Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31760
Docket No. MW-30716
96-3-92-3-507

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(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 (Steel Processing) to perform Maintenance of Way work removing tie plates by hand with the use of a claw bar and depositing said tie plates in a gondola car, pulling spikes, sorting and handling wooden cross ties at Danville, West Virginia, beginning March 18, 1991 and continuing [System File C-TC-7351/12(91-736) COS].

(2) The Agreement was further violated when Carrier assigned outside forces (Steel Processing) to performance Maintenance of Way work removing tie plates by hand with the use of a claw bar and depositing said tie plates in a gondola car, pulling spikes and sorting and handling wooden cross ties at Danville, West Virginia, on April 1, 2, 3, 7 and 8, 1991 (System File C-TC-5220).

(3) As a result of the violation referred to in Part (1) above, furloughed Track Laborer G. L. Morgan shall receive pay for ten (10) hours per day for each day the contractor's employees performed such work on the Carrier's property at his track laborers rate of pay.

(4) As a result of the violation referred to in Part (2) above. Track Laborers G. Williamson, D. Hatfield and J. Kilgore shall each receive fifty (50) hours pay at their track laborers rate of pay."

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 were given due notice of hearing thereon.

The Claimants held seniority as Track Laborers in the Maintenance of Way and Structures Department were furloughed on the claim dates. Beginning on March 18, 1991, and apparently covering the period at least through April 8, 1991, the Carrier contracted with Steel Processing to remove tie plates by hand with the use of claw bars, depositing the tie plates in gondola cars, pulling spikes and sorting the spikes, handling wooden cross ties, all work performed at Danville, West Virginia.

Prior to instituting the contract with Steel Processing, the Carrier gave the Organization the requisite contractual notice. In addition, the Carrier recalled six senior Maintenance of Way employees to perform the disputed work alongside the contractor's forces. Even though some of the members of the Organization performed the subject work, the Organization believed the Claimants were entitled to perform the work instead of the contractor's employees by virtue of Rule 1, Scope; Rule 2, Seniority; Rule 66, Classification of Work; and, in particular, Rule 83, Contracting Work. Specifically, Rule 83, Contracting Work Paragraph (b) reads:

> "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."

The Organization argues that the work performed requires no special equipment and is customarily performed by Maintenance of Way employees as evidenced by the fact that six senior employees were recalled to perform the work. The Organization also argues that the Carrier's proffered defense, that it gave proper notice to the the Organization, does not indemnify the Carrier against the present claims. The Organization argues that mere notice cannot defeat the contractual requirement that senior employees perform work reserved for those employees in both the Scope Rule and the Classification of Work Rule.

Furthermore, the Organization argues that the record is devoid of any evidence of the Carrier's good faith in this matter. Nor does the record contain any denial by the Carrier that the Claimants were unavailable, unqualified and unwilling to perform the work had they been afforded the opportunity to do so.

The Organization finally argues that the Claimants are entitled to money damages because all were furloughed on the claim dates and all lost the opportunity to perform their rightfully reserved contractual work.

Besides defending the claim by asserting that proper notice was given and that six senior Maintenance of Way employees were paid to perform some of the work, the Carrier also argues that the Organization cannot rightfully claim the disputed work because it does not exclusively perform that work system-wide. Therefore, the Carrier urges us to dismiss the claim.

After considering the parties' arguments, we find that the Carrier violated the Agreement by impermissibly contracting out bargaining unit work in violation of Rule 83(b). Merely giving notice of its intent to contract out work is insufficient to protect the Carrier from any liability caused by its decision to hire an outside contractor to perform contractually reserved track work. Here, there is no dispute that the work belongs to the Organization, as evidenced by the fact that the Carrier recalled six senior Maintenance of Way employees to perform the very work in question.

Moreover, Rule 83(b) specifically limits the Carrier's ability to contract out work if, in fact, it has forces available to perform the work in question. Because we have determined that a violation occurred, we next must formulate an appropriate remedy.

Any remedy associated with a contracting violation is equitable in nature. Therefore, in order to be fair to the Claimants, and the Carrier, we will remand this matter to the property for the parties to determine the amount of damages in accordance with the following guideline.

The Claimants will be paid for any work performed by the contractor on the claim dates for which no other contract employees performed any of the disputed work. In other words, the remedy will be fashioned considering the dates on which the contractor performed the work and no claim will be allowed for any date on which the six recalled senior Maintenance of Way employees performed any of the disputed work at Danville, West Virginia.

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 24th day of October 1996.