NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 THIRD DIVISION Award No. 30092

Docket No. MW-30132

94-3-91-3-566

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former 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 (Donahue Brothers, Inc.) to perform Maintenance of Way machine operator work, i.e., loading Maintenance of Way equipment onto flat cars and low-boy trailers at the Barboursville Shops on Friday, August 17, 1990 and Saturday, August 18, 1990 [System File C-TC-7108/12(90-1033) COS].

2) The Agreement was further violated when the Carrier failed to 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) The Agreement was further violated when the Carrier failed to call Watchman W. Clagg to perform watchman duties on Saturday, August 18, 1990.

4) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman C. McComas, Operators D. Reynolds, M. Dillon and E. Dillon, Helpers D. Castleman and T. Lee and furloughed employees J. Garretson and J. Comeau shall each be allowed one (1) hour and twenty (20) minutes of pay at their respective straight time rates and four (4) hours' pay at their respective time and one-half rates.

5) As a consequence of the violation referred to in Part (3) above, Watchman W. Clagg shall be allowed eight (8) hours' pay at the appropriate time and one-half rate."

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.

On August 17 and 18, 1990, the Carrier used an outside contractor with two Rubber Tired 100 Ton Rated Cranes to load equipment at its Barboursville facility. The Organization contends that a 30 ton rated American Crane and a 20 ton rated Little Giant Crane already on the property could have been used to lift the equipment, and that the disputed work is reserved to members of the Organization. The Carrier contends that it determined that equipment of sufficient capacity was not available to adequately and safely handle the work and that, as it has done for many years at Barboursville, it utilized an outside contractor with a suitable crane to perform the lifting work.

The Organization also alleges that the Carrier failed to give proper notice of its intent to contract out, and that the Watchman should have been called to open and close the doors on August 18, 1990.

At the outset, it should be noted that certain contentions were raised before the Board which were not raised on the property; these new contentions will not be considered by the Board.

The following provisions of the Agreement are applicable to a resolution of this dispute:

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 to the Organization reads in pertinent part as follows:

> "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 Agreement with maintenance of way work covered by the 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 supplied)

The effect of these provisions was noted in Third Division Award 29832, which reads in pertinent part as follows:

> "The interaction between Rule 83(b) and Appendix B has been the subject of several prior decision 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, 28466. 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."

After reviewing the record in this matter, in particular the Plant Manager's explanation of the need to bring in heavier equipment than was available, it is apparent that the work in question fits the "special equipment" exception of Appendix B, and that similar work has been contracted out in the past. While the Organization disagreed with the Carrier's evaluation of the type of equipment needed to do the work, it is well-established that the Carrier has the sole discretion in determining how to proceed in conducting operations of this kind.

The question remaining is whether the Carrier gave proper notice under the terms of the Agreement. The Carrier states that the Division Engineer's office phoned the General Chairman to notify him of the planned contracting out. The General Chairman states that he in fact initiated a phone call to the Division Engineer's office after learning from members in the field that a contractor was coming onto the property, and that his arguments in favor of using existing equipment were not accepted by the Carrier. The Board is thus faced with irreconcilable statements of fact and is unable to resolve the issue of whether proper notice was given. We must accordingly dismiss this portion of the Claim.

As to the eight hours claimed by the Watchman, no evidence was offered which would demonstrate that he had the exclusive right to open and close the doors at Barboursville, and we will deny this portion of the Claim.

A W A R D

Dismissed in part and denied in part.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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

Dated at Chicago, Illinois, this 4th day of April 1994.