Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30607
Docket No. MW-30276
94-3-92-3-6

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

PARTIES TO DISPUTE: (Brother 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 (Petroleum Specialists, Inc.) to perform maintenance work (cleaning ballast, grading right of way, spreading and leveling new ballast, pressure washing, sandblasting and painting) at Baldwin Yard, Baldwin, Florida on August 4 through August 17, 1990. [System File 90-111/12 (90-1078) 554]

(2) As a consequence of the aforesaid violation, the eight (8) Claimants listed below*, who hold seniority in the Maintenance of Way Track Subdepartment, Group A and the Water Service, Fuel & Air Conditioning Subdepartment and Group A on the Jacksonville-Tampa Seniority District, shall each be compensated at their respective pro-rata rates of pay for an equal proportionate share of the five hundred sixty (560) straight time hours and at their respective time and one-half rates of pay for an equal proportionate share of the 1008 overtime hours expended by the contractor's employes.

* Mr. A. E. Griffis
Mr. P. Black
Mr. R. E. Thomas
Mr. W. E. Olliff
Mr. C. K. Hundley
Mr. G. C. Young
Mr. J. W. Thompson
Mr. W. D. Wiggins"

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 basic facts of this case are not in dispute. All of the above Claimants were regularly assigned within their respective subdepartments and were headquartered at Baldwin Yard, Baldwin, Florida. From August 4 through 17, 1990, Carrier used the services of an outside contractor (Petroleum Specialists, Inc.) to clear the area around the Baldwin, Florida, engine fueling facility. The process involved reclamation of existing ballast and related grading, spreading and leveling of existing and replacement ballast. The work was necessitated by assorted spills experienced at the fueling operation.

On September 28, 1990, the Organization filed a claim for the total amount of man hours expended by the contractor's forces. In that claim, the Organization contended that the Carrier had violated numerous Rules of the effective Agreement including Rule 2, which reads in pertinent part 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."

In its denial of the claim, Carrier asserted that the Organization had not "...provided any evidence or support for [its] statement that this is work which has been historically performed exclusively by BM of WE Employes...." It did not, however, dispute the Organization's position that the Carrier had failed to confer with the General Chairman as provided by the final sentence of Rule 2, before contracting out the work at issue. The claim was subsequently progressed in the usual manner, and is properly before the Board for adjudication.

The issues presented here have been addressed by numerous Awards of this Board, several of which involve the Parties to this dispute. (See, for example, Third Division Award 29824). It has been well established that, according to the provisions of Rule 2, the Carrier must give the Organization timely notice of its intent to contract out work formerly performed by employees it represents. Thus, 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."

It is undisputed on this record that the Carrier failed to provide the Organization with the notice requirement of Rule 2. 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 work at issue has been traditionally and historically assigned to M of W employees throughout the Jacksonville-Tampa Seniority District, and is, therefore, Scope covered work -- is not supported by the evidence on the record before the Board. Accordingly, the Board does not find that the work at issue is reserved to M of W employees.

With respect to the Organization's claim for damages, we have already addressed that issue at length in several prior Awards. 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 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 sub-contracting out provisions of an agreement because of the absence of actual loss and payment in a matter such as this." (See also, Third Division Award 29021.)

As the Board has noted previously we are in agreement with those Awards which seek to prevent granting Carrier such a license. 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 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) the Carrier was put 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 denies Part (2) of the present claim.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 2nd day of December 1994.

LABOR MEMBER'S
CONCURRING OPINION AND DISSENT
TO
AWARD 30607, DOCKET MW-30276
(Referee Wesman)

The Majority was correct when it found that the Carrier violated the Agreement when it failed to confer with the General Chairman before contracting out the work involved here and, therefore, a limited concurrence is appropriate. However, a strong dissent is required because the reasoning of the Majority in denying an award of damages is based on at least two (2) false premises. First, the Majority found that there was no evidence in the record that the work was historically performed by Maintenance of Way employes and, therefore, was not scope covered work. The Majority then compounded its error when it accepted the false premise that the Carrier was only recently (August 29, 1991) made aware that continued violations of Rule 2 would subject it to monetary liability. An award based on false premises is obviously erroneous and of no value as precedent.

First, the Majority erroneously found that:

> "... the Organization's claim -- that the work at issue has been traditionally and historically assigned to M of W employees throughout the Jacksonville-Tampa Seniority District, and is, therefore, Scope covered work -- is not supported by the evidence on the record before the Board. Accordingly, the Board does not find that the work at issue is reserved to M of W employees."

Such a finding is patently erroneous on two fronts. First, there was no reason to look to evidence of past performance of the subject work by Maintenance of Way employes in order to establish

scope coverage in this instance. The parties' past practice is only germane to the determination of scope coverage where the work is not reserved by the clear language of the Agreement. However, under this Agreement, the subject work is reserved to Maintenance of Way employes by clear rules which stipulate that all work in the Maintenance of Way and Structures Department shall be performed by Maintenance of Way employes. Rule 42 defines the work at issue here as Maintenance of Way work as follows:

> "It is understood and agreed that the construction and maintenance of fuel oil facilities for diesel locomotives, except those diesel locomotive fuel oil facilities located at shop points, will be performed by Maintenance of Way Employees subject to the following conditions:
>
> (a) 'Construction', as used herein, does not include the fabrication and assembly of tanks installed for the storage of fuel oil for diesel locomotives.
>
> (b) 'Maintenance', as used herein, does not include the acceptance, disbursement, loading or unloading of fuel oil, nor does it include the interior cleaning of storage tanks."

It was never contended in the record that exceptions contained in Rule 42 applied to the subject facility. Hence, the clear language of the Agreement unquestionably reserves maintenance of the subject fueling facility to Maintenance of Way employes and there was no need to look further to determine that the work was reserved to Maintenance of Way employes.

Notwithstanding the foregoing, the Majority erred when it found that the evidence in the record did not support the Organization's claim that the work at issue had historically been performed by Maintenance of Way employes. Such a finding is plainly contrary to the record before the Board. During the handling of this dispute on the property, the Organization presented signed statements from Maintenance of Way employes attesting to the fact that they had historically performed work of the character involved here. In addition, the Carrier did not dispute that its Maintenance of Way employes performed work of the character involved here and, in fact, agreed that they had. Moreover, the Carrier never once even so much as asserted that it had ever contracted out work of the character involved here nor that it had ever assigned such maintenance work to anyone other than Maintenance of Way employes. Rather, the Carrier simply asserted that the Organization was obligated to prove exclusive past performance of the work by its members in order to prove a violation of the Agreement and had not done so. However, the Board has repeatedly recognized, as it did here, that the Organization does not have the burden of proving exclusive past performance in order to establish that work is scope covered and subject to Rule 2. In light of these facts, the Majority's finding on the record of historical practice is simply inexplicable and unquestionably erroneous.

In addition to the foregoing, the Majority erred when it found that the Carrier was only recently "put on notice" that the Organization would insist on compliance with Rule 2 in the issuance of Award 28936 in August of 1991. In reaching this conclusion, the Majority has chosen to ignore the long series of awards of this Division involving the application of Rule 2 of the current Agreement and Rule 13 of the predecessor Agreement between this Organization and the Atlantic Coast Line Railroad (ACL), which was adopted verbatim as Rule 2 of the Seaboard Coast Line Agreement.

The very first case in which this Board interpreted this rule was decided in Award 13461, rendered April 8, 1965. In Award 13461, the Board found that the Carrier had violated the requirement that it confer with the General Chairman and reach an understanding prior to contracting out work and sustained the Organization's claim for damages on that basis. In 1967, with Award 15333, the Board again awarded damages based on the Carrier's violation of the requirement to hold a conference and reach an understanding prior to contracting out Maintenance of Way work.

After the Atlantic Coast Line and Seaboard Air Line Railroads were merged to form the Seaboard Coast Line Railroad (SCL), the parties negotiated a new Agreement, adopting Rule 13 of the former ACL Agreement as Rule 2 of the SCL Agreement. In disputes arising under Rule 2 of this Agreement, the Board found violation of the

conference and understanding requirement to be subject to the payment of damages in each of the following awards: Third Division Awards 18287, 18288, 18365, 18366, 22274, 22591, 22917, 23498 and 29059. In addition, the Board awarded damages where the Carrier improperly contracted out bargaining unit work where no conference was held in Award 28430 which involved an identical rule in the Atlanta and West Point (AWP) Agreement (AWP is a part of the Seaboard System) and Award 28486 which involved a similar notice and conference requirement in the Chesapeake & Ohio (C&O) Southern Region Agreement (C&O and Seaboard System are both operated by CSX).

A review of the above-cited awards reveals that the Carrier has obviously been "on notice" from the Organization since before the parties entered into the current Agreement that it would insist on the proper application of Rule 2. In addition, the Carrier has been "on notice" from the Board since at least 1965 that failure to comply with the conference and understanding provisions of Rule 2 (and the predecessor ACL Agreement Rule 13) would subject it to monetary damage awards. Hence, it is clear that until recently, the Majority's erroneous assertion notwithstanding, referees have unanimously found that the Carrier was subject to the payment of damages when it violated Rule 2. The Majority in this case simply chose to ignore these facts to avoid an award of damages.

In view of the foregoing, it is obvious that the Majority reached its findings by ignoring the clear rules of the Agreement, ignoring the undisputed facts of the case and by adhering to demonstrably false premises. Hence, the award is palpably erroneous and of no value as precedent.

Respectfully submitted,

G. L. Hart
Labor Member