Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32447
Docket No. MW-31695
98-3-93-3-726

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 Incorporated (former
(Detroit, Toledo and Ironton 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 (Herzog Contracting) to unload crossties in and around Flat Rock Yard in Flat Rock, Michigan beginning July 27 through August 25, 1992 (Carrier's File 8365-1-397 DTI).

(2) As a consequence of the violation referred to in Part (1) above, Backhoe Operator J. R. Miller shall be allowed one hundred twenty-eight (128) hours' pay at his straight time rate and twenty-eight and one-half (28 1/2) hours' pay at his overtime rate."

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 dispute involves the Carrier's decision to contract with outside forces to perform work unloading crossties from gondola cars at Flat Rock, Michigan, from July 25 through August 25, 1992. The Carrier states that the contractor's equipment provided greater efficiency in unloading ties and was not available for use by the Carrier's Maintenance of Way forces, while the Organization contends that effective crosstie-unloading equipment could have been utilized by the Carrier.

At the heart of this dispute is the February 28, 1955 letter Agreement between the Carrier and the Organization, reading 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."

In this instance, ample notification of the proposed contracting was provided to the General Chairman, but there was no resulting "mutual agreement." Except for one significant factor, this claim is virtually identical to a claim concerning the same contract work two years earlier, which was resolved by sustaining Third Division Award 30684.

Award 30684 found that unloading ties is "ordinarily considered" Maintenance of Way work, and the Board continues to reach this conclusion, despite the Carrier's argument to the contrary. Award 30684 further states:

> "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 1995 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."

The single factor distinguishing the instance here under review is based on the following uncontradicted sequence of events:

On July 8, 1992, the Carrier advised the General Chairman of its intention to use a contractor because it "lacked the proper equipment" and it was "not economically practical" to utilize its own forces. The Carrier also proposed to recall all furloughed employees to service while the tie work was being performed. Although the Organization did not agree to the terms of the July 8, 1992 letter, a telephone conference was held on July 20 and, according to the Carrier, the General Chairman stated he "would contact [the Assistant Director, Labor Relations] that afternoon for a discussion." Such contact was not made.

In a July 23 letter, the Carrier renewed its request for the Organization's concurrence, adding to its previous proposal an offer to upgrade the pay of one employee to First Class Machine Operator. No reply was received from the Organization, and the Carrier then proceeded to contract the work. This was followed by initiation of the claim here under review.

Reference now returns to Award 30684. Therein the Board affirmed the unambiguous requirement as to "mutual agreement." Sustaining Third Division Award 30898, concerning a 1986 contracting arrangement, was to the same effect. In the February 28, 1955 letter Agreement, however, the "mutual agreement" provision does not stand alone. It is preceded by a commitment to the use of Carrier forces "when practicable" and also contemplates conditions when it is "necessary" to contract certain work. Further, the Agreement includes an intention of the Carrier to "confer" with the General Chairman. Here, the record shows this intention was frustrated by the repeated refusal of the Organization to enter discussion and/or to consider the Carrier's offers surrounding the proposed contracting.

An analogy may be drawn here. With many other carriers (although not here), Article IV of the May 17, 1968 National Agreement applies. Therein, carriers retain the right to contract out work within in the scope of Maintenance of Way work, but only with restrictions as to timely notice, offer of conference, and reference to elements such as feasibility, past practice, etc. Even where a carrier could readily show that

contracting was required, its right to do so can be impaired simply by a carrier's failure to give timely notice. Here, the situation is a mirror image. The Agreement calls for "mutual agreement", but the Organization may invoke this right only after it meets a request to "confer" and makes a good faith effort to reach "mutual agreement."

The Board concludes that the Organization failed to conform to the full intention of the February 28, 1955 letter Agreement and, in this instance, was in fact exercising an unreasonable "veto power." With this conclusion, the Board finds unwarranted the remedy sought in the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of January 1998.