Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32865
Docket No. MW-31876
98-3-94-3-211

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Southern Pacific Transportation Company (Eastern Lines)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Vaughn Construction Company) to perform the duties of a Maintenance of Way machine operator (operate a trackhoe, backhoe, dump truck, motor grader, concrete breaker, pulsar/packer, 2 rollers, D-4 dozer and a tractor with a lowboy trailer) at the Southern Pacific Transportation Houston Intermodal Yard, Houston, Texas beginning January 23, 1993 and continuing (System File MW-93-26/MW-93-51 SPE).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper written notice of its intent to contract out the work in question and failed to exert a good-faith effort to increase the use of Maintenance of Way forces and reduce the incidence of employing outside forces pursuant to Article 36 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operators J. H. Robb, Jr., D. L. Orsak, D. K. Taylor, T. L. Litt, W. J. Nelson, D. R. Fowler and J. P. Castro shall each be compensated at their respective rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the work in question beginning January 23, 1993 and continuing."

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.

By letter dated September 23, 1992, the Carrier notified the General Chairman as follows:

> "Please accept this as Carrier's Notice pursuant to Article 36 of the BMWE Agreement of our intent to contract out the following work:
>
> > Improvement to Englewood Intermodal Entrance/Gate. Contractor will remove the existing asphalt and concrete paving, subgrade preparation and placement of reinforced concrete paving (20,000 square yards), construction of the canopy, gatehouse, inspection boots and construction of a storm drain."

The Carrier asserts that conference was held on the subject matter of the notice on October 8, 1992. A letter dated October 29, 1992 from the Organization confirms that the parties held a conference.

On December 28, 1992, the Carrier entered into an agreement with the contractor for the performance of the work, which commenced January 23, 1993. The project was substantial in nature and duration. The bid on the project was for approximately $1.5 million. According to the Organization, the work was performed ten to 12 hours per day, six days per week. According to the Carrier, its forces were not used for the entire project because of the coordination and size of the project.

Claimants Robb and Orsak worked on the project along with the contractor. The other Claimants were also fully employed during the time of the project.

Rule 36 states:

"In the event this 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.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

The December 11, 1991 Hopkins/Berge letter states, in pertinent part:

"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 difference. In the interests of improving communications between the parties on subcontracting, the advance notice shall identify the work to be contract and the reason therefore."

The Carrier's notice and conference obligations were met. The Carrier gave advance notice of its intent to contract the work and the parties met in conference substantially prior to the Carrier's contracting the work.

The Organization makes much of the lost work opportunities for employees on furlough. Initially, that appears to be compelling logic for the assertion that the Carrier should have done more consistent with its obligations under the Hopkins/Berge letter to come up with alternative ways to have furloughed employees perform the work as opposed to reliance upon outside forces. However, while the Organization has leeway in choosing who the Claimants shall be, this claim was not filed on behalf of furloughed employees. This claim was filed on behalf of employees who were working during the time of the claim. Indeed, two of the Claimants worked along with the contractor's forces. Had the Organization sought relief on behalf of furloughed employees, we would have to consider the merits of the arguments that the Carrier could have done more to avoid having to contract the work. But, the Organization did not do so.

This was a very substantial, lengthy and complex project. Claimants were fully employed and no relief was sought on behalf of furloughed employees. The Carrier met its notice and conference obligations. The Organization has not shown how these seven named Claimants who were fully employed (two having worked with the contractor's forces) were realistically denied work opportunities or could have possibly performed this complex and substantial project in addition to their full employment. Under the circumstances of this case, we shall deny 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 October 1998.