Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 33341
Docket No. MW-32251
99-3-95-3-57

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Denver and Rio Grande Western Railroad
(Company

STATEMENT OF CLAIM:

"(1) The Agreement was violated when the Carrier assigned outside forces (S.P. Telecom) to perform Maintenance of Way work (driving pilings and building retaining walls) at Byers Canyon, Gore Canyon, Fraser Canyon and Little Boulder Canyon, Colorado between Mile Post 35 and Mile Post 115 beginning November 8 through December 15, 1993 and continuing (System File D-93-117/BMW 94-192).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman fifteen (15) days' advance written notice of its intent to contract out the work in Part (1) above as required by Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Claimants G. E. Vasquez, G. G. Arias, F. Moreno, J. Aguirre, E. G. Torres, S. C. Diaz, L. T. Bartlett and D. E. Lamarine shall each be allowed eight (8) hours' pay per day at their respective straight time rates of pay for the hours worked by the contractor's forces which were outside the regular assigned hours, commencing November 8, 1993 and continuing through December 15, 1993."

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.

Beginning November 8, 1993 and continuing through December 15, 1993 S.P. Telecom performed the work of driving pilings for the purpose of constructing retaining walls to hold the right-of-way in Byers, Gore, Fraser, and Little Boulder Canyons in Colorado, in connection with fiber optics operations. Once the Organization learned of this activity it asserted that the Carrier had permitted S.P. Telecom to do that work in violation of the parties' collective bargaining agreement. Thereafter, on November 12, 1993 the Carrier assigned its own B&B forces to perform the work along with the employees of S.P. Telecom and offered to compensate Claimants Vasquez, Arias, Moreno, Aguirre, Torres, and Diaz 32 hours at straight time and 7.5 hours of overtime pay to represent the period between November 8 and 12, 1993. No offer of compensation was made for Claimants Bartlett or Lamarine. The Organization declined the Carrier's offer.

The Organization contends that the work in question belongs to its bargaining unit by virtue of the parties' agreement and/or the fact that Carrier's B&B forces have performed the work in the past. Therefore, when the Carrier assigned the work to S.P. Telecom, and when it did so without first notifying the Organization, it violated the parties' agreement. The Carrier on the other hand contends that the work does not belong to the Organization and therefore its assignment to S.P. Telecom is no violation. In the alternative, it argues that with respect to Claimants Bartlett and Lamarine there is no violation because, unlike the other Claimants, they are machine operators and specialized equipment necessary to perform the work was available only from S.P. Telecom.

With regard to the claims of Vasquez, Arias, Moreno, Aguirre, Torres, and Diaz we are perplexed by the Carrier's argument that the work does not belong to its B&B forces when during the course of the operation in question it assigned its B&B forces to work along with the employees of S.P. Telecom. If its actions were simply to make an

offer of settlement to dispose informally of the claims, we might not feel the same for it could be argued that such action did not compromise its position on the merits. However, it went beyond any such informal efforts at settlement and instead assigned B&B forces to the work in question. Thus, we conclude that the work in question, by virtue of the Carrier's own actions on and after November 12, 1993, did indeed belong to the Organization as it claims and therefore when the Carrier assigned the work to S.P. Telecom, and did so without notice to the Organization, the Carrier violated the agreement.

However, we disagree with the Organization with respect to the extent of the remedy. As noted above, the record clearly establishes that on November 12, 1993 the Carrier assigned B&B forces to the work. Therefore, the Organization's claim to the work was acknowledged and satisfied from that point forward and any remedy must be limited to the period when only those employees of S.P. Telecom performed the work, i.e. between November 8 and 12, 1993.

With respect to Claimants Bartlett and Lamarine however, no such action was taken by the Carrier. However, it argued that these claims must be denied because the specialized equipment necessary to perform the work was not available to the Carrier so that these Claimants could be assigned to perform the work. Upon review of the record it is clear that the Organization contends in reply only that B&B forces have used the type of equipment in the past. However, it did not rebut the evidence that whether or not that was true, the equipment in question was not available to the Carrier, but rather available only by way of S.P. Telecom. Therefore, the assignment need not have been made to Claimants which also disposes of the argument that the Carrier violated the agreement by not giving notice to the Organization of its arrangement with S.P. Telecom.

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 23rd day of June 1999.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 33341, DOCKET MW-32251
(Referee Perkovich)

The Majority was correct when it found that the Carrier had violated the Scope of the Agreement and therefore a concurrence is appropriate. However, the Majority erred in its reasoning concerning the violation and the failure to allow a remedy for Claimants L. T. Bartlett and D. E. Lamarine.

The Majority held that:

> "With respect to Claimants Bartlett and Lamarine however, no such action was taken by the Carrier. However, it argued that these claims must be denied because the specialized equipment necessary to perform the work was not available to the Carrier so that these Claimants could be assigned to perform the work. ***"

The record is crystal clear that the Carrier had an obligation to notify the Organization prior to contracting out the work and, if requested, meet with the Organization concerning the contracting in accordance with Appendix "D" of the Agreement. If the purpose of the contracting was linked to special equipment, the Carrier was also obligated to advise the Organization of that fact and then be prepared at the conference to establish that it did not own the equipment needed, nor could the equipment be rented or leased without an operator. If that was not the case and it was established that a piece of equipment could be rented or leased without an operator, then a member of this Organization would be assigned to operate the rented or leased equipment, i.e., Claimants Bartlett and Lamarine. Therein lies the fallacy in the Majority's decision. It made a "leap of faith" to conclude that special equipment was necessary in this instance. The problem here is that the Carrier failed to issue a notice of its intention to contract out any work. Obviously, absent notice and conference under Appendix "D", neither the Organization, much less the Majority, would know whether the exceptions had been met by the Carrier. The Carrier's errors were compounded when consideration is given to the unrefuted fact that Maintenance of Way employes had operated this same equipment, owned by S. P. Telecom, just prior to the Carrier furloughing the Claimants. Hence, the Carrier was able to avoid the monetary remedy insofar as Claimants Bartlett and Lamarine were concerned based on a "leap of faith" that special equipment was necessary. To that end, I therefore dissent.

Respectfully submitted,

Roy C. Robinson

Roy C. Robinson
Labor Member