NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29823
Docket No. MW-29689
93-3-91-3-33

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (formerly
(The Chesapeake and Ohio Railway Company)

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

(1) The Agreement was violated when the Carrier assigned outside forces (Tamper Corporation) to perform track work (removal and loading of concrete crossties, preparation of ballast bed, unloading and installation of new wood crossties and placing of rail) on the New River Subdivision from November 6 through November 17, 1989 [System File C-TC-5060/12 (90-103) COS].

(2) The Agreement was further violated when the Carrier failed to timely and properly discuss the matter with the General Chairman in good faith prior to contracting out said work as required by the October 24, 1957 Letter of Agreement (Appendix 'B').

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the furloughed employes listed below* shall each be allowed eighty (80) hours of pay at his pro rata rate and ten (10) days' credit toward 1989 vacation qualifying time.

*B. J. Cooper
Phillip Meadows
W. R. Yancey
James Fox
Winfred Kincaid
Allan Fleshman
John Parker
Ronald Toney
Robert Ennis
David Lane
Robert Richmond
Earl Roberts
Danny Vandall
Michael Meadows
Richard Ballengee
Roy Bennett
Edward Logan
Derek Saunders
E. R. Alderman"

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.

The Organization contends several Agreement provisions were violated by the Carrier's action. The cited provisions read as follows:

"RULE 66 - CLASSIFICATION

* * *

(b) In carrying out the principles of Paragraph (a), Section and extra gangs will perform work to which they are entitled under the rules of this agreement in connection with the construction, maintenance, and/or removal of roadway and track facilities, such as rail laying; tie renewals (except on bridges and structures, but this will not preclude section and extra forces from laying rail or doing other track work on bridges or structures); ballasting; lining and surfacing track...

* * *

(f) Employees in the roadway machine operator group will be used to operate all of the so-called heavier machines used in the performance of track and bridges and structures work...." (Emphasis added)

"RULE 83 - CONTRACT WORK

* * *

(b) It is understood and 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 company 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...."

An October 24, 1957 Letter of Agreement (Appendix B) from the Carrier's Assistant Vice President-Labor Relations to the Organization's General Chairman reads in pertinent part:

"As explained to you during our conference at Huntington, W. Va., and as you are well aware, it has been the policy of this company to perform all maintenance of way work covered by the Maintenance of Way Agreements with maintenance of way forces except where special equipment was needed, special skills were required, patented processes were used, or when we did not have sufficient qualified forces to perform the work. 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 and if you agree that this disposes of your request, please so indicate your acceptance

in the space provided." (Emphasis added)

The December 11, 1981 National Letter of Agreement reads in pertinent part:

> "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.
>
> The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements by strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences.
>
> In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor." (Emphasis added)

Both parties raised new matters in their submissions that were not part of the proceedings on the property. These matters have not been considered by us. We have confined our review of this dispute, as we must, to those matters that were raised by the parties on the property.

The interaction between Rule 83 (b) and Appendix B has been the subject of several prior decisions of this Board involving these same parties and at least eight different Referees. See Third Division Awards 24399, 25967, 26351, 26436, 26791, 26792, 27295, 27585, 28486. Taken together, these awards stand for the precedent that the Carrier may not contract out scope-covered work unless one or more of the exceptions of Appendix B are present and, before letting the contract, it has engaged in discussions with the Organization.

It is important to note at the outset that, during the handling of this matter on the property, the Carrier did not allege that the work in dispute, namely tie renewal, was outside of the scope of the Agreement or that it had not been customarily performed by the bargaining unit. Nor did the Carrier challenge the applicability of the December 11, 1981 National Letter of Agreement. Rather, Carrier's position was premised on the need for specialized equipment, the lack of qualified employees and the assertion that it had complied with the discussion requirements of Appendix B.

Given the posture of the on-property record, we find that the Organization has established a prima facie case that the work involved was reserved to the bargaining unit employees. Therefore, the propriety of Carrier's subcontracting action depends on whether the requirements of Appendix B have been met. Since these requirements are in the nature of affirmative defenses, it is clear that the Carrier bears the burden to prove they were.

The thrust of Carrier's position is that it was desirous of expeditiously and efficiently replacing deteriorating concrete crossties in two areas before the winter season set in. Carrier was concerned about the stability of its roadbed over the winter if the ties were not replaced in a timely manner. Carrier became aware of the availability of a contractor-owned P-811-S Track Renewal Machine. The machine apparently is a multi-operator machine capable of performing "out-of-face" tie replacement. Carrier says the project was time critical and it had no qualified operators of its own to run the machine nor was there time to train its own operators. In its view, Carrier properly arranged for the use of the machine, to be operated by contractor employees, and properly notified the Organization in accordance with Appendix B.

The Organization contends that the contracting arrangement was a "done-deal" before the General Chairman received any information about the project. The Organization says it was told on Thursday, November 2, 1989 that the work would begin the following Monday. It maintains there were no good faith discussions within the meaning of Appendix B and the National Letter of Agreement. In addition, it asserted that some of the furloughed Claimants had experience, from other properties, with the P-811-S machine. It also offered example agreements from two other properties showing that railroad employees have been effectively trained to operate the machine.

After careful review of the record, we find Carrier's position to be deficient in two respects.

Whether Carrier satisfied the discussion requirements of Appendix B and the National Letter of Agreement is in sharp dispute. With the issue joined in this manner, it was incumbent upon the Carrier to prove, by providing probative evidence, that it had not let the contract before the conversation with the General Chairman. Carrier said, in its correspondence on the property, that "...the contract was not signed until immediately before the work started." However, Carrier did not produce a copy of the dated contract to corroborate its assertion. Why it did not do so we cannot say. It is not our role to speculate about matters not explained in the record. But Carrier's failure to produce such evidence, under the circumstances of this record, raises the adverse inference that the document would not have supported Carrier's assertion. When this adverse inference is considered together with the timing of the conversation, occurring on Thursday with the work to start Monday, we find we have no factual basis for concluding that the contract was let in compliance with Appendix B. In light of this finding, we do not reach the related issue whether the conversation constituted a "discussion" within the meaning of Appendix B and/or the National Letter of Agreement.

The issue of the availability of qualified employees remains. Given the deadlocked nature of the assertions in this record and the requirements of Appendix B and the National Letter of Agreement, Carrier had the burden to establish several facts: That the use of the P-811-S machine was required for the project, that Carrier could not have leased it to be operated by its own employees, and that it did not have qualified operators nor could it train them in time. It is not clear from the record that the machine was required to accomplish the work. It was not the customary means of replacing ties. Indeed, Carrier admitted in its correspondence that it had never been used before. However, since the Organization did not effectively dispute the need for this equipment on the property, we accept Carrier's assertions in this regard. However, the National Letter of Agreement imposed an obligation on Carrier to undertake good faith efforts to rent the equipment for operation by its own employees. There is no information in the record to show that Carrier made such attempts. Appendix B also requires a showing that qualified employees are not available. The instant record is devoid of any evidence to establish what the training requirements were or what their anticipated duration might be. In short, we have no basis in the record for concluding that Carrier could not have rented the machine and performed the work with its own emplyees. Carrier had the burden of proof on these points, but we must find that it failed to satisfy that burden.

In light of our findings, we do not have a sufficient basis for concluding that Carrier complied with the requirements of

Appendix B and the National Letter of Agreement when it contracted the work to outsiders. Accordingly, we will sustain the Claim. It appears, however, that the Claim slightly overstates the actual number of days worked and the number of contractor personnel used. Therefore, Carrier is directed to compensate the seventeen senior furloughed Claimants, at the pro-rata rate, for seventy-two hours of lost work opportunity each, together with appropriate vacation credit.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 29th day of September 1993.

CARRIER MEMBERS' DISSENT
TO
AWARD 29823, DOCKET MW-29689
(Referee G. E. Wallin)

The Majority erred when it inappropriately and without basis subjected the Carrier to a higher standard than is envisioned in the clear and unambiguous language of the Schedule Agreement. It compounded its error by blindly applying the December 11, 1981 Letter of Agreement to the facts in this case without comment on the Carrier's position that such letter did not apply on this property.

When the May 17, 1968 National Agreement was reached with the Organization, a new National subcontracting rule came into effect except on those properties where the Organization elected to retain existing rules and practices. One of those such properties was the former Chesapeake and Ohio Railway, predecessor to CSX Transportation, Inc. the Carrier at bar. On this property the Organization elected to retain the October 24, 1957 Letter of Agreement (Appendix B to the Schedule Agreement) which contrary to the findings of the Majority does not provide for or require that the Carrier enter into any good faith negotiations with the Organization prior to contracting out work. It simply confirmed the parties agreement, in settlement of a Section 6 Notice to prohibit subcontracting, that it would be sufficient for the Carrier to state its expectation to continue its practice/policy of discussing the matter with the General Chairman before letting any such work to contract. This Letter of Agreement is permissive in the extreme and does not restrict the Carrier's right to accomplish necessary work by the use of a contractor's forces or equipment. The clear language of Appendix B stops well short of entering into any binding agreement on this matter or even acknowledging that the practice was subject to negotiation. For this Board to find that the

Carrier in this case violated Appendix B, it would be necessary to read into its provisions something which is not there and to go beyond the function of interpreting and resolving disputes. Simply stated, Appendix B, the controlling agreement in this matter, does not now nor has it ever required negotiations, either good faith or otherwise, between the parties prior to the Carrier subcontracting work.

Furthermore, the Majority's pejorative dictum surrounding the timing of letting the contract in this case and its conjecture over the methods the Carrier elected to perform this necessary work in a timely manner may be appropriate at some level of academia or in some arbitrators utopia but has no foundation in the real world. What happens in the real world is that decisions are made to accomplish work in the most efficient and economical manner possible. In this case, a machine was available to remove the defective concrete ties and to install the new wood ties. This was a machine that Carrier's employees had no experience in operating and which was not available to lease for use by its employees even if they could have operated it. There was no real alternative to use of this machine short of performing the work manually, which in the view of the time frame in which the work had to be accomplished, was no alternative.

In view of the foregoing, Award 29823 is considered to be palpably erroneous and cannot serve as a precedent in any other case.

James E. Yost
J. E. Yost

M. W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

Michael C. Lesnik
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P. V. Varga
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