Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32312
Docket No. MW-31438
97-3-93-3-426

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
(
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to operate a yard cleaner at Radnor Yard, Nashville, Tennessee from May 14 through June 30, 1992 [System File 13(69)(92)/12(92-1007) LNR].

(2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with advance written notice of its intention to contract out said work as required by Article IV and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. T. W. Anderson and N. B. Merritt shall each be allowed eight (8) hours' pay, at their straight time rates of pay, from May 14 through June 30, 1992."

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.

This claim concerns the assignment of two employees of an outside contractor to operate a yard cleaner at Radnor Yard, Nashville, Tennessee, from May 14 through June 30, 1992. The claim is on behalf of two Rank 3 Machine Operators on the Nashville Terminal Seniority District.

Article IV of the May 17, 1968 National Agreement reads in pertinent part as follows:

> "In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto. . . .
>
> [Absent advance understanding between the parties] the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.
>
> Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. . . ."

During the claim handling procedure, the Organization contended no notice had been received of the contracted yard cleaning work, while the Carrier stated that such notice had been given. Accompanying its Submission, the Carrier provided a copy of a letter dated January 1, 1992 in reference to "our past practice of contracting for the yard cleaning program," including a reference to Nashville Terminal. The Organization states that such letter was not part of the on-property record in this claim and thus is "new argument," which should not be considered by the Board.

The Board, however, need not resolve this aspect of the dispute, noting only that there is no record of any advance discussion of the proposed yard cleaning. This is possibly because Carrier's invitation to ask for a conference was not accepted, or the Organization in fact did not receive notice. As provided by Article IV, the Carrier proceeded with the work, subject to the Organization's right to progress a claim.

The Board concludes there is no basis to determine that the operation of a yard cleaner, and yard cleaning itself, can be found not to be within the Scope Rule of the Agreement. This, of course, does not mean that the Carrier may not contract the work, but there must be some showing as to the justification for contracting out work which has every appearance of being appropriately assigned to Carrier forces. Some evidence of this, as pointed out by the Organization, is that the Carrier possesses yard cleaning equipment.

The reasons advanced by the Carrier in this matter here under review are not convincing. The Carrier's Submission states it "has historically outsourced the work of yard cleaning;" however, it did not present the Board with any evidence of this. In its responses to the appeal the Carrier says the Claimants (both Machine Operators) "were not qualified or available." While the Carrier is clearly the judge of an employee's qualifications, no support is offered to explain why the Claimants were considered unqualified to operate a yard cleaner.

As to being "available," it is simply not enough to state that the Claimants were "fully employed." The Organization is contending that a specific work opportunity has been lost. While not appropriate in all circumstances, pay for this loss is not a penalty, but rather it is an appropriate remedy for the Carrier's actions.

The Board's conclusion is strongly influenced in this instance by the Carrier's failure to provide evidence or proof supporting its stated reasons for contracting the yard cleaning work. In sustaining the claim, the Board notes, however, that the Award applies only to the particular circumstances and location set forth in the Statement of Claim.

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 13th day of November 1997.