Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29221
THIRD DIVISION Docket No. MW-28509
92-3-88-3-318

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Seaboard System Railroad)

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

(1) The Carrier violated the Agreement when, without an understanding having been reached between the Carrier (Chief Engineering Officer) and the General Chairman setting forth the conditions under which the work will be performed as required by Rule 2, it assigned outside forces to perform Maintenance of Way work at the Charleston, South Carolina Intermodal TOFC facility beginning May 4, 1987 [System File TOFC-87-69/12(87-917)].

(2) As a consequence of the violation referred to in Part (1) above Messrs. D. Gaymon, R. Drew, J. Bath, E. Powlesland, L. B. Brownlee, I. Coakley, N. Bryant, R. Teder, D. L. Timmons, R. H. Byrd, J. W. Adams, B. R. Bethea, W. Harris and M. McKissick shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in the performance of the work referred to in Part (1) above."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The claim before the Board involves the interpetation and application of Rule 2 (Contracting) of the Parties' Agreement. It reads as follows:

"RULE 2

This Agreement requires that all maintenance work in the Maintenance of Way and Structures Department is to be performed by employees subject to this Agreement except it is recognized that, in specific instances, certain work that is to be performed requires special skills not possessed by the employees and the use of special equipment not owned by or available to the Carrier. In such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed.

It is further understood and agreed that although it is not the intention of the company to contract construction work in the Maintenance of Way and Structures Department when company forces and equipment are adequate and available, it is recognized that, under certain circumstances, contracting of such work may be necessary. In such instances, the Chief Engineering Officer and the General Chairman will confer and reach an understanding setting forth the conditions under which the work will be performed. In such instances, consideration will be given by the Chief Engineering Officer and the General Chairman to performing by contract the grading, drainage and certain other Structures Department work by magnitude or requiring special skills not possessed by the employees, and the use of special equipment not owned by or available to the Carrier and to performing track work and other Structures Department work with company forces."

It is the position of the Organization that the Carrier contracted for the work in question without consulting the General Chairman as required by the Agreement. It also contends that the Carrier's defenses for violating the Agreement are without merit. First, the claim was submitted within 60 days of when the contracting started, which is the key date, in its opinion. Second, it believes it improper for Carrier to rely on efficiency and/or economy in its attempt to justify its violation of the Agreement. In this regard, it is suggested that lack of managerial foresight cannot be an excuse for not having Carrier forces available. The work of the Carrier's forces or the work of the contractor could have been rescheduled. Thus, additionally it contends no loss of work opportunity need be proven to sustain the claim.

The Carrier contends at the outset that the claim is time barred. It notes that the notice was dated April 20, 1987, and the claim was not filed until July 2, 1987, beyond the 60-day time limit. It also maintains that the General Chairman tried to avoid the conference required by the Agreement. It also maintains that Rule 2 is not an absolute prohibition against contracting. The General Chairman cannot convert his refusal tactics and refusal to consent to the contracting into a violation of the Agreement on the Carrier's part. Contracting is permitted under certain circumstances. The facts of this situation fit the identified circumstances. The Carrier asserts it properly contracted the work in view of the fact it did not have adequate forces and equipment as they were all committed to other projects.

Several issues need to be addressed. First, there is no merit to the Carrier's time limit argument. The Organization is absolutely correct that the mere issuance of a notice is not sufficient to toll the time limits in circumstances such as these. Second, there is no basis for the Organization's complaint that the contract was let prior to the conference. The level of mutual animosity between the Parties makes it difficult in this case to determine, to use a figure of speech, which came first, the chicken or the egg.

Regarding the merits of the Carrier's decision to contract the work in question the Board finds its decision considered and within the permissible parameters for contracting encompassed in Rule 2. In this connection, there are several significant factors which, in combination with each other, justify the contracting under the unique circumstances of this case. They include (1) the fact no employees were on furlough in the seniority district, (2) the fact all active employees and equipment were committed elsewhere, and (3) a certain degree of urgency to the project. The Organization did argue that the Carrier could have reorganized, reallocated, and rescheduled the work to make the Carrier forces available. The Carrier responded with validity that the project was driven by shipper concerns, and a delay would have resulted in a loss of business. We also note that the sheer magnitude of the project (3-4 months) speaks to the practicalities of delaying other projects in order to utilize Carrier forces.

In summary, the Board cannot find that the Agreement was violated under the circumstances presented by this record.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 7th day of May 1992.