

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31006
Docket No. MW-30252
95-3-91-3-720

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 Employees
(
(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 (Kershaw) to perform track maintenance work (undercutting track) on the Wilmington Subdivision of the Florence Division between Pembroke and Hamlet, North Carolina beginning March 12, 1990 and continuing [System File 90-49/12(90-728) SSSY].
- (2) As a consequence of the aforesaid violation, Machine Operators L. Moore, R. L. Graham, N. H. Corbett, G. J. Hemmingway and K. R. Radford shall each be compensated at the appropriate machine operator's straight time and overtime rates of pay for an equal proportionate share of the total number of straight time and overtime man-hours expended by the contractor's employees in the performance of the work described in Part (1) above beginning on March 12, 1990 and thereafter so long as the violation continued."

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.

This claim concerns the Carrier's employment of contractor forces to operate two mainline track undercutters and one switch undercutter for undercutting work commencing March 12, 1990 on the Wilmington Subdivision of the Florence Division. The Organization argues that the Carrier is in violation of the Agreement by its failure to "confer and reach an understanding" with the General Chairman, as provided in Rule 2, and by its assignment of the work to other than Maintenance of Way forces.

The Carrier's response is that such undercutting work has regularly and historically been performed by contractors; that previous notice has been given of this; and that it does not have the equipment to perform the work in the manner here contracted. The Carrier states its belief that notice under Rule 2 is not required since the work had previously "been performed by outside sources as a matter of historical practice" and that therefore "the work did not and does not accrues exclusively to MofW employees."

In this dispute, the Board is presented with allegations by both parties, but no substantial evidence in support thereof. The Carrier contends that it had, on previous occasion, discussed with the Organization the question of using its maintenance of way forces in conjunction with undercutting work, without reaching any agreement. No documentary support for this was provided, however.

The Organization did not provide evidence of its customary performance of undercutting, particularly as to the methodology employed by use of undercutting machines. On the other hand, the Carrier also did not document its "historical" use of contractors for this work.

Guidance can be found, however, in a January 20, 1986 letter from the Chief Engineering Officer to the General Chairman, which was made part of the record before the Board. This letter reads as follows:

"Please refer to Rule 2 of our current working agreement concerning the contracting of work.

In the year 1986, as in past years, the Carrier proposes to contract for certain work for which Special Equipment and/or Skills are required. Included in this work are the items of rail grinding, vegetation control, brush control, undercutting, yard cleaning, underwater inspection of bridges and epoxy treatment of bridges. These projects will be progressed through the year 1986 and, as in the past, MW&S forces will be used with this equipment as required.

This advanced notice is for your information and your continued support in this area will be appreciated."

This specifically refers to contracting of "undercutting" where "Special Equipment and/or Skills are required" and mentions use of "MW&S forces" in connection with (presumably supplementary to) contractor forces. This letter is supportive of the Carrier's contention that the contracting of undercutting has been on an ongoing basis.

The Organization made reference to a 1986 claim which concerned undercutting. This claim, which had been submitted to the Board as NRAB Case No. 88-3-156, was withdrawn, and was settled with payment to the Claimants. The Carrier advises, however, that, as noted in the settlement letter, the parties agreed that "such settlement would not set a precedent and would not be referred to by either party in the handling of any future case." In light of this, the Board obviously may not recognize this settlement as in any way relevant to the matter here under review.

There was a failure of the Carrier to notify the General Chairman in this instance as to the special skills/special equipment involved in the undercutting work. However, the Organization has not demonstrated that use of the undercutting equipment employed has been a function undertaken by Carrier forces in the past. Under these circumstances, there is no support for a monetary remedy. The Carrier is, or should be, aware of the continuing necessity to conform with Rule 2 as to notice, even where notice in previous instances of the same type of work has been provided.

The claim is sustained only as to Paragraph (1). The remedy sought in Paragraph (2) is not appropriate in this particular circumstance.

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 26th day of July 1995.