Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30899
Docket No. MW-29103
95-3-89-3-538

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former
(Louisville and Nashville Railroad Company)

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

(1) The Agreement was violated when the Carrier assigned outside forces (Steel Processing Services) to unload concrete cross ties at Jackson and Ravenna, Kentucky from September 14 through October 22, 1988 [System File 3 (35) (88)/12(89-25) LNR].

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messers. P. G. Wolfinbarger, E. L. Johnson, H. L. Rogers, R. C. Kissick, C. E. Henry, F. Moreland, Jr., R. R. Witt, G. D. Rader, R. W. McIntosh, L. G. McIntosh, W. R. Brown, B. V. Walters and M. Napier shall each be allowed two hundred twenty-four (224) hours4Xof pay at their respective straight time rates and one hundred seventy-four (174) hours of pay at their respective time and one-half rates."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

By letter dated September 14, 1988, the Carrier notified the Organization:

> "... of Carrier's desire to contract [with Steel Processing Services] for the installation of approximately 50,000 concrete crossties between Mile Post VB 183.2 and VB 203 on the EK Subdivision, Corbin Division. There are no furloughed MofW Track Subdepartment employees and all available company forces will be used in this project.
>
> Company forces will be used to unload the crossties and to surface the track behind the installation."

Consistent with the notice, during the project the crossties were first unloaded by the Carrier's forces. However, prior to completion of the project, the Carrier reassigned its forces and the remaining crossties were unloaded by the contractor's forces. According to the Organization, the Carrier's forces unloaded 20,000 of the 50,000 crossties. Further, according to the Organization on the property, during the period September 14 through October 22, 1988, the contractor used 13 employees to unload the crossties at Jackson and Ravenna, Kentucky. The Organization further asserts that at the time there were furloughed employees and equipment laid up. The Carrier responded on the property that there were no employees on furlough during September 14 through October 22, 1988 (the dates in the claim) and the proper Carrier owned equipment was not available. In reply, the Organization proffered photographs of contractor forces unloading ties with the Carrier's equipment in the near vicinity or being utilized. The Carrier responded on the property that there was a "... need to reschedule employees on other necessary work." With respect to the Carrier's equipment in the Organization's photographs, the Carrier asserted that the Organization's presentation of a picture did not demonstrate that the equipment was available to perform the work. The Carrier then again asserted that as it demonstrated to the Organization during conference, none of the listed Claimants suffered any ill effects as a result of the rescheduling of work and they were needed on more pressing work and were so utilized.

Rule 2(e) states:

"The railroad company may contract work when it does not have adequate equipment laid up and forces laid off, sufficient both in number and skill, with which the work may be done."

This is not the typical contracting dispute. Here, as shown by its notice to the Organization, the Carrier contracted out the installation of crossties, but informed the Organization that the Carrier's forces would unload the crossties. After the project started, the Carrier reassigned its employees and the contractor's forces completed the unloading of the crossties. The claim only focuses upon the unloading of crossties which was completed by the contractor's forces.

Putting aside the unique type of dispute before us, we have difficulties with the evidence and arguments presented by the parties. Specifically, the Organization argues that when the Carrier assigned the partially completed unloading functions to the contractor's forces, the Carrier was obligated to give notice to the Organization to that effect under Article IV of the 1968 National Agreement along with the commitments of the December 11, 1981 Letter. The Organization further argued that the Carrier should have rented equipment under the requirements of the December 11, 1981 letter. But, the notice argument and other arguments usually asserted under Article IV and the December 11 letter were not specifically pressed by the Organization on the property and are, for all purposes, new argument at this juncture. On the property, the Organization's (as well as the Carrier's) focus was on Rule 2(e). From the perspective of the Carrier's arguments and presentations, the difficulty we have is that although the Carrier asserts that there was a need to reassign its forces which caused it to deviate from the September 14, 1988 notice to the Organization that the Carrier's forces would perform the unloading functions and although the Carrier makes further assertions that equipment was not available and that no Claimants lost work as a result of the contractor's forces taking over the unloading function, there is no specific evidence in the record to support those affirmative assertions.

Under the circumstances, and given the status of the record before us, the claim will be resolved as follows:

The Carrier committed in its September 14, 1988 notification to the Organization that "Company forces will be used to unload the crossties ...." In the end, because the Carrier reassigned its forces leaving the balance of the unloading function to the contractor, that commitment to use "Company forces" was not adhered to. As an affirmative defense, the Carrier argued that due to needs elsewhere and considering the availability of manpower, its forces had to be reassigned and that the necessary equipment was not available to perform the work. However, there was no specific evidence offered by the Carrier to support those assertions. Given that lack of evidence and further given the photographs offered by the Organization showing the Carrier's equipment in the vicinity of the unloading process, we cannot find that the Carrier sufficiently demonstrated to this Board that its affirmative defense under Rule 2(e) had merit. In short, because of the commitment initially made by the Carrier to the Organization in its September 14, 1988 notice that Carrier forces would do the unloading of crossties, and because of the lack of specific evidence in this record to support the reasons for changing that commitment, we cannot say that the evidence shows that the Carrier "... does not have adequate equipment laid up and forces laid off, sufficient both in number and skill, with which the work may be done" under Rule 2(e). Because of its initial commitment to the Organization, the Carrier's arguments must be viewed as an affirmative defense. But, the Carrier did not factually support that defense. As such, under the circumstances, we find that a violation of Rule 2(e) has been shown.

But the question becomes how to remedy the demonstrated violation given the status of this record. The Organization presses arguments that Claimants should be compensated for the work performed by the contractor's forces on the dates in the claim because of lost work opportunities. The Organization further asserts that the Carrier was obligated to give additional notice under Article IV of the 1968 National Agreement along with the commitments of the December 11, 1981 Letter when the Carrier decided to change the unloading assignment. In other circumstances, because of the subcontracting restrictions contained in Article IV and the December 11, 1981 letter, those arguments may be compelling reasons to fully sustain the Organization's request for compensation for lost work opportunities. However, as earlier noted, those arguments were really not articulated on the property and it would be improper for us to now consider the merits of those assertions when the parties did not, in the first instance, have the opportunity to address the merits of those arguments.

Moreover, and because of the lack of specific evidence, the record is in conflict with respect to whether any Claimants were furloughed during the time the contractor took over the unloading function. Under the circumstances, we cannot require the Carrier to additionally compensate employees who were working on the claim dates. However, those Claimants (if there were any) on furlough on the claim dates shall be made whole. But, those Claimants who were working on those dates are not entitled to further compensation.

But, we cannot further ignore the commitment that was made by the Carrier to the Organization that "Company forces will be used to unload the crossties ...." and the lack of specific evidence in this record from the Carrier justifying the asserted reasons why that commitment was not adhered to. We also note that while the record is in conflict concerning the furlough history of Claimants, it appears that some Claimants did experience furloughs at some point after the project was completed. We are not certain, however, when those furloughs commenced. But we are of the opinion that if Claimants were furloughed within a limited period of time after the contractor's forces completed the unloading of crossties, that because of the Carrier's previous commitment to the Organization that the Carrier's forces would perform the unloading and because the Carrier has not proffered specific evidence to support its reasons for not following through with its commitment to the Organization, the affected Claimants should be compensated for the limited loss of work opportunities. The question now is how to determine the length of that period.

The period in the claim when Claimants did not work on the unloading of crossties but contractor forces did (September 14 through October 22, 1988) spans 39 calendar days. Closer examination of the correspondence from the Organization on the property shows that the work was not performed by the contractor's forces on 39 consecutive days. During the 39 day period, no claim was made for five days (September 18, 25, October 2, 9 and 16). Thus, claim is only actually made for 34 days. Under the circumstances, given the un-met commitment of the Carrier to the Organization that Carrier forces would unload the crossties and the lack of evidence supporting the justification for not following that commitment, we shall further require as a remedy that any Claimant who was furloughed within 34 days after completion of the unloading by the contractor's forces (October 22, 1988) shall be made whole for the time that such Claimant went on furlough until the 34 day period after completion of the contractor's forces performing the work expired (November 25, 1988).

That 34 day period is selected because had the Carrier complied with its commitment to use its forces to unload the crossties, in theory, there would have been 34 days in which Claimants could have performed additional work. That aspect of the remedy will cover the limited loss of work opportunity we feel is appropriate in this case.

In sum then, as a remedy: (1) any named Claimant on furlough when the contractor's forces unloaded the balance of the 50,000 crossties on the dates in the claim (September 14 through October 22, 1988) shall be made whole; and (2) any named Claimant who was working during the period the contractor's forces unloaded the crossties but subsequently went on furlough on or before November 25, 1988 shall be compensated for lost wages from the date of furlough until November 25, 1988. Because the remedy, if any, which is structured in this case flows to Claimants who may have been furloughed and addresses lost work opportunities, compensation under this award shall be at the straight time rate.

It may be that the relief in this matter is substantial or non-existent depending upon when (and if) Claimants were placed on furlough. But given the status of this record from both parties' perspective, this is the only way we see to resolve this matter. The claim is denied in all other respects.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of June 1995.