AWARD NO. 22
CASE NO. 22

SPECIAL BOARD OF ADJUSTMENT NO. 1130

PARTIES TO DISPUTE	)	**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**
	)	
	)	**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 (W. T. Byler Construction Company) to perform Maintenance of Way machine operator work (operate backhoes and trackhoes) in connection with switch and crossing installation work between Mile Post 37 in the vicinity of Rosenberg, Texas and Mile Post 120 in the vicinity of Flatonia, Texas beginning on July 20, 1998 through September 15, 1998 (System File MW-98-217/1160497 MPR).

2. The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intent to contract out said work or make a good-faith effort to reduce the amount of contracting, as provided in Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operators M. R. Jatzlau, J. D. Bartek, Jr. and M. Salazar shall now each be compensated for three hundred seventy-six (376) hours' pay at their respective straight time rate of pay and each shall each be compensated for seventy-four (74) hours' pay at their respective time and one-half rates of pay.

OPINION OF BOARD

By notices dated June 12, 1998 from Directors of Track Maintenance D. E. Pecaut and B. J. Waguespack, the Carrier advised the Organization of its intent to contract out certain work at specified locations including "... tie renewal, crossing renewal, drainage work and vegetation control" further specifying that "[e]quipment that could be used is backhoe, dumptruck, dozer, bush-hog, chain saws, various types cranes, and operators." The

Organization asserts that it was not in receipt of the complete noticed information until June 28, 1998. By letter dated June 30, 1998, the Organization requested conference be held. By letter dated July 10, 1998, the Carrier declined to meet in conference:

> It is the position of the Carrier that you are out of time to conference Service Order notices by Pecaut and Waguespack as the notices were given June 12, 1998 and your letter was not dated until over 15 days later, June 30. According to Article IV - Contracting Out, the Carrier must notify the General Chairman of contracting out at least 15 days prior thereto. Thus, the Organization has fifteen (15) days to dissuade the Carrier from contracting out. On several of these notices, the fifteen (15) days has expired. Therefore, the Carrier will not conference the two notices dated June 12, 1998.

* * *

The Carrier contracted the work. This claim followed.

Article IV of the 1968 National Agreement states in relevant part:

> 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.

* * *

For reasons discussed in *Award 10* of this Board, the Carrier's argument that the Organization must demonstrate that covered employees must perform the disputed work on an exclusive basis is rejected. The disputed work — operation of backhoes and trackhoes — is classic maintenance of way work and falls "within the scope of the applicable schedule agreement" as contemplated by Article IV.

For reasons discussed in *Award 13* of this Board, we find the Carrier met its notice obligations under Article IV. The notices specify the location and identifies the type of work to be performed and further identifies the equipment to be used.

The Organization was sufficiently put on notice of the Carrier's intentions in order to allow the Organization to adequately discuss the matter in a conference.

However, while we find that the Carrier met its Article IV notice obligations, we do not find that the Carrier met its conference obligations under Article IV. The notices were dated June 12, 1998. Asserting it did not receive complete notification until June 28, 1998 the Organization did not request a conference until June 30, 1998. On July 10, 1998, the Carrier declined to meet asserting that "... the fifteen (15) days [under Article IV] has expired. Therefore, the Carrier will not conference the two notices dated June 12, 1998." Simply put — and putting aside whether the Organization did not receive the Carrier's notices until June 28, 1998 or on some earlier date — Article IV does not contain the 15 day period for the Organization to request a conference as asserted by the Carrier. The 15 day period is the minimum time for *the Carrier* to give notice to the Organization ("... 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."). The only obligation specified in Article IV on the Organization is for the Organization to ask for a conference. If the Organization does so, the Carrier must "promptly" meet ("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."). Again, there is no 15 day period in the negotiated language in Article IV for the Organization to request a conference. If the sophisticated negotiators who constructed Article IV desired such a result and their having placed that 15 day restriction on the Carrier, one would expect that they would have done the same for the Organization. Clearly, they did not do so. When the Carrier refused to meet after the Organization requested a conference, the Carrier therefore violated its obligation under Article IV to "promptly meet". A violation of Article IV has been shown.[1]

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[1] Had the Carrier met its conference obligations as requested and had the
[footnote continued]

With respect to a remedy, Claimants shall be made whole. *See Third Division Award 32862:*

> ... on the issue of remedy, in the past where the Carrier has failed to give advance notice to the Organization in contracting disputes, this Board has often fashioned limited remedies. Some awards have limited relief to employees in furlough status. See e.g., Third Division Award 31285. The rationale behind those awards flows from the fact that notwithstanding the clear language of Article IV mandating the Carrier to give notice, for years the Organization allowed contracting to go on without objection. It was not until a change of leadership in the Organization on this property that Article IV became a focal point of hundreds of claims which served to put the Carrier on notice that the Organization thereafter intended to enforce the language in Article IV. For this Board to have required the Carrier to compensate non-furloughed employees after those initial claims were filed when the Organization previously allowed the wide spread contracting out of work falling "within the scope of the applicable schedule agreement" would have been manifestly unfair.
>
> However, the language in Article IV concerning the Carrier's obligation to give notice to the Organization of its intent to contract work which falls "within the scope of the applicable schedule agreement" is clear. See Award 31285 ("'[S]hall notify' is mandatory"). Through the persistent filing of claims, the Organization has put the Carrier on notice that it intends to enforce that language. This Board has repeatedly acknowledged that a point exists where the Carrier's reliance on the Organization's prior willingness to permit contracting of such work would no longer shelter the Carrier from liability in cases where the Carrier does not give the required notice. See Third Division Award 32338

* * *

The contracting of work in this case occurred after the 1991 admonitions from this Board that when the Carrier thereafter failed to give notice as required by Article IV, the Carrier could be liable for more than only compensation for furloughed employees. Award 32338 and the awards cited therein therefore require the imposition of remedial relief irrespective of whether the involved employees were furloughed. See also Third Division Award 28513 quoted in Award 32338 (imposing such relief "... where the Carrier failed to the degree demonstrated by this record to follow the previous admonitions of this Board over the requirement to give notice").

* * *

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 negotia-

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[continuation of footnote]
Organization received the Carrier's notices earlier that it asserts, the Carrier would have been in a strong position to argue that any harm claimed by the employees should be mitigated, if not negated, by the Organization's failure to make a more timely request to meet. But, the Carrier cannot take such positions because the Carrier refused to meet.

> tions, 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. ...
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> * * *
>
> 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 same conclusion is warranted where, as here, the Carrier fails to meet its conference obligations under Article IV for work contracted out in 1998. As in Third Division Award 32862, by refusing to meet with the Organization, the Carrier similarly frustrated the negotiated conference provisions under Article IV. Claimants are therefore entitled to make whole relief.[2]

The claim shall be sustained. Claimants shall be compensated in accord with the Agreement provisions based upon the number of hours worked by the contractor's forces. The matter is remanded to the parties to determine the amount of relief Claimants shall receive.

AWARD

Claim sustained in accord with the opinion.

Edwin H. Benn
Neutral Member

Carrier Member

Organization Member

Chicago, Illinois

Dated: 8-15-02

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[2] The fact that the Carrier may have met with the Organization in October, 1998 with respect to other notices does not change the result. Under Article IV, the Carrier's obligation is to "promptly meet". After refusing to meet, agreeing to meet over three months later is not "prompt". In any *[footnote continued]*

[continuation of footnote]
event, by that time the work in dispute in this case had been performed.