Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32225
Docket No. MW-31312
97-3-93-3-337

The Third Division consisted of the regular members and in addition Referee W. Gary Vause when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard Coast
(Line 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 (Davis Construction Company) to perform Maintenance of Way work (removal and replacement of fill material on the Carrier's right of way using a 2½ yard front end loader and dump truck) near the west end of the Shops at Uceta Yard, Tampa, Florida on Monday, October 15, 1990 and continuing through and including Friday, November 23, 1990 [System File 90-123/12 (91-272) SSY].

(2) The Carrier also violated Rule 2, Section 1 when it failed to confer with the General Chairman and reach an understanding prior to contracting out the work in question.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Maintenance of Way General Subdepartment Group A Machine Operator D. F. Weltzbarker shall be allowed two hundred twenty-four (224) hours' pay at the Maintenance of Way General Subdepartment Group A Machine Operator's straight time rate and sixteen (16) hours' pay at the Maintenance of Way General Subdepartment Group A Machine Operator's time and one-half rate for the total number of man-hours expended by the outside forces performing the subject work."

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 were given due notice of hearing thereon.

Claimant established and holds seniority as a Group A Machine Operator in the Maintenance of Way General Subdepartment. On the date that this dispute arose, he was furloughed awaiting recall to the Carrier's service.

Beginning on Monday, October 15, 1990 and continuing through and including Friday, November 23, 1990 the Carrier assigned an outside concern (Davis Construction Company) to perform the maintenance work of removal and replacement of fill material on the Carrier's right-of-way using a two and one-half yard front end loader and dump truck near the west end of the Shops at Uceta Yard, Tampa, Florida. One employee of the outside concern used a large front end loader and dump truck. The Organization asserts that this equipment is of the type customarily and traditionally operated by Maintenance of Way General Subdepartment employees, such as the Claimant, to accomplish this kind of maintenance work. The employee of the outside contractor expended total time performing said work of 224 straight time hours, and 16 overtime hours on designated holidays falling on November 22 and 23, 1990.

The Organization asserts that work of the character involved here is encompassed within the Scope of the Agreement and has traditionally, customarily and historically been performed by the Carrier's Maintenance of Way and Structures Department employees.

The Carrier assigned said work to the outside contractor without notifying the General Chairman and without extending any effort to consummate an agreement setting forth the conditions under which the work would be performed.

The Organization argues that this course of conduct by the Carrier violated Rule 2, which provides:

"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. [Emphasis added.]

It is further understood and agreed that although it is not the intention of the Company to contract construction work in the Maintenance of Way and Structures Department when Company forces and equipment are adequate and available, it is recognized that, under certain circumstances, contracting of such work may be necessary. 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 such instances, consideration will be given by the Chief Engineering Officer and the General Chairman to performing by contract the grading, drainage and certain other Structures Department work of magnitude or requiring special skills not possessed by the employees, and the use of special equipment not owned by or available to the Carrier and to performing track work and other Structures Department work with Company forces."

The Organization also argues that the Letter of Agreement dated December 11, 1981, also is relevant:

"December 11, 1981

Mr. O.M. Berge
President
Brotherhood of Maintenance of Way Employes
12050 Woodward Avenue
Detroit, Michigan 48203

Dear Mr. Berge:

During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the carriers' forces.

The carriers expressed the position in these discussions that the existing rule in the May 17, 1968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carriers' right to contract out work in situations where warranted. The organization, however, 'believed it necessary to restrict such carriers' rights because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

Conversely, during our discussions of the carriers' proposals, you indicated a willingness to continue to explore ways and means of achieving a more efficient and economical utilization of the work force.

The parties believe that there are opportunities available to reduce the problems now arising over contracting of work. As a first step, it is agreed that a Labor-Management Committee will be established. The Committee shall consist of six members to be appointed within thirty days of the date of the December 11, 1981 National Agreement. Three members shall be appointed by the Brotherhood of Maintenance of Way Employes

and three members by the National Carriers' Conference Committee. The members of the Committee will be permitted to call upon other parties to participate in meetings or otherwise assist at any time.

The initial meeting of the Committee shall occur within sixty days of the date of the December 11, 1981 National Agreement. At that meeting, the parties will establish a regular meeting schedule so as to ensure that meetings will be held on a periodic basis.

The Committee shall retain authority to continue discussions on these subjects for the purpose of developing mutually acceptable recommendations that would permit greater work opportunities for maintenance of way employees as well as improve the carriers' productivity by providing more flexibility in the utilization of such employees.

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

Notwithstanding any other provision of the December 11, 1981 National Agreement, the parties shall be free to serve notices concerning the matters herein at any time after January 1, 1984. However, such notices shall not become effective before July 1, 1984.

Please indicate your concurrence by affixing your signature in the space provided below.

Very truly yours,

/s/ Charles I. Hopkins, Jr.

Charles I. Hopkins, Jr.

I concur:

/s/ O.M. Berge" [Emphasis added.]

The instant claim was submitted by the General Chairman in a letter dated November 28, 1990 to the Division Engineer. In his response dated January 23, 1991 the Division Engineer stated:

> "In your claim you stated the Contractor removed soiled fill material near the end of the Shops. You have not provided any evidence that the described work has been historically performed and isolated to B of WE employees.
>
> From the information furnished in your claim, I find no evidence of violation of the Agreement. Your claim is hereby respectfully declined in its entirety."

By letter dated March 6, 1991 the General Chairman rejected the Division Engineer's decision and appealed the matter. By letter dated May 2, 1991 the Director Employee Relations responded in relevant part as follows:

> "Investigation reveals that this work was done at the insistence of the EPA due to the amount of soil contamination present in Uceta Yard.
>
> The contractor removed the contaminated soil, transported it from the site whereupon it was incinerated, and renewed the area with fresh fill.

Maintenance of Way Employees have not performed this type of work in the past. Additionally, Carrier does not have the equipment nor means to dispose of contaminated material of this type.

Further, Carrier is not obligated to confer with the Organization under the terms of Rule 2, in cases where the involved work does not accrue to Maintenance of Way Employees through Agreement Rule or exclusive past practice on the property.

Accordingly, there has been no violation of any Agreement Rule and the claim is declined."

In his letter dated March 11, 1993 to the Director Employee Relations, the General Chairman stated in relevant part:

"In response to your letter dated May 2, 1991, declining our appeal in the above referenced file, the Carrier is in serious error for the following reasons. The Carrier asserts that an EPA directive resulted in the work being contracting (sic). We request a copy of the purported directive to substantiate the validity of such contention. Moreover, if EPA was involved, the Carrier was aware and clearly had advance notice of the necessity to perform the subject maintenance work along its right-of-way. The point here being that the Carrier's contention supports rather than defeats this instant claim. If the Carrier was aware of and was given notice concerning the work in question, its failure to notify/confer with the General Chairman in good faith is fatal to its position at the outset.

Although initially the Carrier declined the instant claim because we allegedly provided no evidence that the work of operating a 2½ yard front end loader and dump truck removing and replacing surface soil along the Carrier's right-of-way was not historically performed by and isolated to BMWE employees, you have now expanded your contentions to include:

1. Maintenance of Way employees have not performed work of this type before.

2. Carrier does not have the equipment to do this work.

3. Carrier is not obligated to confer with the Organization under the terms of Rule 2, where the work is not Maintenance of Way work by Agreement rule or exclusive past practice on the property.

First, the Carrier is wrong with respect to its argument that such work is not Maintenance of Way work. Historically and customarily this type of work has been assigned to and performed by its Maintenance of Way, General Subdepartment, Group A, Machine Operators. In support thereof, attached hereto you will find copy of 'Contracting Notice' dated November 12, 1991, Carrier File: 12 (S7) SCL 91-65 where in the Carrier complies with its mandated requirement under the provision of Rule 2, and clearly reveals that the work of the character as involved herein fell under the purview of its Maintenance of Way Agreement. The fact is that the front end loader (with 2½ cu. yard shovel) is specifically listed and the dump truck is similar equipment as contemplated by the Agreement. Hence, the Agreement clearly and unambiguously reserves the work of operating such equipment in connection with maintaining the Carrier's right-of-way to Maintenance of Way forces. The Carrier has recognized that fact and historically made such assignments to its Maintenance of Way, General Subdepartment, Group A, Machine Operators in the past. It is well established that some job titles are clear enough to reserve work thereto. We, to the contrary, are disingenuous. Moreover, if the operation of a 2½ cu. yard shovel/loader and dump truck is reserved by clear rule, there is no need to look to past practice. In any event, if such work is even colorably scope covered, the Carrier was obligated by the clear and unambiguous language of Rule 2 to provide good faith notice/conference to the General Chairman. The purpose of such good faith notice/conference was to arrive at an agreement setting forth the conditions under which the work would be performed. Of course, the Carrier's actions in this instance precluded any good faith discussions in conference and the Carrier's violation of Rule 2 is inescapable.

Beyond good faith advance notice and good faith discussions in conference, the Carrier blatantly assigned maintenance of its right-of-way to other than those for whom the contract was made. Therefore, the Carrier compounded its failure to notify/confer by assignment of

Maintenance of Way work to outside forces, again the work involved was the operation of a front end loader (2½ cu. yard shovel) to scoop up and load into a dump truck for removal from the Carrier's right-of-way and the Carrier cannot validly contend that such work has not customarily, traditionally and historically been assigned to and performed by its Maintenance of Way employees. After removal of such soil along the Carrier's right-of-way, the front end loader was then operated to replace what had been removed with clean material and to smooth the surface. Because such equipment is clearly specified within the Agreement, the Agreement is clear and practice, exclusive or otherwise, is irrelevant, the Carrier's assignment of outsiders to perform the subject work while claimant remained furloughed awaiting recall, was an unconscionable violation of the Agreement.

In addition, 'exclusively' is an invalid defense because it has no valid application in contracting out of work disputes; no valid application whatsoever in contracting disputes involving notice (no notice/bad faith notice); is not in harmony with Rule 2 or the December 11, 1981, Letter of Agreement; precludes good faith discussions and destroys the integrity of the collective bargaining Agreement.

With respect to the Carrier's contention regarding equipment, i.e., it does not have the equipment to do the work in question, such is simply not true. Assuming, arguendo, if such were the case (which we deny) the necessary equipment could have been obtained through rental lease and/or purchase. With a modicum of managerial foresight, the Carrier could have made an effort to procure the necessary equipment (it allegedly lacked) as it had promised to do in the December 11, 1981 Letter of Agreement. Moreover, we have repeatedly and consistently offered our assistance to the Carrier in this regard. But the Carrier even failed to put forth the effort to pick up the phone and request such assistance in this instance. We submit that such is <u>not</u> a good faith effort as contemplated by the parties when the December 11, 1981 Letter of Agreement was made.

In any case, equipment sufficiently (sic) is one (1) on (sic) the two (2) coexisting specific instances in which Rule 2 contemplated would be the centerpiece of good faith discussions, in conference. (The other specifically

stipulated pre-requisite condition being special skills not possessed by the Carrier's forces). In addition to the fact that the Carrier failed to even assert that a specific special skill was involved (none were) its failure to notify-confer and discuss the prerequisite co-existing conditions in accordance with Rule 2, stopped the Carrier from relying thereon in defense of a claim, as here, after the fact. Suffice it to say, the Carrier's equipment contention is meritless and procedurally defective.

This Carrier is a proven flagrant and repeated violator of the contracting provisions of this Agreement and the integrity of the Agreement is at stake.

For all the reasons set forth above and those set forth within our previous correspondence concerning this claim, which by reference is incorporated herein, the instant claim should be allowed as presented.

If the Carrier is in need of additional time in which to respond to this entry to the record, please advise and we will handle accordingly."

In his response dated May 7, 1993, to the General Chairman, the Director Employee Relations stated in relevant part:

"As evidence, to argue the point that M of W Employees have in the past performed claimed work, you state examples of where similar equipment was used to do M of W work. We concur that similar equipment can be used to perform M of W work, but is used to perform work that is not M of W as well. The nature of the work is the determinate factor used to classify work. The fact that work equipment was used is of little value to support your claim. Equipment such as dump trucks and front end loaders are designed and used to perform a multitude of functions of which M of W work is just one. You merely state without foundation that the claim is valid and the work constitutes a violation of the Agreement.

However, the claimed work was remedial action, that is the removal of soil contaminated with diesel fuel and replaced with fresh soil, taken by the Carrier that required specially trained personnel as required by

Federal Law Title 29 CFR, Section 1910.120 copy of which is attached. Mr. Weltzbarker has no record of such training and thus would not legally be qualified to do this work.

Secondly, throughout your correspondence you have failed to demonstrate that remediation of contaminated soil is in fact exclusively M of W work. Merely stating that the Agreement was violated because some type of work was performed does not validate a claim. As a result, your lack of support and validation concerning this argument augments our position that this work was not M of W work and therefore Rule 2 is not applicable.

Also, you use as support charges that: 'The Carrier is a proven flagrant and repeated violator of the contracting provisions of this Agreement and the integrity of the Agreement is at stake.' Again, this unsupported assertion does little to prove the validity of this claim. Remediation of contaminated soil is not, and has not been M of W work. There is no provision in the current Agreement to state that soil remediation is M of W work. That is probably why you fail to state any rule proving otherwise.

Therefore, in that the claimant was not qualified per federal law and the work is not M of W work this claim has no merit and continues to be declined."

In his letter dated May 12, 1993 to the Director Employee Relations, the General Chairman stated:

"In your letter, you state in part, 'The fact that work equipment was used is of little value to support your claim. Equipment such as dump trucks and front end loaders are designed and used to perform a multitude of functions of which M of W work is just one.' Contrary to the above quoted assertions, with regard to the value of our contention, specific evidence was attached to and referenced within the parameters of our letter to you dated March 11, 1993, and need not be readdressed herein,

except to reiterate that this Carrier has already recognized that the work made subject of this dispute is indeed covered under the purview of the schedule Agreement, thus requiring notice. Based on the specific presentation of claim, the specific evidence submitted in support of our claim, as well as, your tacit admission (May 7, 1993) of the violation, there can be no doubt that the clear and unambiguous provision of the Agreement have (sic) been violated. Notwithstanding, you have clearly failed to provide any information to support your apparent assertions with respect to the Carrier's utilization of equipment in other than the Maintenance of Way craft.

An interesting point necessitating mention, in this instant dispute, is that throughout the handling of this case on the property, the Carrier has failed to make any showing, whatsoever, that the work made subject of this dispute, was, as purported, such that required specially trained personnel. We sincerely appreciate your attachment of Title 29 of the Federation Register, however, as you attempt to state in your letter of May 7, 1993, assertions without support don't cut it. During conference of this claim on the property, the Organization requested that the Carrier provide proper documentation to support its otherwise lacking assertion, but here again as of this date nothing has been provided with respect to hazardous materials. Work of the character involved herein is indigenous to work performed by Maintenance of Way employees on a daily basis, i.e., handling creosoted materials, tie filler products, herbicides, replacement of contaminated or soiled ballast, handling of fuel oils and lubricating compounds, replacement of track components specifically in yards and fueling facility locations, grading work on roadbeds and right-of-way at derailment sites, as well as, excavation, removal, distribution and leveling of fill and ballast materials in yards, various facilities and rights-of-way as was done in this instant case."

The two issues before the Board are: (1) Did the Carrier violate Rule 2, Section 1, when it failed to confer with the General Chairman and reach an understanding prior to contracting out the work in question; and (2) Did the Carrier violate the Agreement when it assigned the work to outside forces?

With respect to the first issue, the record shows that the Carrier failed to meet the specific requirements in Rule 2 that the Chief Engineer confer with the General Chairman and reach an understanding setting forth the conditions under which the work would be performed. This issue is addressed in Third Division Award 30970, in which the Board stated:

> "Whether the nature of the work performed brought it within the express exception in Rule 2 is a matter which Carrier could have and should have discussed with the General Chairman under the plain, unambiguous and unqualified notification provisions of Rule 2. Carrier's manifest failure as to notice and good faith discussion constitutes an independent violation of Rule 2 which obviates our inquiry into the nature of the work and requires a sustaining award."

Numerous other Awards, including those dealing with the identical parties in the instant dispute, reach the same result.

With respect to the contracting out of the work, the Board concludes that the Organization made a prima facie case that the work was within the terms of Rule 2: "All maintenance work in the Maintenance of Way and Structures Department." The Carrier raised the affirmative defense that it was required under an order from the EPA to have the work performed, and that pursuant to EPA regulations, it could only be performed by individuals who have had the training required by OSHA and are qualified to handle hazardous materials. The Carrier contended that subtracting the work to a qualified contractor was therefore necessitated by law because Maintenance of Way forces did not possess the requisite skills and/or training to remove the contaminated soil.

The Carrier has the burden of proof to support its affirmative defense. Despite repeated requests by the Organization during the handling of this dispute on the property, the Carrier failed to produce proof that the work was done pursuant to an EPA order. Neither did the Carrier adduce such evidence during the submission of the dispute to the Board. Production of a copy of the EPA regulations does not support the Carrier's claim that it was subject to an EPA order. The Carrier's affirmative defense therefore fails for lack of proof. A sustaining Award is warranted.

AWARD

Claim sustained.

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 17th day of September 1997.