NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 THIRD DIVISION Award No. 29535

Docket No. MW-29700

93-3-91-3-44

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, without conferring and reaching an understanding with the General Chairman as required by Rule 2, it assigned outside forces (Osmose Company) to perform track maintenance work (in track tie preservation) between Mile Post S 680.0 and Baldwin Yard on the Wildwood Subdivision on the Tampa Division beginning October 30, 1989 and continuing [System File 89-74/12(90-212) SSY].

(2) As a consequence of the aforesaid violation, furloughed employes R. M. Leonard, F. W. Gunter, C. Franklin, C. A. Brown, R. A. Gayle, L. Smith, Jr., E. L. Andrews, L. M. Brown, W. F. Blair, R. F. Evans and C. A. Rouse shall be compensated at their respective straight time and overtime rates of pay for an equal proportionate share of the total straight time and overtime man-hours expended by the contractor's employes performing the work described in Part (1) above beginning on October 30, 1989 and thereafter so long as the violation continues."

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 employe 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.

At the time this dispute arose, Claimants had established and held seniority in the Maintenance of Way Subdepartment, Group 1 on the Jacksonville-Tampa Seniority District, and were all on furlough because of force reductions. On October 30, 1989, an outside contractor assigned by the Carrier, the Osmose Company, began performing track maintenance work such as in track tie treatment work beginning at Mile Post S680.0 on the Wildwood Subdivision. Eleven employees of the Osmose Company who hold no seniority whatsoever within the Maintenance of Way and Structures Department performed in track tie treatment work using equipment such as an adzing machine, creosote sprayer, air compressor and pump. These eleven employees worked ten hours per day, six days per week, and as of the date of this claim had worked a total of 4400 hours consisting of 2992 hours straight time and 1408 hours overtime.

The Organization maintains that the Carrier violated the Agreement because it did not afford Claimants an opportunity to perform this in track tie treatment work in accordance with their Maintenance of Way seniority, and that Claimants were fully qualified and readily available to perform this work had the Carrier afforded them an opportunity to do so. The Organization asserts that this dispute involves bad faith on the part of the Carrier.

The Organization asserts that Claimants suffered economically from the Carrier's action through loss of their equal proportionate share of 4400 hours of pay at their respective rates. The Carrier contends that because it had a right to contract out the in track tie treatment work, Claimants therefore experienced no such loss of earnings.

The Organization claims that Rules 1, 2, 3, 4 and 5 of the Agreement provide that the type of maintenance work performed by the Osmose Company employees is reserved to the Carrier's Maintenance of Way forces, and that this type of maintenance work has been traditionally performed by such forces. The Carrier maintains that the type of work performed by the Osmose Company employees is not encompassed within the scope of the Agreement. The Carrier further contends that the type of maintenance work performed required the use of specialized equipment not owned by or available to the Carrier, and that such work required special licensing which the Carrier forces did not possess.

The Organization argues that Rule 5 of the Agreement specifically lists the types of Carrier owned equipment routinely used for such maintenance work, and that such equipment was used for the work performed by the Osmose Company employees. The Carrier contends that the work required a patented process and special skills not possessed by the Carrier forces. The Organization maintains that such a change in the method of performing this work does not by itself remove such work from the scope of the Agreement, and that Carrier's argument regarding the lack of skills or proper licensing of its employees as well as the unavailability of the proper equipment is factually unsubstantiated.

The Organization asserts that the Carrier violated the Agreement when it failed to confer and reach an understanding with the General Chairman prior to assigning the maintenance work to the Osmose Company employees as required under Rule 2 of the Agreement. The Carrier contends that it was not required to do so because the maintenance work involved was of a specialized nature.

Both parties have cited several Awards to support their respective positions. After reviewing said Awards, the Board finds that Awards cited by the Carrier, primarily Third Division Awards 29185 and 26032 to be dispositive in this case. Particularly relevant is the Third Division Award 26032 in which the Board denied a factually similar claim based upon the specialized nature of the work which was contracted out.

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 9th day of March 1993.

LABOR MEMBER'S DISSENT
TO
AWARD 29535, DOCKET MW-29700
(Referee DiLauro)

The Majority exceeded its jurisdiction and obviously erred in denying this claim about in-track tie treatment work performed outside Jacksonville, Florida, because in doing so it illegally adulterated the crystal clear controlling language of Rule 2. This award is palpably erroneous and should not be considered as precedent.

The Majority, in the fourth paragraph of Award 29535, sets forth the factual circumstances of the dispute as being that:

> "*** On October 30, 1989, an outside contractor assigned by the Carrier, the Osmose Company, began performing track maintenance work such as in track tie treatment work beginning at Mile Post S680.0 on the Wildwood Subdivision. ***" (Emphasis added)

Controlling is Rule 2 which, in pertinent part, reads:

> "RULE 2
>
> CONTRACTING
>
> 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."

Plainly, had the Majority read and given common ordinary meaning to the words of Rule 2, the *track maintenance work* involved was that which was contemplated by the parties when they negotiated the words *all maintenance work*. Hence, the Carrier was contractually ***required*** to assign such work to its employes who were subject to the Schedule Agreement. In this connection, and without getting into a lengthy restatement of our position regarding scope coverage of the track maintenance work in question, it is noteworthy that the instant dispute was "argued" on November 4, 1992, just weeks after an article concerning in-track tie treatment appeared in the September 1992 issue of "Railway Track & Structures" (RT&S) magazine. RT&S is recognized as an authoritative periodical throughout the industry. At Page 39, the RT&S article stated:

> **"The process of supplemental treatment has long been recognized by the railroad industry as the single most important maintenance technique to secure additional tie life. ***"**

The article went on to point out that:

> **"*** Ties in the southeast, and other high moisture areas, are often affected by decay long before mechanical wear is apparent. ***"**

The salient point here is that maintenance of crossties *is* track maintenance work reserved to the Carrier's Track Subdepartment employes by Rule 2 unless/until express exceptions are shown.

For the Majority's edification, Rule 2 also provides exceptions to the requirement that *all maintenance work* in the Maintenance of Way and Structures Department be performed by employes subject to the Agreement, i.e., when special skills not possessed by the employees *and* the use of special equipment not owned by or available to the Carrier are involved. Those exceptions were where the Carrier belatedly hung its defensive "hat" during the on-property handling of the dispute and what the Majority illegally followed to deny the claim. The word "belatedly" is significant. Because there was **NO** dispute that the character of the work involved, i.e., in-track tie maintenance, had historically, traditionally and customarily been assigned to and performed by the Carrier's Maintenance of Way forces, **ANY** special skills and equipment issues were plainly the exceptions contemplated by Rule 2, i.e., topics for good-faith discussions in conference **BEFORE** the Carrier's decision to contract out such work. For the Majority's edification, the Carrier's presentation of such issues *ex post facto* are simply **EXCUSES** to escape monetary liability for its violations of the Agreement. Again, Rule 2's language, clearly and unambiguously controls such instances by its terms which read:

> "*** *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."

The Majority could not have been faced with more explicit provisions. The word "*will*" simply mandates that a conference be held *in such instances*. Although the Majority remarked in the penultimate paragraph of its findings that no such conference had occurred relative to the *track maintenance work* in question, it chose to ignore the plain facts and the clear rule. In addition, although directed to **Award 28486** *involving this Carrier* disposing of similar Carrier contentions in the Employes' favor, the Majority chose to ignore what is plain and clear even to those unschooled in Railroad arbitration. Again, **Award 28486**, held:

> "The Carrier maintains the work contracted out did not belong to the Organization. The Carrier bases this position on the necessity to use an outside contractor because a patented process was required and the work has always been contracted out. Furthermore, the Carrier argues the work was excepted since special skill and a patented process was involved.
>
> The record clearly establishes the 'work' performed by the outside contractor using a patented injection method was roadbed stabilization work. There is no evidence in this record that such work is not normally performed by Maintenance of Way employees.
>
> The argument advanced by the Carrier that this work could only be done by the use of a special patented process somehow exempts the work from the scope of the Agreement and Appendix 'B' is not based upon generally accepted principles of contract interpretation.

> "Herein, the Carrier has attempted to argue from a specific exception set forth in Appendix 'B' to a general conclusion that the work does not accrue to Maintenance of Way employees. The 'work' is roadbed stabilization, and there is no evidence all such work is excluded by use of special equipment or a patented process. On the contrary, their utilization is a specific exception which requires the Carrier to discuss the matter with the General Chairman before contracting out such work. See Third Division Award 25967. The determination to use special equipment and a patented process to perform roadbed stabilization lies with the Carrier. That decision does not alter the fact that roadbed stabilization is work that could be performed by Maintenance of Way employees, but not in this instance because of the special requirements the Carrier imposed. The equipment utilized does not alter the work. Rather, it alters the method of performing the work and clearly falls within the purview of Appendix 'B'." (Emphasis added)

Had the Majority read the above-quoted **Award 28486** and applied the well-reasoned principles enunciated therein to the factual circumstances, a sustaining award would have been inevitable. This is stated unequivocally because the factual circumstances considered by **Award 28486** are virtually identical to those considered by this award, i.e., **Award 28486** considered 'patented' roadbed injection maintenance work and this award considered 'patented' crosstie injection maintenance work. However, the applicable controlling contractual language, at least from the Carrier's standpoint, is far more restrictive in the instant case with Rule 2 than in **Award 28486** with Appendix 'B'. Notwithstanding, and incomprehensibly, the Majority chose to alter and amend Rule 2's terms "*all maintenance work*" to mean something other than, less than **ALL MAINTENANCE WORK**. Of course, the Majority does not have

the authority to alter or amend the language agreed upon by the parties to the Agreement. Hence, the Majority's decision in Award 29535 which failed to draw its essence from the Agreement, is illegal and of no precedential value whatsoever.

Perhaps more significantly, the Majority failed in its obligation to serve the purpose of the procedures established by the Railway Labor Act. Instead, its nonsensical findings cast a cloud over the value of the award while leaving the circumstances relative to Rule 2 essentially undecided.

Further evidence that the Majority erred when it arrived at Award 29535 is found in the fact that they considered as precedent, facts and rules which bear little, if any, resemblance to those decided in the subject award. In this connection, the Majority purportedly reviewed the awards cited by both parties and found Award 29185 dispositive and Award 26032 particularly relevant in deciding this dispute. Award 29185 involved the Missouri Pacific Railroad Company and a contracting out of concrete, anchor application and epoxy grouting work was very brief. Although the award concerned agreement rules which did not expressly reserve the work to Maintenance of Way employes, its denial centered on that Carrier's proffer of past practice evidence, i.e., *two hundred fifty-one* (251) *instances* of contracting similar work over a *twenty* (20) *year period*, which went **largely undisputed** and was **acquiesced**

to by the Organization. Beyond the name of the outside contractor involved, i.e., "Osmose", Award 29185 has **NO APPARENT SIMILARITY** to anything in Award 29535. Likewise, or similarly dissimilar is Award 26032, the opinion of which is a scant seventeen (17) lines but which the Majority nonetheless, found to be both "Particularly relevant" and "a factually similar claim based upon the specialized nature of the work which was contracted out." At this juncture, we are impelled to quote the entire "**OPINION OF BOARD:**" of Award 26032, which reads:

> "This Board is asked to rule on a Time Claim asserting that Carrier contracted out work without agreed Letter of Intent. Within this dispute on the failure of Carrier to utilize furloughed Maintenance of Way Laborers are additional time limit contentions as well as disputes over excessive Claim and improper Claimants.
>
> We have reviewed the record as developed on property and fail to find evidence of a probative nature to support the assertion of a Carrier violation. In the instant case, the weed control work was performed on April 28, 1983, by an outside contractor. Assertions that such work has traditionally and historically been performed by Laborers does not meet the Petitioner's burden of proof. No evidence of record establishes that such work herein disputed either belongs to the employes, or has ever been performed by Maintenance of Way Laborers.
>
> Finding no evidence to support the Organization's alleged Agreement violation, this Board denies the Claim. All other issues raised by the parties to this dispute on the property are herein considered of no further consequence by the Ruling."

From a review of the foregoing, it is plain that the Majority compounded its failure to examine the plain facts together with the clear rule by its **FAILURE TO EVEN LOOK AT WHAT IT WAS CITING AS CONTROLLING PRECEDENT** in this instance. Suffice it to say that Award 26032 was denied for a lack of rule support and/or evidence, bears no factual similarity to the dispute decided by Award 29535 and should not have been cited as controlling precedent. Although the Majority grievously erred in Award 29535, the real travesty was the furloughed Claimants' real loss of work opportunity in this instance and their *very* real loss of monetary benefits accruing thereto. Unfortunately, the Majority by Award 29535 visited its own maverick brand of industrial justice upon the Claimants which only brings home the principle that ***an injury to one is an injury to all***. Therefore, I am compelled to dissent.

Respectfully submitted,

D. D. Bartholomay
Labor Member