NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 30069
Docket No. MW-29671
94-3-91-3-11

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 Chesapeake
(and Ohio Railway Company)

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

(1) The Carrier violated the Agreement beginning on November 1, 1989 when, without a conference having been held as required by the October 24, 1957 Letter of Agreement (Appendix 'F'), it assigned outside forces (John Wheelwright, Ltd.) to install a main line switch at Kautex of Canada [System File C-TC-5047/12(90-184) CON].

(2) As a consequence of the aforesaid violation, Foreman R. Shoemaker, Trackman R. Dawson, Foreman G. Boylan, Trackman A. Tanner, Machine Operator D. Grey, Welder J. Young and Welder Helper D. Ross shall each be allowed sixteen (16) hours of pay at their respective time and one-half 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 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.

This dispute involves Carrier's hiring of an outside contractor for the installation of a switch in Carrier's main track serving Kautex of Canada, Inc., during the week of November 1, 1989.

By letter of October 3, 1989, Carrier notified the General Chairman of its intent to contract the subject work. That notice read in pertinent part:

> "This is to advise you of our intent to contract with John Wheelwright, Ltd., Windsor, Ontario, Canada, for the construction of a mainline turnout to serve Kautex of Canada, Inc.
>
> Carrier does not have the available manpower or equipment to perform this work as there are no furloughed employees on this seniority district. It is estimated this work will commence on or about October 16, 1989, and will be completed on or about October 18, 1989."

By letter of October 16, 1989, the General Chairman requested a conference with Carrier to discuss the feasibility of having maintenance of way employees perform the work in question. A conference call was held on November 1, 1989. During the course of the discussion, Carrier informed the General Chairman that the contractor had begun work as of that date. On December 14, 1989, the General Chairman filed a claim alleging violation of various rules including Appendix "F" of the Agreement. Appendix "F" reads in pertinent part as follows:

> "...As explained to you during our conference at Huntington, W.Va., and as you are well aware, it has been the policy of this company to perform all maintenance of way work covered by the Maintenance of Way Agreements with maintenance of way forces except where special equipment was needed, special skills were required, patented processes were used, or when we did not have sufficient qualified forces to perform the work. In each instance where it has been necessary to deviate from this practice in contracting such work, the Railway Company has discussed the matter with you as General Chairman before letting any such work to contract.
>
> We expect to continue this practice in the future and if you agree that this disposes of your request please so indicate your acceptance in the space provided."

The claim was declined by the Carrier on February 13, 1990. The Organization appealed the declination by letter of February 20, 1990. In its April 9, 1990, declination of that appeal, Carrier stated:

> "...In this case, your office was properly notified that we intended to contract the work because we did not have sufficient employees available nor did we have sufficient equipment available to install the switch in a timely manner to meet the schedule of our shipper, Kautex of Canada, Inc. Under those circumstances we are permitted by the agreement to contract the work in question. You were given a telephone conference, at your request, to discuss this matter. Simply because you did not agree with our position in this matter did not prohibit us to proceed with the contracting."

This is not a case of first impression. The issues before the Board in this case have been previously addressed by numerous Awards, many of which involve the Parties to this dispute. It is well established that, under provisions such as those contained in Appendix "F", Carrier must give the Organization timely notice of its intent to contract out work prior to commencement of that work. See, for example Third Division Awards 27011, 29121. Appendix "F" provides that Carrier agrees to "discuss [contracting out of maintenance of way work] with [the] General Chairman before letting any such work to contract." (Emphasis added).

The Carrier protests that, contrary to the Organization's claim, it gave the Organization timely and sufficient notice of its intent to contract the work at issue, in compliance with Appendix "F". A review of the evidence before the Board indicates that the notice in question was received by the Organization on or about October 9, 1989, seven days prior to the originally scheduled commencement of the contracted work. For reasons not clear on the record before the Board, the Organization did not request a telephone conference with Carrier on the matter until its letter of October 16, 1989, which letter was received by Carrier on or about October 24, 1989. Because of various delays, the work at issue had not yet commenced. Carrier granted the telephone conference on November 1, 1989, the day the contractor began work.

While the Board holds the Organization responsible for the initial delay in requesting a telephone conference, that relatively minor lapse of judgment does not here relieve the Carrier from compliance with the letter and spirit of the provisions of Appendix

"F". It must be noted, however, that the Organization may not "hold Carrier hostage" by unreasonably delaying its request to discuss contracting of work once it has received Carrier's notice of intent. Should the Organization elect to engage in such delay, it does so at its peril.

Once it received the Organization's request for the telephone conference, in view of the fact that the work at issue had not yet begun, Carrier was obliged to comply with Appendix "F". Granting a conference on the date Carrier knew the work at issue was to commence cannot be considered compliance. Accordingly, the Board finds that Carrier did not give the intended negotiated procedure contained in Appendix "F" an opportunity to unfold (see Third Division Award 28513). Therefore, the first part of the instant claim is sustained.

With respect to the work itself, the Organization has failed to provide evidence, beyond unilateral assertions, that the work should have been performed by Carrier employees. While the Organization does not dispute Carrier's statement that no qualified Carrier employees were furloughed at the time of the decision to contract the work in question, it argues that the work could have been performed by Carrier employees working weekends and overtime. Therefore, according to the Organization, the Carrier was obligated to explore that option prior to its decision to contract the work. The Board finds no support in the Agreement language or in prior Awards for the Organization's position in this matter.

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 Appendix F, no monetary award is appropriate. However, as noted in Third Division 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. (See also, Award No. 29021 (Marx).)"

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 discussion." (See as well Third Division Awards 29430, 28942, 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 is on notice that future failure to comply with the notice provisions 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, 28513). Since the events of the instant case evolved prior to August 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: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.