Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41643
Docket No. MW-41592
13-3-NRAB-00003-110220

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 Division - IBT Rail Conference
(Union Pacific Railroad Company (former Missouri 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 (Loram) to perform Maintenance of Way Department work (ballast shoulder drainage related work) between Mile Posts 562 and 609 on the Duncan Subdivision on January 3, 2010 and continuing through January 31, 2010 (System File UP607BT10/1532322 MPR).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out said work or make a good-faith effort to reach an understanding and reduce the amount of contracting as required in Rule 9 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 M. Fitzgerald, J. Dewalt, R. Thompson and E. Moore shall now each be compensated for three hundred forty-eight (348) 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.

This claim involves the Carrier's contracting out of drainage work along the right-of-way without giving advanced notice to the Organization. Although contested on the property, the Carrier appears to concede that the work in question is arguably scope-covered, that it was performed during the claim period, and that it failed to give notice of such intended contracting to the Organization as required by Rule 9(a). The issue raised in this dispute concerns the appropriate remedy for such notice violation where the Claimants are fully employed.

The Organization argues that the four named Claimants are entitled to compensation for 348 hours each, alleged to be the amount that the Carrier paid to the contractor for the services of its workers, because that is the measure of lost work opportunity represented by this violation. It asserts that monetary relief is appropriate even for fully employed Claimants on this property, relying on Third Division Award 32862; Public Law Board No. 7101, Case 9; Public Law Board No. 7096, Awards 15 & 16; and Public Law Board No. 7099, Cases 6 & 14.

Conversely, the Carrier contends that no monetary relief is appropriate, noting that the Claimants were fully employed, citing Third Division Awards 32743, 30281, 30162 and 28559. It also argues that the claim is excessive because the Organization failed to sustain its burden of proving the amount of the alleged loss. It points to contractor records relied upon by the Organization to show that only a small number of the hours submitted were for time spent doing production work (59.33) which should be the limit of any compensation awarded.

A careful review of the record convinces the Board that, under precedent established on this property, fully employed Claimants can be awarded monetary relief to make them whole for the loss of work opportunity occasioned by contracting scope-covered work without advance notice, as well as to enforce the notice and conference language negotiated by the parties in Rule 9(a) and (b). See, Third Division Awards 38349 and 32862, as well as Public Law Board No. 7099, Cases 6 & 14; Public Law

Board No. 7096, Awards 1, 15 & 16. We reject the Organization's assertion that the limitation of reimbursable hours constitutes new argument, finding that the Carrier argued on the property that the remedy request was excessive. While there is no dispute that the Carrier violated Rule 9(a) & (b) in this case, the Organization did not meet its burden of establishing that four contractor employees each worked 348 hours during the claim period, the amount claimed. It is unclear from the record where this figure came from. The contractor's Daily Field Reports relied upon by the Organization show that contractor forces were only present and ready to work on 16 days during the claim period (not on January 10, 23, 24 and 31 when there was scheduled maintenance) and that while they only spent about 60 hours total performing production work, they were also compensated for the over 108 hours that they were delayed by various operational factors, which the Claimants would also have been paid for if they had performed the work in question. Of these 16 days, only two of them were 12-hour days, four were 11-hour days, and ten were 10-hour days. These records support a claim for a loss of work opportunity of 168 hours for each Claimant. The Claimants shall each receive 168 hours at their straight time rate of pay to compensate them for this lost work opportunity, and to enforce the important notice and conference requirements negotiated by the parties to this Agreement.

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 24th day of April 2013.