Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35736
Docket No. MW-33424
01-3-96-3-788

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
(
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Westside Transport) to remove spilled grain from the Eastbound Lead and Track No. 17 and remove coal from Track No. 1 at Council Bluffs on June 5, 6, 7 and 8, 1995 (System File 4LF-2603T/950480 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out said work as required by Rule 1 (b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. J. R. Paar, L.M. Graham, M. L. Hildreth and W. D. Thomas shall each be compensated at their respective straight time rates of pay for an equal proportionate share of the one hundred twenty-eight (128) man-hours expended by the outside forces in the performance of the work in question."

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.

It is undisputed that the Carrier subcontracted with and assigned Westside Transport to perform the work of removing spilled grain from the Eastbound Lead and Track No. 17 and removing spilled coal from Track No. 1 at Council Bluffs, Iowa, without providing any notice to the BMWE General Chairman and no opportunity for conference. When the Organization protested with the instant claim, the Carrier initially asserted that this was an "as is where is" transaction, but withdrew from that position when put to its proof by the Organization. In denying the claim on the property, the Carrier did not contest its notice/conference obligation under the controlling Agreement(s) but raised the affirmative defense of "lack of a specific piece of equipment (vac)," disputed some of the dates and the number of hours worked by the Westport Transport employees and asserted that even if, arguendo, a violation had occurred, the "full employment" of the Claimants doing other work for the Carrier precluded any monetary recovery.

The Scope Rule of the governing Agreement and the applicable provisions of the so-called Berge- Hopkins Letter Agreement of December 11, 1981 read in pertinent part as follows:

"RULE 1 - SCOPE

(a) The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employes in any and all subdepartments of the Maintenance of Way and Structures Department, (formerly covered by separate agreements with the C&NW, CStPM&O, CGW, FtDDM&S, DM&CI, and MI) represented by the Brotherhood of Maintenance of Way Employes.

(b) Employes included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.

* * *

By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or, time requirements must be met which are beyond the capabilities of Company forces to meet.

In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements, cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith.

* * *

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." (Emphasis added)

The record evidence discloses a complete and unmitigated failure by the Carrier to comply with the good faith notice and conference requirements of the above-cited Agreement provisions. The "as is, where is" defense was waived and the belated assertion of an "emergency" is not only de novo, but not demonstrated by any credible evidence. During on-property handling, the Carrier asserted that its records of the outside contractor's activities were not exactly in accord with the dates and total hours claimed by the Organization, but provided no evidence to support that bare allegation. The affirmative defense that the Carrier lacked "special equipment" begs the question because no contractually mandated notice was ever given and thus no conference afforded to discuss such alleged special circumstances. As we observed in Third Division Award 35735, another recent case with these same Parties and Agreement language involving a similar blatant violation of the notice/conference provisions, the mutual intent of the contracting Parties is that such advance notice is supposed to provide the opportunity for good faith discussion of precisely these kinds of issues. Finally, notwithstanding the Carrier's defense that the Claimants were "fully employed" on claim dates, their loss of work opportunity coupled with the unmitigated violation of the Carrier's contractual obligation to notify and confer if timely requested by the General Chairman before contracting out such work warrants a sustaining award by the Board. See Third Division Awards 31752, 31754, 31755, 31756, 31760, 31777.

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 24th day of October, 2001.