Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30684
Docket No. MW-30091
95-3-91-3-517

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Grand Trunk Western Railroad Company (former
(Detroit, Toledo and Ironton Railroad Company)

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

(1) The Carrier violated the Agreement when it assigned outside forces (Herzog Construction Company) to perform track work (unloading ties) from Quincy, Ohio to Petersburg, Michigan on February 22, 1990 and on the River Branch on February 23 through 28, 1990 (Carrier's Files 8365-1-280 and 8365-1-308 DTI).

(2) The Agreement was further violated when the appeal letter presented by former General Chairman James L. D'Anniballe to Assistant Director Labor Relations R. J. O'Brien, under date of October 25, 1990, was not timely disallowed as set forth in Rule 32.

(3) As a consequence of the violations in Part (1) and/or Part (2) above, Claimant T. M. Mulford shall be allowed seventy-three (73) hours of pay at his respective straight time rate of pay and nineteen and one-half (19½) hours of pay at his respective time and one-half rate of pay."

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.

Both the Carrier and the Organization raise procedural questions as to the roles of the current and former General Chairmen in the handling of this claim on the property. All parties received timely written responses, either as addressees or shown as receiving a copy. The Board finds that there is no basis to show why the claim should not be heard on its merits.

The dispute concerns the Carrier's engagement of an outside firm, Herzog Construction Company, to unload crossties from gondola cars with special equipment at two locations on various dates in February 1990. The Carrier notified the General Chairman as to its intention by letter dated January 17, 1990. This letter stated in pertinent part as follows:

> "It was pointed out to you that, while carrier does possess backhoe and crane equipment, it is not practicable for carrier forces to efficiently perform subject work because it does not have the equipment that is specially designed to unload ties from gondolas. Further, it is not economically practicable for the carrier to utilize its forces because of the time that would be required if ties were unloaded with a company crane.
>
> Your favorable consideration in this matter is requested."

There followed a series of communications in which the Organization provided several alternatives (among them, the recall of all furloughed employees) as a means to provide consent for the contracting of work proposed by the Carrier.

The reasons for the "consideration" and "consent" sought from the Organization is based on a unique, or at least unusual, letter of February 28, 1955 from the Carrier and accepted by the Organization, which stated in pertinent part as follows:

> "It was also agreed that any future work ordinarily considered maintenance of way work on the Detroit, Toledo and Ironton Railroad will be performed by our own forces when practicable, and that when it is necessary to contract any such work we will confer with the General Chairman and all such contract work shall be by mutual agreement between the Chief Engineer and the General Chairman."

There followed various interchanges between the parties, including the Carrier's offer to bring one employee back from furlough for the period that a contractor's employee operated the contractor's equipment in unloading ties.

Finally, the Carrier went ahead with the contracted use of the special rail unloading equipment, while at the same time bringing back from furlough one Maintenance of Way employee. As a result, this claim was initiated. The Carrier, during the claim handling, argued that unloading ties is not "ordinarily considered maintenance [of way] work". Given the preceding discussions between the parties as to other methods of unloading ties, the Board cannot accept this assertion unaccompanied by any proof. Likewise, the Carrier states that the use of its employees was not "practicable," thus leading to the proposed contracting. Yet the February 28, 1955 letter states that when use of Carrier forces is not practicable, it would then confer with and seek "mutual agreement between the Chief Engineer and the General Chairman."

The Carrier contends that the "unreasonable" refusal of the General Chairman, if repeated in other instances, would in effect be giving the Organization "veto power" over the use of outside contractors. Without knowledge of other similar failures to reach mutual agreement, the Board cannot classify this single instance as a use of a broad "veto power" by the Organization. The language of the 1955 letter Agreement was prepared by a Carrier representative for the Organization's review. Thus, it is not the Board but the Carrier which imposed the "mutual agreement" threshold for maintenance of way contracting.

In its defense, the Carrier refers to other Awards in supposedly similar situations. Only one of these Awards refers to outside contracting. This is Third Division Award 26220, where the related language states that in construction projects, a Carrier representative "and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed." The language preceding this states "under certain circumstances, contracting of such [construction] work may be necessary." Third Division Award 26220 resulted in a denial of the claim. However, the Board finds the language discussed therein offers far more flexibility to the Carrier than the requirement here that "all such contract work shall be by mutual agreement."

The Carrier further argues that the proposed remedy is excessive, given that the Claimant was fully employed during the period in question, as well as the consideration that the Carrier had unilaterally brought a Maintenance of Way employee from furlough during this period. The Board recognizes that there are many circumstances which call for mitigation of a remedy, given the status of the Claimant. Here, however, the Organization has shown that work was taken from Maintenance of Way personnel without the "mutual agreement" to which the Carrier committed itself. The resulting remedy sought by the Organization is not unreasonable.

AWARD

Claim sustained as to Parts (1) and (3). Claim denied as to Part (2).

O R D E R

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 31st day of January 1995.