Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28312
THIRD DIVISION Docket No. MW-28037
90-3-87-3-605

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Monongahela Railway Company

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

(1) The Agreement was violated when outside forces were used to perform track rehabilitation work on Tracks 9, 10 and 11 in Maidsville Yard from March 17, 1986 through April 7, 1986 (Carrier's File M-3793).

(2) The Agreement was further violated when the Carrier did not give the General Chairman fifteen (15) days advance notification of its plans to assign said work to outside forces in accordance with Addendum No. 9.

(3) Because of the aforesaid violations, furloughed employes M. R. Gallo, K. J. Rock, J. R. Franks, J. E. Myers, T. Garcia, B. K. Johnson and H. T. Moore shall each be allowed one hundred twenty-eight (128) hours of pay at the rate of eleven dollars and forty-two cents ($11.42) per hour for a total of one thousand four hundred sixty-one dollars and seventy-six cents ($1,461.76) each."

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.

Under a Letter Agreement, preliminary to a formal leasing arrangement, the Carrier agreed on March 3, 1986, to lease property and tracks to the Consolidated Coal Company for the purpose of establishing and operating a coal loading facility. The arrangement gave Consolidated the right to enter the designated area "for the purpose of constructing a driveway crossing over No. 2 Track and preparing and using about 5.0 acres of land for the construction of a loading facility and the rehabilitation and maintenance of tracks 9 and 11."

As to the rehabilitation of Tracks 9 and 11, Consolidated engaged another firm to perform the work. This track work was performed from March 17, 1986 through April 17, 1986.

On March 24, 1986 -- while the track rehabilitation work was in progress -- the Superintendent wrote to the General Chairman as follows:

> "Please excuse the delay in advising you of a special handling which has developed just recently which affects indirectly the MW&S Department in the Maidsville, W. Va. District.
>
> The Monongahela Railway Company has entered into and will ultimately finalize the leasing of Maidsville Yard tracks Nos. 9-10-11 to Consolidation Coal Company in order to facilitate coal loading by rail at their Humphrey Preparation Plant. Included in lease agreement is proviso for the coal company to perform all necessary rehabilitation of these tracks, as well as ultimate maintenance of same.
>
> In recent years, the MW&S Department has very infrequently performed maintenance of these tracks as the present volume of traffic and business did not warrant same. The costs of labor and material for rehabilitation and maintenance in future is the sole responsibility of Consolidation Coal Company.
>
> In no way will the complement of MW&S track forces at the Maidsville headquarters be affected.
>
> This will result in increased business to the Monongahela Railway Company affording the opportunity to maintain present force in this area of operations.
>
> If you have any further discussion relative to this affair, please feel free to contact me."

The Organization contends that the Carrier was in violation of Addendum No. 9 in failing to advise the Organization at least 15 days in advance concerning the track rehabilitation work. Addendum No. 9 reads as follows:

"Contracting out of Maintenance of Way Work

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."

The Carrier argues that, in this instance, such notice was not required. The Carrier points out that it did not subcontract work, but rather it was Consolidated which undertook a subcontracting arrangement to complete work on property leased to it.

Numerous Awards have held a carrier harmless in instances where contracting work is undertaken by another party and where such work is not under the control of and/or for the benefit of the Carrier. As a recent example to this effect, Third Division Award 26103 states:

"In this case at bar (unlike PLB 2203, Award No. 21) there is no showing that the Carrier was involved in the contract or had any knowledge whatsoever of the contract by its subsidiary. Nowhere on property does this Board find any probative evidence to go beyond mere inference

> that Carrier violated the Scope of the Agreement. This Board finds from the record on property that the Carrier had no control over the work herein contested on leased property of its subsidiary or knowledge thereof, and that such subcontracting has been no violation of the Agreement."

Nothing herein is intended to dilute the effect of such Awards. Other Awards, however, have examined situations where a carrier is fully aware of the work to be performed and where it is apparent that such work could have been performed by carrier forces. To this effect is recent Third Division Award 26212 in a situation closely parallel to that here under review. Award 26212 states in part as follows:

> "Thus it appears this Board has defined several categories of cases in which the Agreement will not be violated by use of outside forces. These, at a minimum include situations:
>
> (1) Where the work, while perhaps within control of Carrier, is totally unrelated to railroad operations.
>
> (2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on Carrier's property and is undertaken at the sole expense of that other party.
>
> (3) Where Carrier has no control over the work for reasons unrelated to having itself contracted out the work.
>
> Applying these criteria, and recognizing there may well be others which would apply in different circumstances we conclude the work at issue here was within the Scope Rule of the Agreement. The very instrument by which the property was leased to Coastal includes the parties' Agreement 'with respect to the construction maintenance and operating of industrial track.' This constitutes an agreement by Carrier to have track built by the Lessee and is fairly within the Notice requirement of the Agreement as well as the December 11, 1981 letter. Further, significant control over the manner in which the track is to be constructed, maintained and operated is reserved to Carrier and the operation of

the track is certainly intimately connected with Carrier's railroad operation. Had Carrier directly let the work in question to Byler clearly the Agreement and notice requirements would apply. It seems equally clear that by leasing the property for the express purpose of construction of the track an attempt is made to do by indirection that which cannot be directly done. We conclude the Agreement was violated when no advance notice of the Lease was given.

We agree with Carrier that the Organization did not establish historic exclusivity in the handling of this Claim. However, without regard to the issue of whether it would otherwise be necessary to do so, we have repeatedly held such proof is not necessary when the question is one of Notice under the Agreement and the work is within the Scope of the Agreement."

An essential part of the arrangement with Consolidated was preparation of the tracks for use by the Carrier to the loading facility to be operated by Consolidated. Whether the work was to be performed by Consolidated or by a contractor selected by Consolidated is not the central issue. That the work was of a type which could have been performed by Carrier forces is not disputed.

At issue here is the requirement of advance notice under Addendum No. 9. It is not known whether, after conference which may have been requested by the Organization, some alternate arrangement would have been devised. What is certain is that failure to provide the required notice obviated any opportunity by the Organization to have the work done by Carrier forces. The Carrier knew that the track rehabilitation was to be performed as an essential preliminary to establishment of the loading facility.

Under these circumstances, the Board finds the reasoning in Third Division Award 26212 persuasive. The Carrier proceeded without sufficient advance notice at its own peril.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1990.