

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 35975  
Docket No. MW-32942  
02-3-96-3-322

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 Employees  
(CSX Transportation, Inc. (former Monon  
( 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 to perform Maintenance of Way and Structures Division work (track construction and reconstruction, removal of crossties, track panels, etc.) between Mile Posts 118 and 122 in LaFayette Yard at LaFayette, Indiana beginning October 17 through November 18, 1994 [System File 1-003-95/12 (95-0501) MNN].
2. As a consequence of the aforesaid violation, Foreman S. L. Huddelston, Machine Operators D. E. Hancock, R. D. Miller and Trackmen S. A. Truax, D. Deardurff, E. L. Nigg and A. J. Bland shall each be allowed eight (8) hours' pay at their respective straight time rates for each Monday through Friday worked by the outside forces, two (2) hours' pay at their overtime rates for each Monday through Friday worked by the outside forces, and ten (10) hours' pay at their overtime rates for each Saturday and Sunday worked by the outside forces.”

**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 October 6, 1994, the Carrier notified the Organization as follows:

"This will serve as Carrier's notice of its intent to contract for the construction of 1,500 TF Lead Track to the Bids facility in LaFayette Yard; surfacing of 3,00[0] L.F. of Yard Tracks; removal of 1,200 TF of former main, including 2 road crossings immediately south of Fifth Street; Pick up of 3,000 L.F. of rejected lengths of CWAR and stockpile; removal of 25, 39 foot panels and stockpile; and pickup and disposal of crossties and crossing timbers between M.P. 118 and 122; LaFayette, Indiana, Monon Seniority District, Chicago Division.

It is necessary to contract the foregoing due to the fact that the Carrier does not [have] equipment laid up and forces laid off, sufficient both in number and skill with which the work might be done."

\* \* \*

Conference between the parties did not change the Carrier's stated intent. The work was then contracted out and was performed by outside forces during the period October 17 through November 18, 1994.

The record further indicates that prior to the Carrier's contracting out the work, the Claimants were assigned to that work, but were taken off that assignment when the Carrier brought an in-track welding truck on the property and the Claimants were assigned to work with that equipment. The record further indicates that the Claimants were subsequently furloughed for approximately three months.

The Carrier responded to the claim as follows:

\* \* \*

**"Our investigation of your claim reveals that due to a shortage of manpower a contractor was used to finish the construction project south of Fifth Street. The Carrier was mandated by the State of Indiana to finish this project by November 30, 1994. Due to in-track welding operations and extra gangs working with the tie unit there were no forces available to perform this work. In addition, a Notice-Of-Intent was sent to the Federation. . . ."**

**In subsequent correspondence, the Carrier reasserted that " . . . the work made subject herein was mandated by the State of Indiana to be completed by November 30 [and d]ue to the shortage of manpower, this work had to be contracted out and you were so notified."**

**The Organization requested evidence from the Carrier concerning the Carrier's asserted requirement from the State of Indiana that the Carrier had to complete the project by November 30, 1994. The Carrier ultimately responded, stating that ". . . Carrier's utilization of forces in such a manner was compelled by the State of Indiana, mandate, and its own track project curfews."**

**In sum then, the record shows that the Claimants were working on track work; the Carrier reassigned them to work with an in-track welding truck; the Carrier subcontracted the track work taking the position that there was a shortage of manpower and equipment and that it was mandated by the State of Indiana to complete the work by November 30, 1994.**

**RULE 60 - Contracting Out provides:**

**"In the event a 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. Said 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 Rule (Article IV of the May 17, 1968 Agreement) 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."

**We find that the Carrier improperly contracted out the work.**

First, clearly, the work was scope-covered and the Claimants were sufficiently skilled and capable of performing the work. The Claimants were performing the work before they were pulled off the project and reassigned to other work.

Second, in its Submission to the Board, the Carrier argues that its only obligation was to give notice and hold a conference:

"The Board will note there are no specific conditions stipulated in this contracting rule for Carrier to meet in order to contract scope covered work with the exception of Carrier being required to (1) notify the Organization of its intent to contract the work in question; and (2) meet with the general chairman in an attempt to reach an understanding concerning said contracting. Both of these conditions were met by Carrier, in accordance with the above rule. . . ."

With respect to Rule 60, the Carrier is perhaps technically correct. It gave notice and held a conference.

However, in this case, there is a further obligation. While much has been said about the strength/weakness and even utter chaos caused by the December 11, 1981 Hopkins/Berge letter, nevertheless, that letter states:

\* \* \*

**"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."**

\* \* \*

Here, the evidence shows that the Claimants were performing the work; the Carrier reassigned the Claimants away from the work; the Carrier then subcontracted that very work asserting that there was a manpower shortage; the Carrier further stated that there was a time constraint placed on it by the State of Indiana, but, after the Organization requested specifics concerning that time constraint, the Carrier merely reiterated that there was a time constraint. What the status of this record shows is that the asserted manpower shortage was created when the Claimants were taken off the job by the Carrier and when the Organization wanted to know the basis for the State of Indiana's alleged deadline, the Carrier effectively declined to demonstrate it. If that kind of record evidence is permitted to justify subcontracting, then the obligations in the Hopkins/Berge letter - no matter how vague or uncertain they may be - would be rendered an absolute nullity. It is a fundamental rule of contract construction that negotiated language be interpreted to have at least some meaning. If adopted, the Carrier's arguments in this case on these facts would be contrary to that rule of contract construction. On the merits the claim shall be sustained.

With respect to the remedy, the Claimants (who were subsequently furloughed) lost work opportunities when they were deprived of the ability to perform the work subcontracted by the Carrier - indeed, the very work they were previously performing. The Claimants shall therefore be made whole. The matter is remanded to the parties to determine the number of hours of work performed by the outside forces. The Claimants shall be made whole at the applicable rates called for by the Agreement.

**AWARD**

**Claim sustained in accordance with the Findings.**

**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 19th day of March, 2002.**