Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30194
Docket No. MW-30149
94-3-91-3-586

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 Atlantic
(Coastline Railroad Company)

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 in accordance with Rule 2, it assigned an outside concern (D. C. Construction) to perform grade crossing pavement work between Mile Post A624 and Mile Post 601 on the Nahunta Subdivision from April 18 to May 31, 1990 [System File 90-61/12(90-729) SSY].

(2) As a consequence of the aforesaid violation, Foreman J. H. Hilton, Assistant Foreman T. A. Brown and Trackmen J. Bray, J. Parrish, C. Cooper and K. S. Austin shall each be allowed pay in the amount of equal proportionate shares of the total number of man-hours (140 at the straight time rate) expended by the outside concern."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all of 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 underlying facts in this case are 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 at various road crossings beginning on April 18, 1990, between Milepost A624 near Callahan, Florida, and Milepost 601 near Folkston, Georgia, on the Tampa Division. The paving work was completed on May 31, 1990. 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 employes, 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 Employes.

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 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.

In Third Division Award 29824 involving the same parties, the Board held as follows:

> "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 took place prior to August 29, 1991, Paragraph (1) of the Statement of Claim will be sustained by the Board, but Paragraph (2), which requests a monetary remedy, is denied.

AWARD

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.