Form I NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 26791
THIRD DIVISION Docket No. MU-26624
88-3-85-3-376

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employee
(The Chesapeake and Ohio Railway Company (Northern 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 grading work in the Waverly Yard at Holland, Michigan on June 2. 1984 (System File C-TC-2154/K-4775).

2. Because of the aforesaid violation, Machine Operator G. Bosch shall be allowed eight (8) hours of pay at his time and one-half rate."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employes 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 valved right of appearance at hearing thereon.

On June 2. 1984, an outside construction company worked at Waverly Yard in Holland, Michigan. By letter of July 3. 1984, the Organization claimed that the contractor was used to surface the roadway in violation of Appendix F in that the General Chairman had received no Notice of Intent to contract out Maintenance of Way work. During the progression of this Claim, the Organization further argued chat: the "contractor himself surfaced the road on one date and later applied the calcium chloride to the roadway"; employees had previously applied calcium chloride; equipment was moved by Carrier just prior to June 2nd; a Claim for eight (8) hours was appropriate.

In denying the Claim, the Carrier contended that the contracted work was to apply calcium chloride for dust control. It argues that such work did not fall within the Scope of the Agreement and Maintenance of Way Employes had never done such work before. It further pointed out that: "any leveling of road was incidental to dust control application-; a roadgrader was necessary and unavailable; the Claim was vague; leas than four (4) hours were used by the contractor.

In its Submission to this Board, the Carrier argues that the Statement of Claim has been amended and is procedurally invalid. On property, the Organization argued that the Carrier failed to advise of its intent to contract out work, while the claim to this Board is that it failed to have a conference as required. In the Agreement language there is an intrinsic relationship between notice and conference. The terms are technically distinct. They may be joined if, after written Notice of Intent, the Organization requests a conference. The Board views the Claim es amended, but not procedurally barred. It is essentially the same Claim as handled on property and to chat extent this Board will consider it as valid. This is consistent with the essence of other Awards that have ruled on this issue (Third Division Awards 24399, 25967, 26210, 26351. 26436).

There is dispute in the record as to the nature of the work done by outside forces and the interpretation of the Agreement. All Ex Parte arguments presented for the first time are not considered herein. The relevant Agreement provision in dispute is a letter of October 24, 1957 incorporated as Appendix F of the Agreement which states in pertinent pert:

> . . . 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 □ stter with you as General Chairman before letting any such work to contract."

The Organization argues that since surfacing the roadway was Maintenance of Way work, the General Chairman should have been contacted to discuss the Carrier's plans before the work vent to be contracted. The Carrier argued that since the contract was for dust control which was not Maintenance of Way work, in that they had never applied calcium chloride in the past, the "work did not accrue to them and no notice of this contract was required."

The Agreement requires the Carrier to advise of its intent to contract out any work that might fall within the Scope of the Maintenance of Way Agreement. The Carrier did not deny that the road was smoothed prior to the application of calcium chloride. Nowhere does the Carrier refute that the job of surfacing roads was Maintenance of Way work. The Carrier does not dispute that the contractor "surfaced the road on one date and later applied calcium chloride to the roadway." On the whole of the record, the work contracted required two specific tasks.

The record at bar indicates that some of the work performed lies within the Scope of the Agreement and "could have been performed by the employees" (Third Division Award 25967). We are not persuaded by the Carrier's argument that i: did not have to notify the Organization of its intent to contract out work that, by its very nature, encompassed work which was protected by the Agreement. 'Whether the smoothing of the road was incidental or central to the application of calcium chloride, it was nonetheless work subject to discussion under Appendix F. The Board sustains the Claim.

As for compensation, the record does not contain evidence either supporting a time and a half rate of pay, or showing eight (8) hours work done by an outside contractor. The parties are directed to review the appropriate records to ascertain the correct number of hours. The Claimant shall be compensated at his straight time rate of pay for the actual hours of work performed by the contractor. The Carrier violated the Agreement when it did not discuss its intent to contract out the disputed work with the General Chairman.

4 W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1988.