Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27585
THIRD DIVISION Docket No. MW-26767
88-3-85-3-516

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

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

STATEMENT OF CLAIM: "Claim of 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 [Rule 84(c)], it assigned outside forces to perform ditching work at Kenova and Ashland June 25, 1984 through August, 1984 (System File C-TC-2415/MG-4888).

(2) Because of the aforesaid violation, cut back Equipment Operator L. W. Dillon shall be allowed the difference between what he should have been paid at the Class A equipment operator's rate and what he was paid at the Trackman's rate during the claim period."

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 waived right of appearance at hearing thereon.

Claimant is an Equipment Operator who, at the time this dispute arose, was in a cutback status as a Trackman. On June 25, 1984, the Carrier contracted with Asplundh Corporation to perform ditching and road bed work at its Kenova and Ashland Yards. The work performed by the contractor consisted of ditching work at the yards and was performed through use of a backhoe. The work continued for approximately two months. The Carrier concedes that the Organization was not given advance notice of its intent to contract out the work contending that the failure to do so was through inadvertence. However, on the dates in question, the Carrier upgraded the senior cut-back Operator on the Huntington Division working as a Trackman, A. Humphrey, to the Operator's rate. Claimant seeks the difference between the Trackman's and Equipment Operator's Class A rates for the time period that the contractor performed services.

Initially, the Carrier's argument that the Organization has presented a different claim to this Board than it presented on the property thus requiring dismissal of the Claim must be rejected. Our review of the record does show in accord with the Carrier's position that the on-property handling specifically focused upon the lack of notice of contracting out the work at issue, whereas the Claim before this Board makes reference to the lack of a conference. Further,

our examination of the record shows that there is no substantial variance between the dispute presented on the property and that which is now before this Board for decision. Whether the Claim asserts the lack of a conference or the similar lack of notice will not ultimately affect the outcome of this matter on the facts presented. Since the basic claim set forth on the property was followed consistently through the procedures, the merits of the Claim are properly before us. See Third Division Awards 26436, 26351, 26210, 25967, 24399.

With respect to the merits, Rule 83(b) states in pertinent part:

> "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."

The letter of agreement of October 24, 1957 found in Appendix B of the Agreement further addresses the issue:

> "... it has been the policy of this company to perform all maintenance of way work covered by the Maintenance of Way Agreement 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 contract.
>
> We expect to continue this practice in the future...."

The Carrier does not contest that it was required to notify the Organization of its intent to contract out the work at issue and further admits that it did not do so. Therefore, the above-quoted provisions of the Agreement have been violated.

However, the Carrier seeks to escape the imposition of monetary relief with the argument that the work involved the use of one operator employed by the contractor and during the time it contracted out the work, the senior cut-back Operator on the property was upgraded. We find that position well-taken in this case. In light of the fact that the senior cut-back Operator was upgraded from his cut-back Trackman's status during the time that the contractor performed the work, we cannot say that monetary relief is appropriate in this case. Since the Claim specifically only seeks relief for the differential in the lost Operator's wages, the lost work opportunity was remedied by the upgrading of the senior cut-back Operator. We view this case as distinguishable from cases where monetary

remedies have been formulated. For example, in Third Division Award 25967, monetary relief was granted for work contracted out in violation of the requirements of the rules involved in this case. However, in that case, the Carrier did not follow the notification requirements and further did not upgrade affected employees as it did herein. Thus, work opportunities remained lost as a result of the Carrier's violation thereby making monetary relief necessary. Similarly, in Third Division Awards 26351 and 26210 compensation was awarded as claimed to furloughed employees where non-furloughed employees were upgraded or the upgrade did not cover the entire period that the work was performed by the outside contractor. Here, the senior cut-back employee was upgraded for the time that the contractor performed the work and, most significantly, there is no claim that furloughed employees are entitled to relief. The only remedy sought is the differential for Claimant who, admittedly, is not the senior cut-back employee.

But the Organization nevertheless seeks the differential payment to Claimant. Two further reasons exist to reject that position. First, to sustain the Organization's argument will result in the Carrier paying two employees for the loss of one work opportunity and, as such, will amount to an undue penalty where the Carrier has already complied with a make whole remedy by appropriately paying the differential to the senior affected cut-back employee Humphrey. Second (and putting aside the question of whether this issue was raised on the property), Claimant's hearsay contention that Humphrey told him that "he had no intentions of bidding on the operators position and therefore did not claim back pay" does not defeat the fact that this record shows without factual contradiction that Humphrey was compensated for the differential now also sought by Claimant. While the Organization is correct that Claimant has standing to file a Claim, Claimant nevertheless carries a further burden of demonstrating that he is entitled to monetary relief in order to receive the same. There has been a clear demonstration that the Agreement was violated. However, in light of the compensation given to the senior cut-back Operator and the specific relief sought in the Claim, there has been no demonstration that Claimant is entitled to monetary relief.

A 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 27th day of October 1988.