Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29432
Docket No. MW-29481
92-3-90-3-416

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard System Railroad)

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 between the Chief Engineering Officer and the General Chairman, as required by Rule 2, it assigned outside forces to perform right of way maintenance work (reconditioning road crossings) beginning on January 26, 1989 at Mile Post AN 592.7 on the Thomasville Subdivision of the Tampa Division and continuing on road crossings across the Thomasville Subdivision [System File 37-SCL-89-16/12(89-476) SSY].

(2) As a consequence of the aforesaid violation, Messrs. W. J. Hornsby, R. L. Miller, D. E. Steedley, W. A. Johnson, K. S. Austin, A. Long, J. M. Eunice, C. White, Jr. and J. D. Ray shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by the outside forces performing the work outlined in Part (1) above."

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.

The underlying factual situation in this claim is not in dispute. Without first notifying the Organization and conducting a meeting between the Chief Engineering Officer and the General Chairman, the Carrier engaged an outside contractor to perform paving work beginning on January 26, 1989, on the Thomasville Subdivision of the Tampa Division at various road crossings. The paving work was part of the reconditioning of these crossings; all other work involved in the reconditioning was performed by employees subject to the Agreement. All of the Claimants were fully employed during the time the outside contractor performed the work.

The Organization contends that paving work has been traditionally and historically assigned to and performed by employees subject to the Agreement, and that Claimants were equipped, fully qualified and readily available to perform the work if given the opportunity to do so.

The Carrier, on the other hand, contends that this is work which has historically been performed by other than Maintenance of Way employees, and is not work which is exclusively reserved for them under the Agreement.

The following Rules are pertinent to a resolution of this dispute:

"Rule 1 Scope

These Rules cover the hours of service, wages and working conditions for all employees of the Maintenance of Way and Structures Department as listed by Subdepartments in Rule 5 - Seniority Groups and Ranks, and other employees who may subsequently be employed in said Department, represented by Brotherhood of Maintenance of Way Employees.

Rule 2 Contracting

This Agreement requires that all maintenance work in the Maintenance of Way and Structures Department is to be performed by employees subject to this Agreement except it is recognized that, in specific instances, certain work that is to be performed requires special skills not possessed by the employees and the use of special equipment not owned by or available to the Carrier. In such instances, the Chief Engineering Officer and the General Chairman, will confer and reach an understanding setting forth the conditions under which the work will be performed...."

The evidence of record demonstrates a mixed practice on this property with respect to the performance of paving work. It has been previously performed by members subject to the Agreement, but has likewise been previously contracted out by the Carrier.

The Carrier contends essentially that it need not comply with the notice and meeting requirements of Rule 2 if the Organization has not demonstrated exclusive rights to paving work. It admits, however, that employees subject to the Agreement have performed this work in the past, and that it has also given the Organization notice under Rule 2 on numerous occasions.

Numerous prior Awards of the Board have held that issues of exclusivity are not a defense to notice and meeting requirements. The question presented to the Board is thus not whether the Organization has demonstrated exclusivity, but whether paving work is covered by the Agreement, making the provisions of Rule 2 applicable. Since the evidence shows that the Carrier and the Organization have met and conferred in the past on other paving projects and that employees subject to the Agreement have performed this work in the past, the Carrier by its conduct has implicitly conceded that the work is a proper subject of contracting discussions.

The Board thus concludes that paving work is covered by the Agreement and that the Carrier is bound by the notice and meeting requirements of Rule 2. Accordingly, we find that the Carrier violated the Agreement when it contracted out the work without giving notice and engaging in the required discussions.

The remaining issue is the question of damages. The record is undisputed that Claimants were fully employed and suffered no monetary loss as a result of the action claimed. Accordingly, Paragraph One of the Statement of Claim is sustained, but Paragraph Two, which requests a monetary remedy, is denied.

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 21st day of October 1992.