Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30964
Docket No. MW-29998
95-3-91-3-395

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
(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 (Palmer Paving Company and Detroit Concrete Paving Company) to perform track work (blacktopping various crossings) in the vicinity of Northville, Plymouth and South Lyon, Michigan on May 9, 13, 20, 27 and June 10, 1988 [System File C-TC-4085/12(88-865) CON].

(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 Article IV of the 1968 National Agreement and failed to make a good faith effort to reduce the incidence of subcontracting in accordance with the 1981 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman K. Maxwell, Trackmen R. Savage, P. Siwik, R. Ramirez, L. Shirkey and R. McLaughlin shall each be allowed an equal proportionate share of one hundred eight-four (184) hours of pay at their respective pro rata 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 May 20, 1988, the Carrier notified the Organization that it intended to contract out the paving of asphalt crossings on various divisions. Included in the letter was notification that Nor-West Asphalt Paving Company would perform the work on the Plymouth Subdivision. Nor-West Asphalt could not meet the Carrier's scheduled needs so the Carrier utilized Palmer Paving to do the work. This claim protests the performance of that work by Palmer Paving on May 9, 13, 20, 27 and June 10, 1988.

As written, the claim is framed in terms of a violation of Article IV of the 1968 National Agreement as well as the December 11, 1981 Hopkins/Berge letter. The argument in the Organization's Submission specifically addresses the December 11, 1981 letter concerning contracting out. Those provisions as they address subcontracting do not apply to this particular property. It is now not disputed that under the terms of Article IV of the 1968 Agreement the Organization opted to retain the then existing Rules on contracting out and notified the Carrier (by letter dated July 22, 1968) to that effect.

As a result of the Organization's exercise of its option under Article IV of the 1968 Agreement, the governing language on this particular property is found in the October 24, 1957 letter which states, in pertinent part:

> "... [I]t 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...."

Consistent with the obligations set forth in the above letter, it has been held on this property that there must be a conference prior to the contracting of work. In Third Division Award 24399 the Board held:

"We find that no conference was held and that there was a violation of the Carrier's obligation and accordingly we will sustain the claim."

In this case, the Carrier gave the Organization notice of its intent to contract out the work by letter dated May 20, 1988. However, the record shows that some of the work covered by the claim was performed by Palmer Paving on dates prior to the issuance of the notice to the Organization (May 9 and 13) and on the date of the notice (May 20). The claim alleges that "...the Carrier failed to timely and properly discuss the matter with the General Chairman in good faith prior to contracting out said work ...." At least for the work performed by Palmer Paving on May 9, 13 and 20, 1988, the Organization's factual assertions are correct. The work was performed prior to the receipt of notice by the Organization on those dates and hence, the work was contracted out without a prior conference. To that extent, the claim must be sustained for the work performed on May 9, 13 and 20, 1988. Award 24399, supra. The Carrier agreed in the October 24, 1957 letter that:

"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 ...." [emphasis added].

That practice of prior discussion was not followed with respect to the work performed on May 9, 13 and 20, 1988. Given the type of violation demonstrated, we believe under the circumstances of this case that make whole relief should be granted for the lost work opportunity for an equivalent number of hours performed by Palmer Paving's employees on those particular dates.

However, we shall deny the claim with respect to the work performed on dates after the notice was given (May 27 and June 10, 1988). The record fails to indicate that after receiving notice of the Carrier's intent to contract out the work that the Organization sought to invoke its right to a conference and discussion for the additional work. See Third Division Award 30963 wherein the Board held:

"The evidence before us as developed on the property shows that the Carrier gave the Organization notice of its intent to contract out the work and the Organization did not follow through with respect to requesting any discussions. We can go no further."

The Carrier's exclusivity arguments do not change the result with respect to the portion of the claim that we have sustained. See Third Division Award 28692 decided between the parties which involved the Carrier's use of a contractor to blacktop a crossing (this claim was held in abeyance pending the outcome of that Award with the parties reserving the right to further progress this claim if dissatisfied with the result of that Award) wherein the Board held:

> "This Board has consistently rejected the proposition that a Carrier must notify the General Chairman only when the work in question is exclusively reserved to the Organization.
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> * * *
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> The exclusivity doctrine, however, applies when the issue involves a challenge to the Carrier's right to assign work to different crafts and/or classes of employees.
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> * * *
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> This record indisputably establishes the Organization has performed the work in question.
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> * * *
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> [T]his Board finds the Carrier violated the Agreement when it failed to notify the General Chairman of its plan to contract out the blacktopping performed on October 14, 15, and 16, 1987."

We do not find Award 28692 to be palpably in error. Here, as in Award 28692, the record sufficiently establishes that the employees performed this type of work in the past.

The Carrier's further assertions that it contracted out this kind of work in the past (which it factually supported) may ultimately prove to permit it to contract out such work. But, on this property, the threshold requirement under the October 24, 1957 letter is that the Carrier must give the Organization an opportunity to discuss the proposed contracting out before the Carrier contracts out the work. With respect to the dates for which we have sustained the claim, that was not done. We therefore cannot reach the Carrier's past practice arguments.

We considered Third Division Award 26711 between the parties and do not find that Award controlling. The contracted work in

that case was the application of weed control chemicals by a licensed contractor, which type of work was regulated by the EPA. The Board found that "...those covered by the Agreement have occasionally engaged in various kinds of minor weed control work" which was different from the kind of work which was contracted out "' they [the Carrier' s employees] have not made general applications of this type of chemical....'" Award 28692 which concerns blacktopping (the kind of work involved in this case) is more on point for the particular work involved. And, as was not found in 26711, the record in this case sufficiently shows that the employees have performed the work in the past.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 26th day of July 1995.

LABOR MEMBER'S DISSENT
TO
AWARD 30964, DOCKET MW-29998
(Referee Benn)

In the instant case, the Carrier raised no argument on the property concerning the applicability of the December 11, 1981 Hopkins/Berge Letter. In fact, the Carrier's first and only mention of any objection to the applicability thereof was a simple unfounded assertion on Page 2 of its Submission. Yet, the Majority took it upon itself to take up this new issue and reach its erroneous conclusion thereon. Inasmuch as Circular No. 1 prohibits the consideration of arguments and evidence not raised during the handling on the property, this award is palpably erroneous and can have no precedential value. Furthermore, as a point of fact, the December 11, 1981 Hopkins/Berge Letter, and the carriers' commitments embodied therein, continues in effect on carriers signatory to the December 11, 1981 National Agreement, including this Carrier. See Third Division Award 29823 involving this Carrier.

It is of particular interest to note the facile inconsistency of this same Majority in considering the Carrier's belated assertion in its Submission in light of its determination that it could not consider the Organization's argument over the timing of Carrier's notice concerning a contracting transaction in Award 30963 (between these same two parties).

In addition to the foregoing, the Majority repeated its palpably erroneous reasoning concerning claims over contracting out elaborated within Award 30963. The errors discussed in the Labor Member's Dissent to Award 30963 which the Majority repeated in this award are more than sufficient to render it palpably erroneous and of no value as precedent. The reasoning of the Labor Member's Dissent to Award 30963 is fully applicable to this award and in the interest of brevity is incorporated herein by reference. In addition, in this case, the Majority failed to take into consideration that all of the work complained of had been let to the contractor prior to notification of the General Chairman. Hence, reducing the remedy by denying the claim for the dates after the date of notice is erroneous as well.

Respectfully submitted,

G. L. Hart
Labor Member