Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28337
THIRD DIVISION Docket No. MW-27214
89-3-86-3-288

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(St. Louis Southwestern Railway Company

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

(1) The Carrier violated the Agreement when it assigned outside forces to perform yard cleaning work at Pine Bluff, Arkansas, beginning April 1, 1985 (System File MW-85-35-CB/53-838).

(2) As a consequence of the aforesaid violation, Foreman I. C. Spears and Machine Operator L. H. Loggins shall each be allowed pay at their respective rates for an equal proportionate share of the man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

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.

On February 14, 1985, Carrier notified the General Chairman, under the provisions of Article 33 of the Agreement, of its intent to contract out work of cleaning up debris along tracks and in yards on the Pine Bluff Division. The notice indicated that the contractor would be using a yard cleaner which it would operate with its own forces. The notice further stated that all of Carrier's yard cleaners were fully utilized and that the work would begin on March 1, 1985, and continue for approximately 75 working days.

On February 19, 1985, the Organization responded with a contention that the intended contracting out was "totally ridiculous" and that the work was not emergency work and could be performed at a later date when Carrier cleaners became available. Additionally, the Organization contended that large force reductions were being made in all Maintenance of Way Departments and that the use of a contractor was in direct violation of the December 11, 1981 Agreement. The February 19, 1985 letter indicated that Claims would be filed if Carrier allowed contractors to do the work, but it did not request a meeting to discuss the matter.

On May 14, 1985, Claims were filed on behalf of the individuals named in the Statement of Claim for an equal proportionate share of the total man hours worked by the contractor's forces. As these Claims were progressed on the property the Organization preserved its initial basis of objection to the contracting and also contended that Carrier had not made a good faith effort to reduce contracting or increase the use of Maintenance of Way forces as contemplated by the December 11, 1981 Letter of Understanding.

In response to the Claims, Carrier contended that it had given proper notice to the Organization and that it had valid reasons for contracting the work out. Before this Board it also contended that neither Claimant lost any work as a result of the contract, both being fully employed during its duration.

In support of their arguments before this Board both parties rely upon a large number of Awards involving contracting out issues in the Maintenance of Way Craft. On review we find that many of these Awards are clearly not on point because they deal with cases in which the Carrier did not initially give the Organization the required notice of intent to contract out Maintenance of Way work, which is not our situation here. Several others deal with cases in which incomplete or generalized blanket notices were given, a defect which the Organization has not alleged is present here. One dealt with a case where the wrong General Chairman was given the notice; something else which is not present here. Still other Awards cited to us deal with the issue of whether a notice was required in cases in which it was argued that the work to be contracted was not exclusively within the scope of the Agreement; something else absent in this case. None of the remainder of the citations, to our knowledge, cover a situation where a timely notice was given, but the Organization did not seek a meeting to discuss the matter.

Article 33 reads in its entirety as follows:

> "In the event this 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. 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 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 December 11, 1981 Letter of Understanding reads:

"During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the carriers' forces.

The carriers expressed the position in these discussions that the existing rule in the May 17, 1968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carriers' right to contract out work in situations where warranted. The organization, however, believed it necessary to restrict such carriers' rights because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

Conversely, during our discussions of the carriers' proposals, you indicated a willingness to continue to explore ways and means of achieving a more efficient and economical utilization of the work force.

The parties believe that there are opportunities available to reduce the problem now arising over contracting of work. As a first step, it is agreed that a Labor-Management Committee will be established. The Committee shall consist of six members to be appointed within thirty days of the date of the December 11, 1981 National Agreement.

Three members shall be appointed by the Brotherhood of Maintenance of Way Employees and three members by the National Carriers' Conference Committee. The members of the Committee will be permitted to call upon other parties to participate in meetings or otherwise assist at any time.

The initial meeting of the Committee shall occur within sixty days of the date of the December 11, 1981 Agreement. At that meeting, the parties will establish a regular meeting schedule so as to ensure that meetings will be held on a periodic basis.

The Committee shall retain authority to continue discussions on these subjects for the purpose of developing mutually acceptable recommendations that would permit greater work opportunities for maintenance of way employees as well as improve the carriers' productivity by providing more flexibility in the utilization of such employees.

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

Notwithstanding any other provisions of the December 11, 1981 National Agreement, the parties shall be free to serve notices concerning the matters herein at any time after January 1, 1984. However, such notices shall not become effective before July 1, 1984.

Please indicate your concurrence by affixing your signature in the space provided below."

In this case it is clear that Carrier did give the notice required by Article 33. Additionally, the notice identified the work to be contracted and offered reasons therefor, as required by the pen-penultimate paragraph of the December 11, 1981 Letter of Understanding. However the Organization did not request a meeting to discuss the matter. Thus, the opportunity to meet and make a good faith attempt to reach an understanding concerning the subject of the notice was not taken advantage of by the Organization in spite of a strong admonition to do so. (We are aware that the Organizaton sent a letter of protest and what was stated in this letter may well have been its position in a face-to-face meeting, but we do not think that this action is an appropriate substitute for a meeting, especially since the Chief Negotiator for the Organization and the Chief Negotiator for the carriers urged the parties locally to take advantage of meetings and discussions.)

As we read Article 33 and the December 11, 1981 Letter of Understanding, the Carrier must give notice of its intent to contract out "work within the scope of the applicable schedule agreement." When this notice is given, the Organization, at its sole option, may request a meeting to discuss matters relating to said contracting. Such discussions, once requested, are obligatory and are to be conducted in good faith in an attempt to reconcile any differences between the parties. If the Organization fails, for whatever reason, to take advantage of its contractual right to have such a meeting and passes up an attempt to engage in contemplated good faith discussions, it misses its opportunity to demonstrate "that work within the scope of the applicable schedule agreement is contracted out unnecessarily."

Without such a meeting and discussion, which by the language of the Agreement must be originated by the Organization, we doubt that we have license to explore further the merits of the transaction. Accordingly, after careful review of the entire record in this case, the explicit provisions of Article 33, the lengthy provisions of the December 11, 1981 Letter of Understanding and the Awards relied upon by the parties, we are unable to find a basis on which the Organization's Claim can be sustained.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1990.