Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32560
Docket No. MW-31761
98-3-94-3-28

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 Seaboard
(System Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Knox-Kershaw, Inc. of Montgomery, Alabama) to perform General Subdepartment, Group B maintenance work of overhauling two (2) ballast regulators identified as BR 705 and BR 706 beginning November 20, 1991 and continuing [System File 92-14/12(92-496) 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, the Claimants* listed below, who hold Rank 1, System seniority as mechanics in the Maintenance of Way General Subdepartment, Group B, shall each be compensated an equal proportionate share of all time expended by the outside contractor in the performance of the subject work at the appropriate Maintenance of Way General Subdepartment, Group B pro-rata rate.

*B. J. Rutherford
J. F. Bradham
W. H. Rowell
G. L. Thrift

C. B. Kent
R. W. Raney
J. E. Griffin
S. R. King, Jr.
J. D. Brauer
B. H. Selph
F. L. Fortner
J. W. Overstreet
W. A. King
R. Musgrove
R. W. Hinnant
L. B. Sellers
R. C. Cox
W. C. Johnson
S. S. Burnett
W. S. Strickland
J. L. Braddock
W. E. Daniels
B. C. McKinnon
H. L. Hood
D. E. Smith"

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.

The Organization in its Submission seeks to have the claim sustained on procedural grounds, on the basis that the General Chairman's initial appeal to the appropriate Carrier officer was not answered by that officer. The Organization's position is without contractual basis. The Carrier had advised the Organization as to the proper persons to whom claims should be initially directed. As the Organization states, it is that person who "usually and customarily" responds to the claim. In this instance, another Carrier representative responded in 30 days.

In the on-property correspondence, the General Chairman took no exception that the timely reply came from a different Carrier representative. Further, the Statement of Claim as presented to this Board includes no reference to this alleged violation. Most

significantly, Rule 40, Section 1(a) requires simply a reply from "the Carrier" within 60 days. Many previous Awards have reached a similar determination.

The Organization also objects to the Board's consideration of a letter, with attachments, included in the Carrier's Submission. The letter is addressed to the General Chairman and is dated January 7, 1994, prior to the Organization's referral of the dispute to the Board on January 21, 1994. As stated in Third Division Award 32558, addressing a similar circumstance:

> "The Board has no basis to question the authenticity of this correspondence, nor to find that it was untimely."

According to the Organization, one of the Claimants was directed on November 20, 1991 to prepare and deliver to a contractor parts for the rebuilding of two Ballast Regulators. This occurrence gave rise to the initiation of the claim. The Claimants have their headquarters at the System Roadway Repair shops, Rice Yard, Waycross, Georgia. The record shows no indication of any prior notice to the Organization at Waycross or elsewhere.

The March 16, 1992 response from the Manager-Work Equipment reads as follows:

> "When Ballast Regulators BR 705 and BR 706 were sent to Knox Kershaw for repairs, the Carrier did not have the manpower or shop space available to perform this work. In addition, these machines were not working on the Waycross region, therefore, the Maintenance of Way employees were not entitled to this work. This work would have been performed at another location if manpower and space were available.
>
> Attached you will find a copy of repairs to Ballast Regulators done at other shops. In view of these facts, it is my contention that no claim is warranted."

In an October 8, 1993 on-property response, the Director Employee Relations stated:

"We do not argue that the Waycross employees do equipment repair however you have failed to prove that all major repairs to maintenance of way work equipment is exclusively their work."

The Board finds the Carrier in violation of Rule 2 which requires, even in a variety of special circumstances, the Chief Engineering Officer and the General Chairman to "confer and reach an understanding setting forth the conditions under which the work will be performed." The Carrier's initial claim response, quoted above, is precisely the type of information which could have been the subject of a conference prior to contracting. Such information might have been persuasive to the Organization, but it obviously comes well after any opportunity to propose alternate means of accomplishing the repairs with Carrier forces.

The Carrier defends its failure to follow this mandatory procedure on various grounds: (1) this repair work has on frequent occasion been given to contractors in the past; (2) the work is done at locations other than Waycross and by employees of a different craft; and (3) the Ballast Regulators were not for use at Waycross.

None of these defenses is convincing to the Board. This is not a dispute as to the appropriate craft or location to which the work should be assigned. Thus, exclusivity is not an issue. The record fails to show that opportunity for conference was provided at any location or to any General Chairman.

Beyond this, as noted above, the Carrier virtually concedes in its claim responses that the work arguably could have been performed by the Claimants. As a result, it cannot be concluded that the Carrier was unmindful of its need to comply with Rule 2.

The question frequently arises as to remedy where the Claimants were fully employed at the time of the violation. There are recognized instances where pay would be, as argued by the Carrier, a "penalty" for the Carrier and a "windfall" for the Claimants. The Board does not find this applicable here. The work involved was irrecoverably lost to Carrier forces. Since no opportunity for conference was provided at any location, the claim by Waycross employees is appropriate. Further, it is not without precedent for the Organization to request pay for hours worked by the contractor's employees to be divided among a group of eligible employees (even if far

fewer employees would have been involved in the work). That is the Organization's prerogative and is without additional expense to the Carrier. In reaching this conclusion, the Board relies on two Awards, among many others, involving the same parties and the same issue.

Third Division Award 22917, issued in 1980, emphasized that a meeting to "confer and reach an understanding" was "a condition precedent to contracting out Maintenance of Way work." This Award described Rule 2 as "clear, simple and unambiguous language and directly applicable to the facts herein." While not directing pay (because one of the Claimants was already compensated at a higher rate of pay) the Award stated its intent to "direct Carrier to observe the procedural requirement of this Rule."

Third Division Award 30970, issued in 1995, stated:

> "With respect to the question of damages for allegedly 'fully employed' Claimants, there is conflicting precedent and each such case appears to turn on it facts. To reward the blatant disregard of the Rule 2 notice requirements which this record demonstrates with impunity would render that Agreement provision a nullity."

Here, the situation may not warrant the "blatant" characterization, but the Award otherwise expresses the obvious significance of Rule 2, as forewarned in Award 22917.

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 29th day of April 1998.