NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26210
Docket Number MW-26119

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Chesapeake and Ohio Railway Company
( (Southern Region)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement beginning on September 16, 1983 when, without a conference having been held as required by the October 24, 1957 Letter of Agreement and in violation of the letter of intent to contract out work dated April 22, 1983, it assigned outside forces (R. J. Corman Construction Company) to perform maintenance of way work including the removal and replacement of drain pipes, rail, switches and ties, the dressing and cribbing of track, ditching, roadgrading and handling track material at various locations on the Cincinnati-Chicago Seniority District of the Western Division (System File C-C-1944/MG-4275).

(2) Because of the aforesaid violation each cut-off equipment operator on the Cincinnati-Chicago Seniority District shall be compensated at the Class 'A' equipment operator's rate of pay for an equal proportionate share of the man-hours expended by the outside forces in the performance of the work referred to in Part (1) hereof."

OPINION OF BOARD: On April 22, 1983, Manager of Labor Relations Comiskey wrote the General Chairman stating:

> "This is to advise you of the Carrier's Intent to contract with R. J. Corman Construction Company to furnish one Extend-A-Hoe with operator and Hi-Rail Rotary Dump Truck for program ditching at various locations on the Cincinnati-Chicago Seniority District of the Western Division.
>
> It is estimated that this project will take 120 man-days to accomplish. Work is scheduled to commence September 16, 1983 and to be completed December 15, 1983.
>
> Carrier has no alternative but to contract this work as Carrier does not possess this type of equipment for ditching. Also, all Carrier ditching equipment is actively engaged at other equally important locations.

There will be no furloughed Equipment Operators on the seniority territory involved during the period the contractor is working on the property."

On October 6, 1983, the General Chairman wrote Manager of Engineering Cashwell as follows:

"I am enclosing copy of letter advising me of the Carrier's intent to contract with R. J. Corman Construction Company to perform ditching at various locations on the Cincinnati-Chicago Seniority District of the Western Division. This contractor was scheduled to commence work September 16, 1983 and be completed December 15, 1983. Mr. Comiskey stated that the Carrier had to contract this work as Carrier ditching equipment was actively engaged at other equally important locations and that the Carrier did not possess this type of equipment for ditching. The last paragraph of his letter states that there will be no furloughed equipment operators on the seniority territory involved during the period the contractor is working on the property. In this letter of intent to contract I was advised that R. J. Corman would do ditching and ditching only.

To my knowledge, he has installed a 10" train pipe at Richmond Yard, a 12" drain pipe at MP 84.7, another drain pipe at MP 80.8. He has ditched at Richmond Yards as well as at MP 84.7, 80.8, 86.4. There is nothing in the letter of intent to contract that says this contractor will install any pipe. I would like to bring to your attention that he has removed the rail, the derail pipe and a complete switch from MP 64.1. He also at this same location assisted the Basic Force in removing the Switch Tie and installed 39 main line ties. He did cribb with the backhoe as well as the dressing and the stacking of the used ties. This was also clearly omitted from Mr. Comiskey's letter of intent, dated April 22, 1983.

I have also been advised that there are Equipment Operators furloughed on this seniority district as well as it is a known fact that the railroad has the necessary equipment available to do this type of work or they could have rented the equipment locally without operators.

This contractor went to work on September 16, 1983 and is continuing to work and violate the letter of

intent. Therefore, I request that each and every furloughed Equipment Operator be paid for each and every hour this contractor is on the property, divided equally, for as long as the contractor is on the property. This claim should stand as a claim for any future hours that the contractor violates the intent to contract letter.

Please investigate and advise."

Rule 83(b) reads in part:

"(b) It is understood an agreed that maintenance work coming under the provisions of this agreement and which has heretofore customarily been performed by employees of the railway company, will not be let to contract if the railway compay has available the necessary employees to do the work at the time the project is started, or can secure the necessary employees for doing the work by recalling cut-off employees holding seniority under this agreement;

* * *

This shall not preclude letting to contract the building of new lines, sidings, and yards; the extension of existing lines, sidings, and yards; the construction of new buildings or other facilities which has customarily been handled by contract in the past; or the doing of maintenance work requiring equipment which the railway company does not have or skill and tools not possessed by workmen covered by this agreement; on the other hand, the railway company will continue its policy of doing construction work with employees covered by this agreement when conditions permit."

In Appendix B of the parties Agreement, dated October 24, 1957, the Carrier recites its policy of performing maintenance of way work with employees covered the Agreement except in certain circumstances and states:

"In each instance where it has been necessary to deviate from this practice in contracting such work the Railway Company has discussed the matter with you as General Chairman before letting any such work to contract. We expect to continue this practice in the future . . . ."

The Organization argues the Rule and the October 24, 1957, Letter of Agreement cover work of the character at issue here. It further contends that

even if the work falls within a defined exception of 83(b) (which it does not concede) Carrier cannot contract the work until it has discussed the matter with the General Chairman.

The Organization also argues the contractor did not use an Extend-a-Hoe or Hi Rail Rotary Dump Truck as noticed but used equipment of a type which Carrier has. If Carrier's equipment was unavailable, it was due to Carrier's scheduling of its use.

Carrier admits its Investigation disclosed the contractor did provide "minimal assistance" to company forces on 9 days between September 22 and October 7, working four hours on the last three of those days, but did nothing other than ditching after October 7, 1983. Carrier further asserted on the property that the Contractor did employe special equipment, an Extend-a-Hoe and a Rotary Dump, although admittedly the dump was broken down for a time. Carrier asserted the Contractor spent no more than 64 hours performing work that went beyond the notice. The Organization position is that all work done by the Contractor should have been done by Carrier forces and equipment. Carrier insists all of its equipment was actively engaged elsewhere and not available.

Carrier insists the Claim has been amended in that it originally sought payment for each and every furloughed Equipment Operator but was later modified to a Claim that the Senior Equipment Operator be paid for 120 days. Carrier asserts still another amendment was made when the Claim to this Board alleged the Agreement was violated" when, without a conference having been held as required by the October 24, 1957, Letter of Agreement . . . carrier assigned outside forces." We do not agree there is fatal variance between the Claim as originally presented and as modified to request payment for the Senior Operator only. We do note however in Agreement with the Carrier that in handling on the property no Claim was made that in addition to the Notice, discussion was required prior to the contracting out. Rather as we read the evidence the contention consistently was that the work performed exceeded that which was covered by the Notice. It was on this basis that the Claim was progressed on the property. It is on this basis that we shall consider it here, without deciding whether Appendix B requires discussion when timely Notice is given but no discussion is then requested by either party. This case thus differs from the situation in Third Division Award 25967 involving the same parties. There Carrier gave no notification of contracting out on the theory that Notice is required only when the work to be contracted is not within the exception to Rule 83(b). This Board held notification "a necessary preliminary to . . . discussion . . . ."

Carrier agrees there was some work which it describes as "minimal" done which exceeded the contemplation of the Notice of Intent. It denies it was as extensive as stated by the Organization. In support of the Claim the Organization presented letters from three of Carriers employees who worked with the Contractor. These letters describe work done on twelve days which might be considered as beyond the Notice of Intent. In this same period Carrier admits nine days or partial days were spent assisting company forces.

The Letters from the employees describe the equipment of the Contractor as a "small back hoe" and a "regular dump truck." No response is made to Carrier's contention it had no backhoe available to it at the time.

We conclude the Organization has not met its burden of proving time was spent doing work beyond the scope of the Notice of Intent except to the extent noted in the employee letters which really coincide generally with what Carrier admits. Accordingly we shall require the Senior Equipment Operator on lay off status be compensated at appropriate rate for the twelve days. We note an equipment operator was upgraded to Class A status for the duration of the Claim period but we do not consider that material to the issue. As there is no showing Carrier is incorrect in asserting that in three of these days only four hours of work took place the compensation shall be for a total of nine days at eight hours and three days at four hours for a total of eighty four hours.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 15th day of January 1987.