NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29824
Docket No. MW-29640
93-3-90-3-618

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 conferring and reaching an understanding with the General Chairman as required by Rule 2, it assigned outside forces (Herzog of St. Joseph, Missouri) to perform maintenance work (reconstructing road crossings) at Mile Post locations AB 157.4, AB 166.9, AB 170.1, AB 177.3 and AB 182.5 on the Plymouth Subdivision of the Florence Division on September 13, 20, 27, 28 and October 2, 1989 and continuing [System File 89-59/12(90-71) SSY].

(2) As a consequence of the aforesaid violation, Maintenance of Way Track Subdepartment Group A employes W. R. Keeter, J. T. Johnson, L. J. Patrick and W. C. Coward shall each be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours of work performed by the contractor's employes beginning on September 13, 1989 and thereafter for as long as the violation continues."

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 employe 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 Organization has raised a timely objection to evidence offered by the Carrier de novo in its Submission. None of that evidence will be considered by this Board. The Board's findings are based solely upon the record established on the property.

The basic facts of this case are not in dispute. During September and October 1989, the Carrier utilized its forces to rehabilitate road crossings between Mile Posts AB 157.4 and AB 182.5 on the Plymouth Subdivision of the Florence Division. On September 13, 20, 27, 28, and October 2, 1989, without conducting a meeting between the Chief Engineering Officer and the General Chairman, the Carrier used an outside contractor to pave the prepared crossings as well as the approaches leading to the track structure. Claimants were fully employed at the time.

On October 31, 1989, the Organization submitted a claim on behalf of four employes for the amount of time expended by outside forces in paving the rehabilitated crossings. In its letter, the Organization claimed that Carrier had violated Rule 2 of the Agreement between the Parties. Rule 2 reads as follows:

"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 claim was denied by Carrier on December 10, 1989. In its denial, Carrier maintained that the paving work to restore the highway had been contracted to Hertzog Contracting Corporation under a contract dated June 26, 1989, because Carrier's

> "...Maintenance of Way employees do not have the equipment nor the experience in

> resurfacing highway grade crossings to the standards required by the State, County and Municipal agencies."

This is certainly not a case of first impression. The issues before the Board in the instant case have been addressed previously by numerous Awards on this Division, several of which involve the Parties to this dispute. It is well established that under the provisions of Rule 2, Carrier must give the Organization timely notice of its intent to contract out work formerly performed by members of the Organization. Moreover, in order to establish a violation of the notice requirement of Rule 2, it is not necessary for the Organization to prove exclusive performance of the work in question. As the Board held in Third Division Award 27011:

> "...While there may be a valid disagreement as to whether the work at issue was customarily performed by the equipment operators, Carrier may not, as a general matter, put the cart before the horse and prejudge the issue by ignoring the notice requirement."

The record in the instant case clearly shows that Carrier failed to comply with the notice requirement of Rule 2. Carrier admits it made its decision to use an outside contractor in June 1989, a full three months before the work actually began. Accordingly, there was ample time for Carrier to comply with Rule 2 had it chosen to do so. As is noted in Third Division Award 28513, failure to give the notice required in Rule 2 prevents the negotiated procedure set forth in that Rule from unfolding.

The second part of the Organization's claim--that the paving work at issue has been customarily and historically performed by Maintenance-of-Way employees throughout the railroad industry and is, therefore, scope covered work--has already been addressed in several prior Awards. As the Board held in Third Division Award 29432, there is a mixed practice on this property with respect to the performance of paving work. No evidence on this record suggests that the practice is no longer "mixed." Accordingly, the Board does not find that the work at issue is reserved to Maintenance-of-Way employees.

With respect to the Organization's claim for damages, the Board notes that Awards are divided on this issue. Until recently, most Referees have held that unless the Organization can demonstrate that Claimants have suffered monetary damage as a result of Carrier's failure to comply with the notice requirement of Rule 2, no monetary award is appropriate. However, as the Board noted in Third Divison Award 23928:

> "...The opposing line of cases allege that to limit damages only in such actual losses situations would in effect give a Carrier license to ignore the subcontracting out provision of an agreement because of the absence of actual loss and payment in a matter such as this."

Also see Third Division Award 29021.

This Board is in agreement with those Awards which seek to prevent granting Carrier such a license. As is noted above, there are several Awards involving the issue and Parties currently before this Board. In Third Division Award 29432 involving the same parties, the Board held that Carrier "violated the Agreement when it contracted out the work without giving notice and engaging in the required discussions." (See, as well, Third Division Awards 29430, 28942 and 28936, also involving these parties.) Accordingly, the Board finds that as of August 29, 1991 (the date the earliest of the aforementioned Awards was issued) Carrier was put on notice by this Board that future failure to comply with the notice provision of Rule 2 will likely subject it to potential monetary damage awards, even in the absence of a showing of actual monetary loss by Claimants (See Third Division Awards 29034, 29303,and 28513.) Since the events of the instant case evolved prior to August 29, 1991, however, the Board does not sustain paragraph two of the present claim.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Carl [illegible]
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 29th day of September 1993.