

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35735
Docket No. MW-33422
01-3-96-3-785**

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 Employees
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (McKay Construction) to perform Maintenance of Way work (breaking asphalt and concrete and hauling said materials away) on the road crossing project at Main Street, Glen Ellyn, Illinois on April 17 through 23, 1995 (System File 9KB-6183T/950426 CNW).**
- (2) The Agreement was further violated when the Carrier failed and refused to confer with the General Chairman in a good-faith attempt to reach an understanding concerning the work in question as required by Rule 1 (b).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. K. Krefft shall be allowed forty (40) hours, pay at the common machine operator’s rate and Messrs. T. Neumaier, R. Probst and R. Taylor shall each be allowed twenty-four (24) hours, pay at the dump truck operator’s rate.”**

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 Scope Rule of the governing Agreement and the applicable provisions of the so-called Berge- Hopkins Letter Agreement of December 11, 1981 read in pertinent part as follows:

"RULE 1 - SCOPE

- (a) The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employees in any and all subdepartments of the Maintenance of Way and Structures Department, (formerly covered by separate agreements with the C&NW, CStPM&O, CGW, FtDDM&S, DM&CI, and MI) represented by the Brotherhood of Maintenance of Way Employees.
- (b) Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.

* * *

By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees described herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided

that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or, time requirements must be met which are beyond the capabilities of Company forces to meet.

In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements, cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith.

* * *

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The Parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the Parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor." (Emphasis added.)

The facts giving rise to the instant claim are not in material conflict in the record before us. Thus, it is undisputed that by letter dated April 5, 1995, Carrier's Assistant Vice-President Labor Relations-Non-Operating sent the BMW General Chairman written Notice of Intent to subcontract out certain work in connection with crossing renewals, as follows:

"Please accept this as the Carrier's notice required under Rule 1(b) of the BMW Agreement of our intention to sub-contract certain work in the connection with crossing renewal projects. Specifically, the Carrier intends to use contractors to perform asphalt paving in connection with crossing rehabilitation projects. Crossing renewals are being performed in conjunction with state highway departments, along with projects of various cities and counties. The work to be performed by a contractor involves the laying and paving of asphalt at crossing locations that intersect with various streets, highways, etc. We will also require, at some locations, to have the contractor use concrete saws, concrete breakers and vibratory rollers in order to handle the work that the Transportation Company is not experienced in and for which it does not have the equipment. Chicago and North Western forces will perform all work related to track rehabilitations, such as surfacing and placing of flange rails. In most cases, the work will be performed at the direction and, in some cases, at the cost of outside agencies."

Nor is it disputed that the BMW General Chairman promptly responded by letter of April 11, 1995, reading in pertinent part as follows:

"Please refer to your April 5, 1995 letter received by this office on April 11, 1995 wherein you advise of the Carrier's intention to subcontract work in the connection with crossing renewal projects.

The Brotherhood requests an immediate conference of this notice in an effort to reach an understanding in accordance with Rule 1 scope, Section (b), Paragraph 3. It is imperative the Brotherhood be able to present its position BEFORE the Carrier commits itself to using outside contractors.

Rule 1(b), Paragraph 2 provides in pertinent part: "*** However, such work may only be contracted provided that special skills not possessed by

the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or, time requirements must be met which are beyond the capabilities of Company forces to meet.' The April 5, 1995 Notice has failed to clearly identify any circumstances or positions which legitimately falls within these five enumerated exceptions."

* * *

Notwithstanding the Carrier's manifest and acknowledged notice/confer responsibility under the above-cited Agreement provisions and despite meeting its notice obligation, the Carrier inexplicably ignored the General Chairman's request for a conference and simply subcontracted the asphalt paving preparation work at issue in this claim. It is undisputed that, without even acknowledging let alone acceding to the General Chairman's plainly worded invocation of the Organization's right to a pre-contracting conference, the Carrier contracted for employees of McKay Construction to perform paving removal, paving and related clean-up work at the Main Street Crossing, Glen Ellyn, Illinois, during the period April 17 through 23, 1995. The Carrier did not dispute that four employees of the outside contractor utilized ordinary Maintenance of Way equipment such as a backhoe and dump trucks to perform the grade crossing repair work. Such work consisted of breaking and removing old asphalt, concrete and roadbed using a backhoe tractor equipped with a breaker attachment on April 17 through 23, 1995 and utilizing contractor owned dump trucks to haul away the spoil from the crossing. Nor was the question that a pre-contracting good faith conference is required in such a situation ever persuasively contested on this record.

The Carrier's procedural objection to an alleged improper change in the nature of the claim is not only de novo but misplaced, because the claim perfected on the property and appealed to the Board plainly grieves the refusal/failure of the Carrier to grant the General Chairman's timely and unambiguous request for a pre-contracting conference. In denying the claim, the Carrier also pointed out that some prior arbitration tribunals have found adequate justification for contracting out such work due to time constraints, lack of equipment or inadequate manpower. But none of those precedents involved a complete and unmitigated failure or refusal to grant a timely, contractually mandated request for a pre-contracting conference which, by mutual intent of the contracting Parties, is supposed to be a forum for good faith discussion of

precisely these kinds of issues that could have and should have been discussed at the requested conference in this case. Finally, notwithstanding the Carrier's defense that the Claimant's were "fully employed" on claim dates, their loss of work opportunity coupled with the blatant, unexplained and unmitigated violation of the Carrier's acknowledged contractual obligation to meet and confer with the General Chairman before contracting out the work warrants a sustaining award by the Board. See Third Division Awards 31752, 31754, 31755, 31756, 31760, 31777.

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 October, 2001.