Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 34981
Docket No. MW-33159
00-3-96-3-590

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Grand Trunk Western Railroad Incorporated

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Holland Company) to perform Maintenance of Way work (welding rail joints) on the Eastward Main from Valparaiso, Indiana, Mile Post 57.3 to Kingsbury, Indiana, Mile Post 75.3 beginning March 20 through April 24, 1995 (Carrier File 8365-1-511).

(2) As a consequence of the aforesaid violation, Welders R. A. Patsey and D. E. Martens shall each be compensated at the welder's straight time rate, ten (10) hours per day, four (4) days a week for the period of March 20 through April 24, 1995."

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.

On March 7, 1995, the Organization received correspondence from the Carrier which stated:

"Attached is a copy of my letter to you dated February 8, 1995 concerning the contracting out of undercutting, asphalt and welding work to be done in conjunction with the Grand Trunk's 1995 Rail, Tie, Surfacing and Undercutting Programs.

I am sorry but this letter was inadvertently sent to you at the wrong address."

The day after receiving the notice, by letter dated March 8, 1995, the General Chairman requested a conference and also requested that the Carrier forward for his perusal signed copies of any contracting Agreements relating to the proposed project. In that connection, the General Chairman noted that the Carrier's notice did not indicate what equipment would be necessary, nor whether it had attempted to procure rental equipment should it be needed.

On March 18, 1995, the Carrier responded to the General Chairman's request, asserting that any Agreement between the Carrier and a contractor was "privileged information" which the Carrier refused to disclose to the Organization. The Carrier went on to state the following:

"Inasmuch as the flash butt welding of the rail joints is scheduled to commence March 20, 1995 or the following Monday, I tried to contact you several times by phone on March 17, 1995 to conference the matter, but you were unavailable.

With respect to the remaining work, it is suggested that we confer at the Carrier's General Office or on the telephone at 10:00 a.m. on March 29, 1995."

Subsequent to a March 31, 1995 telephone conference, the Carrier reiterated its intent to contract out the "specialized work" of undercutting, flash butt welding and asphalting. With respect to the flash butt welding, the Carrier maintained that it did not own the necessary equipment, nor did it have "the availability" to rent or lease a flash butt welder. The Carrier also maintained that it "would not be practicable" to train an employee to handle a flash butt welder for the short period of time it would actually be needed. The Carrier further noted that contracting out the work of undercutting of approximately 70 miles of track had "been done in the past." According to the Carrier, the undercutting was contracted out because it did not possess a "sophisticated" undercutter, and it was "not practicable" to lease or rent one. Said work was scheduled to commence May 1, 1995 and continue until approximately August 31, 1995.

Finally, the Carrier noted that, "based on the geographic location of the work involved," it intended to contract out the finish asphalt paving of approximately 300

railroad crossings beginning on or about April 1, 1995 and continuing through October 1995. The Carrier contended that its decision to contract out the aforementioned work was premised upon "a lack of qualified personnel" necessary to perform finish asphalt work and because the quantity of work involved "did not justify" the purchase or lease of specialized equipment. In that connection, the Carrier alleged that it did not know of any lessors who would provide equipment without operators.

In response to the Carrier's March 31 letter, the Organization forwarded a 22-page list of vendors who would provide the necessary flash welding and undercutting equipment without operators.

In subsequent correspondence, on May 20, 1995, the Organization submitted a claim on behalf of Welders Patsey and Martens alleging that beginning March 20 and ending April 24, 1995, the Carrier assigned forces (Holland Company) to perform welding work which the Carrier's Maintenance of Way welding forces had "historically, traditionally and customarily performed." The Organization further asserted that the Carrier did not notify the General Chairman in writing of its plans to contract out the subject work as required by Article IV and the December 11, 1981 Letter of Agreement, thereby precluding any possibility of the parties reaching an understanding concerning the proposed contracting.

On March 7, 1995, the Organization received correspondence from the Carrier, including a letter dated February 8, 1995 which had been sent to the wrong address, stating that the Carrier intended to contract out certain projects. Following an immediate response from the General Chairman, the Carrier sent a second letter to the General Chairman dated March 18, stating that the proposed contracting was due to commence on March 20, 1995.

There is no dispute that the work at issue commenced on March 20, 1995, only 13 days after the March 7, 1995-notification date. Additionally, the conference was not held until March 31, 1995, 11 days after the outside contractor had already begun the disputed work on March 20, 1995. The pertinent portions of Article IV of the 1968 National Agreement and the December 11, 1981 (Berge-Hopkins) Letter of Agreement specifically require the Carrier to provide the General Chairman with at least 15 days' advance written notice whenever it intends to contract out work within the Scope of the Agreement. Further, a long line of decisions by the Board and other arbitral tribunals establish that merely going through the motions of a conference after the contracting out is a fait accompli and is not compliance with the good faith requirements of the cited contractual commitments to provide adequate notice and a bona fide conference. The principles governing disposition of this case are set out in Third Division Award 30977, as follows:

"Due to Carrier's failure to afford the Organization 15 days notice and opportunity for discussion, as provided for in Article IV of the Agreement, as reaffirmed in the Letter Agreement of December 11, 1981, these claims will be sustained. B&B mechanics worked on these doors in the past and had a colorable claim to the work, which mandated the notice and discussion prior to subcontracting. Whether specialized tools and equipment were in fact necessary for these particular projects is a matter which Carrier could have and should have explored with the General Chairman in the good faith discussions required by Article IV and the December 11, 1981 Letter Agreement. The organization was entitled to the requisite notice, the purpose of which is to identify the work to be contracted and the reasons therefor. Nothing in this record justifies Carrier's failure to comply with the notice and discussion provisions. Third Division Awards 27614 and 26593 are ample precedent for sustaining these claims for monetary damages."

As provided for in Article IV of the Agreement and reaffirmed in the Letter of Agreement dated December 11, 1981, the Organization was entitled to the requisite notice and a meaningful conference. Due to the Carrier's failure to afford said notice and conference to the Organization, this claim will be sustained, notwithstanding the Carrier's assertion that the Claimants were "fully employed." See Third Division Awards 19924, 28185 and 28851.

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 20th day of September, 2000.