Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27636
THIRD DIVISION Docket No. MW-26715
88-3-85-3-468

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Consolidated Rail Corporation

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

(1) The Agreement was violated when it assigned outside forces to unload, haul and spread stone in connection with track and roadbed work at Wabash Yards, Effingham, Illinois; Ansonia, Ohio; Collinsville, Illinois and South Anderson Yard on March 26, 27, 28, 30, April 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30 and May 1, 2, and 11, 1984 (System Dockets CR-1040, CR-1045, CR-1043 CR-1039, CR-1038, CR-1044, CR-1047 and CR-1046).

(2) The Carrier also violated the Agreement when it did not give the General Chairman advance written notice of its intention to contract out said work.

(3) As a consequence of the aforesaid violations, Equipment Operators J. W. Casey and W. C. Johnson shall each be allowed sixteen (16) hours of pay, Equipment Operator R. G. Childress shall be allowed twenty-four (24) hours of pay, Equipment Operator T. A. Varvil and Vehicle Operators R. S. Emanus and D. W. Persinger shall each be allowed ninety-six (96) hours of pay, Vehicle Operator T. K. Phillips and Equipment Operator R. C. Decker shall each be allowed one hundred twenty (120) hours of pay, Equipment Operator D. P. Groves shall be allowed one hundred eight-four (184) hours of pay and Vehicle Operator S. J. Poor shall be allowed two hundred (200) hours of pay at their respective straight time rates."

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 employes 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.

Claimants in this dispute are furloughed Maintenance of Way employees on the Southwest Division of the former Southern Region.

On the claim dates there is not dispute that Carrier used outside contractors and their equipment to load and haul stone to work sites at Wabash Yards, Effingham, Illinois; Ansonia, Ohio; Collinsville, Illinois; and South Anderson Yard in the Southwest Division. There is also no dispute that Carrier failed to furnish the General Chairman advance notice of the contracting out. The Organization has bottomed its claim on the alleged violation of the Scope Rule which it contends specifically reserves to them the work at issue here. Carrier, by contract, submits that the Scope Rule is general in nature and does not specifically grant the Organization the right, exclusive or otherwise, to perform the involved work. Furthermore, Carrier maintains that the Organization cannot rely on past practice to support its claim since this type of work has historically been performed by outside contractors. Notwithstanding the lack of merit of the claim under the general Scope Rule, or practice, Carrier further argues that it does not have the necessary equipment to perform the loading and hauling of stone, nor does it have the employees qualified to operate such equipment.

After careful review of the record in its entirety, we find that the parties have two very different and irreconcilably opposed views of this case. To the Carrier, the work involved is simply that of hauling and unloading stone, and when viewed as an isolated, independent event without reference to its purpose, Carrier argues the work is clearly beyond the purview of the Scope Rule. In the Organization's view, we must consider the purpose for which the work of hauling and unloading stone was assigned, the purpose being to repair and maintain the tracks and roadbed.

Relevant portions of the Scope Rule read as follows:

> "In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. 'Emergencies' applies to fires, floods, heavy snow and like circumstances.
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> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the company shall promptly meet with him for that purpose. Said Company and organization representatives shall

make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the Company may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith."

There is no question that, under these provisions, the Carrier is required to notify the General Chairman when it "plans to contract out work within the scope" of the applicable Agreement. The Carrier argues, however, that the proposed work is not within the scope of the Agreement and thus no notification is required. The Carrier contends that there is no showing that the Organization has exclusive rights to such work, either through specific Agreement language or otherwise.

The Organization demonstrates, however, that such work had been assigned to its employees it represents and that seniority rules as well as proposed job assignments make specific reference to such work and the equipment required therefor.

The Board finds that the Carrier's insistence on an exclusivity test is not well founded. Such may be the critical point in other disputes, such as determining which class or craft of the Carrier's employees may be entitled to perform certain work. Here, however, a different test is applied. The Carrier is obliged to make notification where work to be contracted out is "within the scope" of the Organization's Agreement.

The Scope Rule quoted above recognizes the right of the Carrier to contract out work, but at the same time, it places the Carrier under the special obligation of pre-notification and, if requested, discussion and an "attempt to reach an understanding" with the Organization. Whether or not the work here involved would have eventually been contracted out, assigned to another craft or class, or assigned to Maintenance of Way employees is not the principle point and indeed need not be resolved here. What the Board does find, however, is a failure by the Carrier to initiate the notification procedure.

The Claimants herein are on furlough contending their availability to perform the work. The Carrier argues that payment of the claim is inappropriate, even if violation is found of the provisions of the Scope Rule. The Board does not agree. What would have been the outcome had the Carrier complied with the notification procedure cannot be predicted or retroactively determined by the Board. One consequence, however, is that discussion and attempts at reaching an understanding may have resulted in assignment of work to Maintenance of Way employees. On this basis, the Board finds the remedy sought in the claim to be proper.

Thus, the Board will sustain the claim as stated in Paragraphs 2 and 3 of the Claim. With this, it is unnecessary to rule on the contention in Paragraph 1 of the claim.

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 16th day of December 1988.