

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36094
Docket No. MW-35203
02-3-99-3-50**

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen 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 (J. R. Bowman Construction Company) to perform Bridge and Building Subdepartment work (construction of an office building and concrete loading ramp) at the northeast end Car Shop at Erwin, Tennessee beginning November 17 through December 23, 1997 and continuing until said violation ceased, instead of assigning Messrs. D. V. Brewer, R. D. Hollifield, J. Byrd and G. E. Griffith [Carrier's File 12(98-0342) CLR].**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed 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) The claim as presented by Vice Chairman B. R. Tipton on January 6, 1998 to Manager Facilities Maintenance E. E. Wilkes shall be allowed as presented because said claim was not disallowed by Director Employee Relations J. H. Wilson (appealed to him under date of February 24, 1998) in accordance with Rule 36.**

- (4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Claimants D. V. Brewer, R. D. Hollifield, J. Byrd and G. E. Griffith shall ' . . . be paid an equal amount of the two hundred (200) hours that the contractor has worked on this project, at their applicable rates of pay. Also, that they continue to be paid for any days that are worked after December 23, 1997, until the contractor completes this project."

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.

This case presents "the rest of the story" of the dispute between the Carrier and the Organization over the subcontract with J. R. Bowman Construction Company to construct an office building and concrete loading ramp connected to the Heavy Car Repair Shop at Erwin, Tennessee. As discussed in companion Third Division Award 36092, the Carrier subcontracted that work without any advance notice to BMW General Chairman T. R. McCoy, Jr. and without the opportunity for discussion, as mandated by the good-faith effort commitments in the December 11, 1981 Hopkins-Berge Letter and Rule 48 of the Agreement. For that blatant violation, we awarded compensatory damages for the period July 16, 1997 through early September 1997, when the Carrier temporarily suspended performance of the improperly subcontracted work after receiving the Organization's initial claim dated September 4, 1997.

The Carrier instructed J. R. Bowman Construction Company to suspend work on the Erwin, Tennessee, project on September 8, 1997. Thereafter, at 8:21 A.M. on

November 11, 1997, the Carrier faxed to the General Chairman written notice of its intention to proceed with contracting out the disputed work. At 10:55 A.M. that morning, the parties discussed the notice via a telephone conference call, during which the Organization objected that the belated notice of a subcontract which had already been executed and partially implemented was not adequate compliance with Rule 48 and the December 11, 1981 Hopkins-Berge Letter. The Carrier acknowledged its previous failure to provide advance notice regarding the project, but contended that the November 11, 1997 notice was applicable and adequate for the remainder of the subcontract. When no agreement was had, commencing on November 17, 1997, the Carrier allowed the outside contractor to resume the disputed work to completion. In response, the Organization filed the instant claim which was handled to stalemate on the property and appealed to the Board for final determination.

The Board does not concur with the Carrier's assessment of its contractual obligations in the facts of this case. Unmitigated failure to comply with the notice and good-faith discussion provisions of Rule 48 and the December 11, 1981 Hopkins-Berge Letter before entering into the subcontract was not cured by temporarily suspending the disputed work, to go through the motions of serving belated notice of a fait accompli and engage in foredoomed discussions, before resuming to completion the improperly subcontracted work. In these particular facts and circumstances, where the subcontract had already been let and the subcontractor had already substantially performed the disputed work, the mere formality of mid-project notice, without any reasonable opportunity to address or possibly influence the Carrier's already implemented subcontracting decision, is not compliance with Rule 48 and the December 11, 1981 Hopkins-Berge Letter. In short, the initial fatal failure of notice and discussion was not cured by the Carrier's belated efforts of November 11, 1997.

Because we sustain Parts 1 and 2 of the claim, there is no need to address Part 3. As for Part 4, notwithstanding the Carrier's "full-employment" defense, there is ample on-property precedent, e.g., in Third Division Awards 30970, 31597 and 31777 for awarding each of the named Claimants compensation at his/her respective and applicable rates of pay for an equal proportionate share of the man-hours expended by the outside forces in the performance of the work in question, for the period from November 17, 1997 until completion of the project.

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 22nd day of July 2002.