ("As a remedy, because the Carrier's notice obligations were not met under Rule 52 for the disputed work, Claimants shall therefore be made whole for the lost work opportunities") between the parties. In view of the foregoing, this claim must be sustained.

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 15th day of December 2010.