NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25967

THIRD DIVISION Docket Number MW-25776

Herbert J. Marx, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Chesapeake and Ohio Railway Company (Southern Region)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, without a conference having been held as required by the October 24, 1957 Letter of Agreement, it assigned outside forces to perform ditching and grading work and to unload and spread stone and/or gravel at Camp Morrison on the Peninsula Sub-division of the Richmond Division (System File C-C-1556/MG-3901).

(2) Because of the aforesaid violation, cut-back Machine Operator J. Coff shall be allowed two hundred eighty-eight (288) hours of pay at the machine operator's rate and furloughed Trackman J. L. Silver shall be allowed two hundred twenty-six (226) hours of pay at trackman's rate plus six cents (6¢) per hour differential."

OPINION OF BOARD: In this dispute, the Organization argues that the Carrier violated the applicable Rules by assigning, without conference with the Organization, certain work to outside forces. This work involved ditching and roadbed work at Camp Morrison on the Peninsula Sub-division of the Richmond Division. This type of work is specifically covered in Rule 66, Classification.

As to the restrictions on the Carrier in assignment of such work to outside forces, the Organization cites Rules 83(b), which reads in pertinent part as follows:

> "(b) It is understood and agreed that maintenance work coming under the provisions of this agreement and which has heretofore customarily been performed by employees of the railway company, will not be let to contract if the railway company has available the necessary employees to do the work at the time the project is started, or can secure the necessary employees for doing the work by recalling cut-off employees holding seniority under this agreement."

In addition, the Organization cites Appendix B, a letter from the Carrier to the General Chairman dated October 24, 1957, which reads in pertinent part as follows:

> "As explained to you during our conference at Huntington, W. Va., and as you are well aware, it has been the policy of this company to perform all maintenance of way work covered by the Maintenance of Way Agreements with maintenance of way forces except where special equipment was needed, special skills were required, patented processes were used, or when we did not have sufficient qualified forces to perform the work. In each instance where it has been necessary to deviate from this practice in contracting such work, the Railway Company has discussed the matter with you as General Chairman before letting any such work to contract.
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> We expect to continue this practice in the future . . . ."

As to the work involved, the parties are in sharp dispute. The Organization, throughout extensive on-property written correspondence, argued that the Carrier had the necessary equipment and personnel to perform the work and had utilized its own employees to do similar work in the past. The Carrier argued that the "magnitude" of the work (involving extensive road construction) precluded the use of its own forces and also that the equipment employed by the outside contractor to perform the work expeditiously was not available to the Carrier.

The Board need not resolve this factual conflict, however, since the dispute turns, as the Board sees it, on the contractual ground as to whether or not the Carrier was required to arrange for advance discussion with the General Chairman, as provided in Appendix B.

In this particular connection, the Carrier raises a procedural objection, based on which it urges the Board to dismiss the case. The Carrier notes that in the original Claim letter, the Organization stated its argument that "Labor Relations has not furnished this office with a letter showing the intent of the Carrier to contract this work". The appeal to this Board, however, states as follows:

> "(1) The Carrier violated the Agreement when, without a conference having been held as required by the October 24, 1957 Letter of Agreement, it assigned outside forces to perform . . .".

The Carrier contends that this is not the same Claim as argued on the property. The Board does not agree. A review of the original Claim letter leaves no doubt that the Organization's concern is with the performance of the work itself by outside forces, as well as a notification failure. The furnishing of a "letter" or some other form of communication is, as the Organization notes, a necessary preliminary to the discussions specified in Appendix B. The Claim is in valid form for processing to this Board.

Rule 83(b) states that work "customarily being performed by employees" will not be contracted out if the Carrier has or can secure by recall the necessary employees. The Carrier maintains and the Organization denies, as suggested above, that this particular project does not fall within the Scope of customary work. Appendix B, however, goes further and adds to the exceptions under which work will not be assigned to Maintenance of Way employees; namely, the need for special equipment or special skills, use of patented processes, or in the absence of sufficient qualified forces. In Appendix B, the Carrier undertakes to continue the practice of discussing the matter in advance with the General Chairman "in each instance where it has been necessary to deviate from this practice in contracting such work".

The Carrier argues that this must be read to mean it is required to give advance notice only when work is to be contracted out for reason other than the exceptions noted. The Board finds this too narrow a view. Classification Rules and Rule 83(b) prohibit the contracting of work when employees are available. In such circumstances, no "discussion" is called for. Appendix B spells out other circumstances under which contracting may be done (special equipment needs, etc.) but balances this with the undertaking to discuss first.

In this particular circumstance, the difference between the parties as to the work itself appears to center on its "magnitude" and not the unusual nature of the work itself. Of relevance here is Award No. 24399 (Sickles) involving the same parties and sustaining the Organization's position, which states in part as follows:

> "OPINION OF BOARD: The pertinent Agreement reserves certain work to the Employes and the October 24, 1957 Letter of Agreement between the parties specifies that the Carrier will perform all maintenance of work with classified employes except where special equipment is needed. But it was agreed that the Carrier would discuss any asserted necessity to deviate from that practice prior to contracting work out.
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> The Employes assert that no such conference was held even though work which could have been performed by the Employes was contracted to another firm . . . ."

Here, as in the situation in Award No. 24399, it appears the work "could have been performed by the Employes". Whether it was practical to do so, whether special equipment was needed, etc., would have formed the content of the specified advance discussion with the General Chairmen. In the absence of such discussion, the Board concludes that the Carrier is in violation of its undertaking in Appendix B.

As to the appropriate remedy, the Board is not persuaded by the Carrier's argument as to no lost work opportunity for the Claimants. This is

based on innumerable previous Awards on this subject. As to the amount of time utilized by the contractor in use of a truck, which work is claimed by one of the Claimants, the Carrier and the Organization are directed to consult the work records to determine the appropriate amount of hours. Failing the proffer of such records, the Claim must stand as presented.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board had jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of March 1986.