Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35578
Docket No. MW-35223
01-3-99-3-58

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Grand Trunk Western Railroad, Inc. (former Detroit
(and Toledo Shore Line 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 (Great Lakes Energy Recycling) to perform Track Subdepartment work (move crossties and cut brush) on the Deroad Yard Shoreline Subdivision and in the vicinity of the Deroad Yard on September 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, October 1, 2 and 3, 1997, to the exclusion of Track Foreman J. Comage, Trackmen D. Irby, III and D. Johnson (System File DTS 014/8365-1-627 DTS).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Comage, D. Irby, III, and D. Johnson shall '*** be paid one hundred and twenty (120) hours at their respective straight time rate of pay each and thirty (30) hours at their respective one and one-half time rate of pay each.'"

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.

In a letter dated August 28, 1997, the Carrier wrote to the Organization's General Chairman advising of the Carrier's intent to utilize Great Lakes Recycling Company to dispose of debris, chip dead trees, and perform general grading work at Deroad Yard. The letter also advised the General Chairman that this work was being performed by a contractor due to insufficient equipment and lack of adequate, available company forces. The letter stated that the work would begin on or about September 8, 1997 and would continue for approximately four weeks, and that during such time no Maintenance of Way employees would be furloughed.

The letter was addressed to the Organization's Toledo, Ohio, address, but the Organization moved its office location prior to August 28, 1997 and, according to the Carrier, the letter was returned marked improper address. When the error was discovered, the Carrier re-mailed the letter to the Organization's new address via overnight delivery. It was received by the Organization on Friday, September 12, 1997.

There is no dispute that the contracted work began not on September 8, 1997 as originally contemplated, but rather, on Monday, September 15, 1997.

In a letter dated September 23, 1997, the General Chairman wrote to the Carrier stating that the Track Department had a sufficient number of skilled employees to perform the contracted work and that such work had been performed by employees in the past. The letter further requested a conference and noted that the contracted work

was to be mutually agreed upon by the Carrier's Chief Engineer and the General Chairman.

Review of the correspondence between the parties during the handling of this dispute on the property shows that no conference was held.

The Organization submitted the instant claim on November 7, 1997 alleging that the Carrier violated both the Scope and Work Classification provisions of the Agreement when it used contractors at Deroad Yard to perform the disputed work. The Organization also contended that the Carrier's notice of its intent to contract out was untimely and improper because such notice was not received until September 12, 1997, thereby precluding any possibility that the parties could confer and reach an understanding about the proposed subcontracting. The claim sought 120 straight time and 30 hours overtime on behalf of each of the three Claimants. In subsequent correspondence, the Organization alleged that the Claimants were furloughed during the time the contractor performed the disputed work and, therefore, lost the opportunity to perform work that was rightfully theirs.

The Carrier denied the claim, stating that the Organization was properly notified in advance of the September 15, 1997 start date of the Carrier's intent to contract out certain projects. The Carrier pointed out that it had attempted to notify the Organization earlier, but the notice letter was returned due to improper address. This was an inadvertent, understandable clerical error, the Carrier argued, and not a deliberate attempt to evade the notice provisions of the Agreement.

In any event, the Carrier maintained, the Organization was incorrect when it stated that a prior understanding was necessary before the work could be contracted out. The Carrier argued that the requirement to meet and reach accord is only necessary in situations where company forces and equipment are adequate and available and the company desires to contract construction or maintenance work. The Carrier maintained that, in the instant case, company forces and equipment were neither adequate nor available. In that circumstance, the only requirement under the Agreement is that the parties confer upon the request of the General Chairman. The General Chairman chose to wait until September 23, 1997 to request a conference. By that time, however, the work was nearly completed, the Carrier pointed out. Any claim of untimely notification should therefore be rejected, because the Organization did not carry out its own contractual obligations in a timely manner.

Finally, the Carrier contended that the claim was excessive in that the Claimants were fully compensated on the dates claimed.

The Board reviewed the record in this case and makes several observations at the outset. First, we are restricted to consideration of the arguments that were presented during the handling of this case on the property. New arguments in the parties' Submissions and during panel discussion at the Board cannot be considered. No citation is necessary to confirm that fundamental and well-established principle.

Second, it appears that the Organization at one point in the processing of this dispute relied upon the language contained in Article IV of the May 17, 1968 BMWE National Agreement. That provision requires that the Carrier notify the General Chairman in writing as far in advance as practicable of its intent to contract out work, but "in any event not less than 15 days prior thereto." However, in a letter dated July 22, 1968, the Organization informed the Carrier that it elected to retain the present contracting out Agreement, identified as Supplement No. 3 effective May 1, 1957, which contains Article 52(m). Accordingly, the Organization's references and citation of the language contained in Article IV of the May 17, 1968 National Agreement are irrelevant to this dispute and have been disregarded by the Board.

The Organization also relied upon Article 52(m), and that provision is properly before the Board. Article 52(m) provides as follows:

> "(m) Although it is not the intention of the company to contract construction or maintenance work when company forces and equipment are adequate and available, it is recognized that, under certain circumstances contracting of such work may be necessary. When such circumstances arise the Chief Engineer and the General Chairman will confer and reach an understanding setting for the conditions under which the work will be carried out, giving consideration to performance by contract of grading, drainage, and bridge and structural work of magnitude or requiring specific skills not possessed by the employee or the use of special equipment not owned by or available to the company and to performance by company force of track work and other structures.
>
> The company will contract for construction and maintenance work for which company forces and equipment are neither adequate nor available

but shall in each instance give the General Chairman advance notice of the specific work to be thus performed, and on request will confer with the General Chairman in respect thereto." (Emphasis added.)

A careful reading of the foregoing provisions shows that the first paragraph of Article 52(m) requires the Carrier to confer and reach an understanding with the Organization prior to contracting work when company forces and equipment are adequate and available. The Organization argues that it is this paragraph that is controlling in the instant matter.

The second paragraph of Article 52(m) applies only to the contracting of construction or maintenance work when company forces and equipment are not adequate or available. Under such circumstances, the Carrier is required to provide advance notice and confer with the General Chairman upon request. There is no requirement that the parties reach an understanding setting forth conditions under which the contracting work will be carried out. It is the second paragraph of Article 52(m) that is relied upon by the Carrier.

Whether the nature of the work performed brought it within the first paragraph or the second paragraph of Article 52(m) is a matter of dispute. Presumably, that issue would have been discussed by the parties had there been adequate opportunity for conference prior to the determination to contract out the work in question. As the record stands, however, the Carrier did not notify the Organization until Friday, September 12, 1997 of its intent to contract out work beginning on September 8, 1997. The record does not disclose why the work was delayed until Monday, September 15, 1997, but it is clear that the decision to contract out was a fait accompli at that point. We find that the timing of the notice was not reasonably sufficient to afford meaningful opportunity for the Organization to respond under either paragraph of Article 52(m).

The Board does not find persuasive the Carrier's argument that the late notice should be excused because it was the result of unintentional error. To embark on the slippery slope of intent would open the door to all sorts of subjective considerations which, in our view, are not contemplated by the specific Agreement language applicable here. Nor are we persuaded that there should be a balancing of equities, as the Carrier suggests, or that responsibility for the failure to hold a conference should be shifted to the Organization because a conference was not requested until September 23, 1997. The notice of intent to contract out that was received on September 12, 1997 referenced

work that the Carrier stated was to have started on September 8, 1997, and for all intents and purposes precluded meaningful discussions at conference. The Carrier in this instance chose the regular mail as its method of conveyance and must be held responsible for any delay when its letter of intent was returned.

Because the provisions of Article 52(m) were effectively frustrated by the lack of meaningful opportunity to confer, the claim must be sustained. Whether or not the Claimants were "fully employed"at the time the work was contracted out is a matter of dispute that need not be decided by the Board. The only precedent Awards on this subject were submitted by the Organization and they hold that monetary damages are in order even when employees are not furloughed. Several reasons are cited, including the need to assure compliance with the requirements of the Agreement; to compensate the Claimants for lost work opportunities; and to protect the notice and confer provisions which, when violated, preclude a determination by the parties themselves as to whether a solution to use Carrier employees could have been devised. See Third Division Awards 31386, 32435, 32861 and 34981.

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 24th day of July, 2001.