Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 35047
Docket No. MW34444
00-3-98-3-64

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Clinchfield
(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 (Philip and Jordon Contractors) to maintenance of way work (install a bin wall, dig a ditch, bolt metal panels together, set panels in place and dump rock behind the wall) at Mile Post 154.2 to Mile Post 154.8 near Pigeon Roost, North Carolina on October 16, 1996 and continuing [Carrier's File 12(97-0373) CLR].

(2) The Agreement was further violated when the Carrier failed to grant and hold a requested conference to discuss its notice of intent to contract out the work in question or to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 48 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. D. V. Brewer, J. A. Williams, F. Flanary, J. Byrd, R. D. Garland, R. D. Hollifield, G. E. Griffith and G. K. Willis shall each be compensated at their respective and applicable rates of pay for three hundred ninety (390) hours' pay for the man-hours expended by the outside forces on October 16 through November 4, 1996 and for an equal proportionate share of the total number of man-hours expended by the outside forces

subsequent to November 4, 1996 and continuing until the violation ceased."

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 July 22, 1996, the Carrier advised the Organization as follows:

"This will serve as the Carrier's notice of intent to contract for the equipment rental, with operators, for the purpose of the installation and backfilling of prefabricated steel bin walls and gabion shoulder walls to stabilize embankment slopes between mile post Z-154.5 and mile post Z-155.0, near Huntdale, North Carolina, on the Blue Ridge Subdivision of the former Clinchfield Railroad.

Although it is the Carrier's position that this work is not that of the character of work which exclusively accrues to Maintenance of Way Employees, this notice is in keeping with our commitment to advise you of when Contractors will be performing work on or near our property. As you are aware, the existing embankment slope failure has been tied to the cause of three train derailments and the need to have this work done as soon as possible is to ensure the continued safe operation of trains. The project involves work on a very unstable roadbed requiring the expertise of equipment operators specializing in the stabilization of landslides. Therefore, we have no alternative to contracting this work due to the fact that we do not have available employees who possess the

skills necessary, nor the equipment available, with which the work may be done.

This notice fully satisfies the Carrier's obligation concerning contracting matters under the terms of the applicable Agreement."

The Organization responded to this notice by letter dated July 26, 1996, requesting a conference to discuss the matter. Throughout the handling of this claim on the property, and in its Submission to the Board, the Carrier denied ever receiving the Organization's July 26, 1996 letter. At the Referee Hearing before the Board, however, the Manager of Labor Relations acknowledged the Carrier received the letter on August 6, 1996, but explained it was not given to the appropriate official for handling. Consequently, no conference was held.

Rule 48 of the parties' Agreement, taken from Article IV of the May 17, 1968, National Agreement, provides as follows:

"RULE 48 - CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the Genera1 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. Said carrier and organization representative 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 Rule 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."

This issue was again addressed on the national level in the December 11, 1981, letter between Charles I. Hopkins, Jr., on behalf of the National Carriers' Conference Committee, and 0. M. Berge, President of the Brotherhood of Maintenance of Way Employes. In that letter, Mr. Hopkins wrote:

> "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 differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

With regard to the primary portion of the claim, the Carrier made a convincing argument that the work performed may have required design and engineering skills of a specialized nature to prevent landslides. There is, however, no indication in the record of any special equipment used, or the need for the operators of that equipment to have any special expertise. We conclude, on the basis of the record before us, that the work in question could have been performed by the Claimants.

As to the second part of the claim, there is no question that the Carrier violated the Agreement by not affording the Organization an opportunity to discuss its Notice of Intent to subcontract in conference. The Carrier acknowledges it received a timely and proper request for the conference, hut failed to respond because it was not brought to the attention of the proper official. The fault for this lies entirely with the Carrier. It does not matter that the Organization did not file another request for a conference or otherwise pursue the matter. The Agreement requires only one request on the part of the Organization. The Carrier is then required to meet. Its failure to do so constitutes a violation of the Agreement.

While the Carrier asserts it is not guilty of bad faith, we note that the Manager of Labor Relations averred the receipt of the request for conference was admitted to the Organization when the claim was discussed on the property. Nevertheless, the Submission before the Board repeats the Carrier's erroneous argument that no request was ever received. We are perplexed as to why the Carrier, in its Submission, would not relate the facts as they were known at the time.

The Organization avers the Carrier has a history of failing to comply with the notice requirements of Rule 48. In support of this argument, it cites Third Division Award 22917, involving the Seaboard Coast Line, a predecessor of the Carrier. That Award stated, in part, as follows:

> ". . . Rule 2 was intended to require as a condition precedent to contracting out Maintenance of Way work that the Assistant Vice President, Engineering and Maintenance of Way and the General Chairman confer and reach an understanding setting forth the conditions under which the work will be performed. It is clear, simple and unambiguous language and directly applicable to the facts herein. In prior Third Division cases involving the same parties, albeit different fact situations, we have held in conceptually analogous disputes that conferral was a necessary requirement. We find that it was required here. (See for example, Third Division Awards 22591, 22274 and 18287). Carrier violated Rule 2 when it didn't confer with the Chairman regarding the leasing of said equipment and we are compelled to sustain the first part of the claim."

Although no remedy was awarded in that case, the Organization cited no fewer than 26 later Third Division Awards involving the Carrier, covering a period of time from May 1988 (Award 30964) through November 1993 (Award 33324) wherein it was found that the Carrier violated the notice provisions of contracting out Rules either by not serving a proper notice or not satisfying the Organization's request for a conference. In each of these cases, the Board sustained the Organization's claim, notwithstanding the Carrier's assertion the claimants therein were fully employed and not deprived of work opportunities as a result of the contracting out. In Award 31762, the Board wrote:

"Consequently, since we have determined that a violation occurred, we must next determine the appropriate remedy. We note for the record that this is not the first time that this particular Carrier failed to comply with the prenotification requirement. (See Third Division Awards 24399, 26436.26791, and 28486.)

Given the previous past violations of this Carrier and this Division's findings that contracting out violation may qualify for penalty payments without proof of actual damages if the Organization can establish repeated violations, which it has done here, we will sustain this claim as presented."

Similarly, in Award 32435, the Board wrote:

"With respect to the monetary portion of this claim, the Carrier raised the "full employment" issue as an affirmative defense, however, it failed to submit evidence in support of that defense. Moreover, given the blatant nature of the dual violation, monetary damages are in order to compensate Claimants for the lost work opportunity and to stimulate compliance with the subcontracting notification and Scope provisions of the Agreement. This claim must be sustained."

Finally, in Award 32866, the Board held:

"Third, with respect to the remedy, the fact that Claimants were working during the time the contractor performed theworkdoes not deprive them of a remedy. The Carrier's actions resulted in a loss of work opportunities for the covered employees. Had the Carrier engaged in the conference as required, the parties may well have been able to agree upon a method whereby covered employees could have performed the work."

In the instant case, by not responding to the Organization's request for a conference, the Carrier foreclosed any opportunity to explore how the Claimants might have been able to perform the work in question. In light of the numerous Awards between these parties, and the proven violations of the Agreement, we are compelled to follow the established precedents and sustain the 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 25th day of October, 2000.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 35047
DOCKET MW-34444
(Referee Barry E. Simon)

The Majority determined that the Carrier violated the Agreement because it failed to schedule a conference with the General Chairman to discuss its notice of intent to contract out the work at issue. While we think that such holding was erroneous, we are even more concerned with the rationale given for the award of damages.

First, the Majority erroneously states:

> **"While the Carrier asserts it is not guilty of bad faith, we note that the Manager of Labor Relations averred the receipt of the request for conferencewas admitted to the Organization when the claim was discussed on the property. Nevertheless, the Submission before the Board repeats the Carrier's erroneous argument that no request was ever received. We are perplexed as to why the Carrier, in its Submission, would not relate the facts as they were known at the time."**

No such acknowledgment was made during the Referee Hearing. On the contrary, the Manager of Labor Relations stated that during handling on the property, he informed the General Chairman that the Carrier had *no* record of receiving the Organization's request for a conference in July 1996, and that the belated presentation of that request during a conference in August 1997 did not change that fact. The Manager of Labor Relations informed the Board that he located the 1996 reauest in an unrelated file while preparing for the Referee Hearing. Therefore, there was no reason for the Majority to be perplexed as to why the author of the Carrier's Submission, who was not the Manager of Labor Relations, continued to argue that the Carrier simply had no record of the request. As regards the alleged bad faith, we note that the Manager of Labor Relations could have simply concealed his belated discovery, or chosen not to attend the Referee Hearing. Ironically, the Carrier was found guilty of acting in bad faith because the Manager of Labor Relations told the truth.

Second, the Majority stated that its reliance on the Carrier's perceived history of failing to comply with the notice requirements of Rule 48 was based on 27 Third Division Awards. The fact is that not one of them was rendered on the former Clinchfield property. Although this fact was pointed out during the Referee Hearing, the Majority chose to ignore substance in favor of hyperbole. Further, while those Awards involved former CSXT properties, they ranged over a period of six years (1988 to 1993), during which time CSXT component roads filed hundreds of notices of intent to contract out

work. In other words, the Majority found that because the Carrier lost arbitration cases involving a very small percentage of contracting out cases, it is a "repeat offender." Further, nearly all those Awards involved the Carrier's failure to provide advance notice of its intent to contract out work, as opposed to failure to schedule a conference.

Third, the Awards cited by the Majority in support of paying damages to fully employed Claimants did not involve the Clinchfield Railroad, and citation of those Awards is perplexing. Two of those Awards involved disputes on the former Chesapeake & Ohio Railway Company, and the other involved a dispute on the former Seaboard Coast Line Railroad. There simply is no history of the Carrier's failure to comply with the notice and conference provisions of Rule 48 of the Clinchfield Railroad Agreement with the Organization. This one failure to schedule a conference, which was occasioned by an inadvertent error, and not an act of bad faith, was obviously a rare event. Although the point was made during the Referee Hearing, the Majority chose to ignore it in favor of the misinformation presented by the Organization.

Fourth, the Majority completely ignored the fact that the Claimants were not furloughed, as BMWE represented, but rather were working on System Production Gangs at the time. BMWE further asserted, erroneously, that the Claimants would have preferred to work at home on this project, but were forced to work on System Production. As noted on the property and during the Referee Hearing, the Claimants regularly choose to work System Production because it is much more lucrative work.

It is apparent that the Majority was swayed by Organization assertions that were not supported by the facts. It is unfortunate. The "rationale" given by the Majority for paying the fully employed Claimants was fatally flawed. Under the circumstances, we must dissent.

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga