

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30970
Docket No. MW-29564
95-3-90-3-510

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc. (former Seaboard
(System 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 SP 635.2 and Mile Post S683.3 on the Wildwood Subdivision at the Tampa Division from June 9, 1989, through July 8, 1989, [System File 37-SCL-89-40/12(89-912) SSV].
- (2) As a consequence of the aforesaid violation, the employes assigned to the Wildwood Subdivision Section Forces listed boles shall be compensated as follows:
 - (a) Section Force 5T09 Foreman P. S. Cloud, Jr., Trackmen C. L. Brown, C. Newman, E. L. Williams and R. Poole shall each be allowed pay at their respective straight time and overtime rates for an equal proportionate share of the eighty (80) straight time and one hundred forty (140) overtime man-hours the outside contractor worked on the territory of Section Force 5T09.

- (b) Section Force 5T16 Foreman R. Thomas, Apprentice Foreman J. C. Davis, Trackmen P. Black and R. K. Whitley shall each be allowed pay at their respective straight time and overtime rates for an equal proportionate share of the four hundred eighty (480) straight time and two hundred ninety (290) overtime man-hours the outside contractor worked on the territory of Section Force 5T16.
- (c) Section Force 5T03 Foreman W. D. Wilkerson, Apprentice Foreman R. L. Johns, Trackman D. Taylor, Jr. and Trackman C. Small shall each be allowed pay at their respective straight time and overtime rates for an equal proportionate share of the eight hundred eighty (880) straight time and six hundred sixty (660) overtime man-hours the outside contractor worked on Section Force 5T03.
- (d) Section Force 5T35 Foreman J. J. Johnson, Apprentice Foreman C. Johnson, Trackmen R. Goodwin and J. C. Manning shall each be allowed pay at their respective straight time and overtime rates for an equal proportionate share of the one hundred sixty (160) straight time and one hundred seventy (170) overtime man-hours the outside contractor worked on the territory of Section Force 5T35."

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.

This dispute involves Carrier's utilizing the services of a contractor, Osmose Wood Preserving, Inc., on the Wildwood Subdivision for the purposes of testing the effectiveness of a new wood preservative. The preservative, trade named "Adz-Life," is designed to extend the life of wooden crossties by treating, through an injection process, those surfaces which were "adzed" or sheared to accommodate tie plates. The fact that the process is experimental in nature, and that special equipment not possessed by Carrier was necessary, is not in dispute.

On July 31, 1989, the Organization filed a claim alleging that the aforementioned work had "...traditionally and historically been assigned to and performed by Carrier employees..." further citing Carrier's alleged violation of Agreement Rule 2 (Contracting), when it "assigned said work to an outside contractor without notifying, conferring and reaching an understanding with the General Chairman."

Carrier denied the claim, asserting that:

"The work performed by Osmose was an experiment tried to determine the effectiveness of in-place treatment of cross-ties in order to extend the life of the ties. The material placed was ADZ-LIFE of which the principal ingredient is sodium fluoride. This material requires licensed certified pesticide applicators. As stated, this was an experiment which required specialized equipment developed by Osmose that was not readily available and involved a process also developed by Osmose that was not available for use or sale by other parties. Since it was an experiment, the Osmose employees had been specially trained for this work.

In your claim you state that this was work which has traditionally and historically been assigned to and performed by Carrier employees who hold seniority in the Maintenance of Way, Track Subdepartment, Group A. This certainly cannot be the case since this was the first time this treatment has ever been used on CSX and was done in this instance strictly as an experiment. The exception to Rule 2 stipulates instances where the work to be performed required special skills not possessed by

Carrier employees and special equipment not owned by or available to Carrier employees. The Claimants not only were not qualified to perform the work but they do not possess the special skills and licenses to handle the material which was used by the applicator."

The General Chairman progressed the claim to Carrier's highest designated officer wherein he again alleged a violation of Rule 2, and further stated "that equipment which can be used to perform this type of work is available through Tamper Corp., in West Columbia, SC, for sale or lease to CSX." Carrier continued to deny the claim, which has been placed before this Board for resolution.

It is not disputed that Carrier failed to "notify, confer or reach an understanding with the General Chairman," prior to contracting out the work at issue. Rule 2 clearly states that "all maintenance work in the MofW and Structures Department is to be performed by employees subject to this Agreement." An express limited exception applies to work requiring "special skills" or "special equipment." But even in those "special" cases, Carrier is obligated by the unqualified language of Rule 2 to confer and at least try to reach an understanding with the General Chairman setting forth "the conditions under which the work will be performed." Failure to confer and seek agreement undermines the "special skills/special equipment" defense. See Third Division Awards 18287, 18365 and 22917.

Whether the nature of the work performed brought it within the express exception in Rule 2 is a matter which Carrier could have and should have discussed with the General Chairman under the plain, unambiguous and unqualified notification provisions of Rule 2. Carrier's manifest failure as to notice and good faith discussion constitutes an independent violation of Rule 2 which obviates our inquiry into the nature of the work and requires a sustaining award.

With respect to the question of damages for allegedly "fully employed" Claimants, there is conflicting precedent and each such case appears to turn on its facts. To reward the blatant disregard of the Rule 2 notice requirements which this record demonstrates with impunity would render that Agreement provision a nullity. We shall sustain both Part 1 and Part 2 of the claim. See Third Division Awards 27189 and 28513.

Form 1
Page 5

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AWARD

Claim sustained.

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.