Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35837
Docket No. MW-33363
01-3-96-3-868

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (installation of a culvert) at Mile Post OZA 252.6, Chicago Division on January 12 through 18, 1995 and on February 28, 1995 and continuing [System File 31795.BC/12(95-0654) CEI].

2. As a consequence of the violation referred to in Part (1) above, Messrs. R. D. Meeks, R. S. Darrough and M. W. Warner shall each be compensated at their respective straight time and time and one-half rates of pay for all hours expended by the outside forces in the performance of the work in question."

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.

By letter dated October 5, 1994, the Carrier advised the Organization of its intent to contract out the installation of a 72-inch diameter by 80 foot culvert by tunneling at Mile Post OZA 252.62 at Patoka, Indiana, on the Chicago Division. The Carrier further advised the Organization that "[w]e have scheduled Friday, October 14, 1994, beginning at 9:00 A.M. in this office to discuss this matter further should you so desire."

By letter dated November 2, 1994, the Organization acknowledged receipt of the Carrier's contracting out notice and reiterated the Organization's position taken in previous phone calls between the parties that the Organization was not in agreement with the use of an outside contractor for the work; there were qualified, skilled employees who could perform the work, which the employees have done in the past and that equipment was available on the property to perform the work and, if not available, could be rented.

The work in dispute was performed by a contractor on various dates in January and February 1995.

This claim followed.

First, the Carrier argues that the claim should be dismissed because the Organization failed to progress the case to the Board within nine months of the Carrier's final denial. We disagree.

With respect to the Carrier's timeliness argument, the record shows a denial by the Carrier's Assistant Vice President Employee Relations dated August 19, 1995; a letter dated January 19, 1996 from the Carrier's Director of Employee Relations confirming a conference held on January 18, 1996 again rejecting the Organization's claim; a reply to that letter from the Organization dated July 12, 1996; and the Organization's Notice of Intent to the Board dated October 17, 1996.

Rule 36 of the Agreement provides:

> "All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employee or his duly authorized representative before the appropriate division of the National Railroad

Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the 9 months' period herein referred to."

The Carrier points to its declination letter dated August 19, 1995 and the Organization's Notice of Intent dated October 17, 1996 (14 months later) and argues that the dispute was untimely progressed to the Board as specified by Rule 36's nine month requirement. With respect to the intervening activities by the parties (i.e., the January 18, 1996 conference and the further exchange of correspondence prior the Organization's Notice of Intent to this Board), the Carrier points to Third Division Award 19579 (and Awards cited therein) for the proposition that " . . . where a precise time limit exists, it must be complied with . . . and that a request for further discussion and/or further discussion after declination of a claim by the highest officer on the property, does not extend time within which an appeal may be taken to this Board."

However, the Organization relies upon a January 23, 1995 Letter of Agreement between the parties providing, in pertinent part:

"Pursuant to our discussions, it was understood and agreed that when a claim has been declined by the respective Division Engineer and the Brotherhood desires to pursue the matter further, your Federation will file an appeal with this office in accordance with the time limit on claims rule of the Agreement in the usual manner. Once your appeal is filed with this office the provisions of the time limit on claims rule will be automatically waived for both the Carrier and the Organization until conference is held and the claim is discussed in conference.

It was further understood that all disputes shall be considered, and if possible, decided, with all expedition, in conference; however, in those cases where this is not possible the Carrier will render a decision within 60 days after such conference discussion. In accordance with the time limit on claims rule the parties will then have nine (9) months to further handle the matter consistent with the Railway Labor Act, as amended.

As agreed, the foregoing does not modify or change the time limit on claims rule in any manner except with respect to the time limits and claims handling procedures, as specifically outlined herein.

These procedures will become effective immediately, and any claims appealed on or after September 14, 1994, will be handled in accordance with the understandings contained herein. Both parties recognize that some difficulties may be experienced in changing the claims handling procedures during the transitional period and agree to cooperate with respect to any problems which may arise during that time.

It was further agreed that either the Organization or the Carrier may cancel this understanding upon ninety (90) days' written notice to the other."

For purposes of this dispute, the material language in the Letter of Agreement is that "[o]nce your [the Organization's] appeal is filed with this office, the provisions of the time limit on claims rule will be automatically waived ... until conference is held and the claim is discussed...." The Carrier is then obligated to "render a decision within 60 days after such conference" and then the "parties will then have nine (9) months to further handle the matter consistent with the Railway Labor Act."

Here, under that language, the filing of the Organization's appeal waived the time limits; a conference was held on January 18, 1996, thereby giving the Carrier 60 days to render a decision; the Carrier's decision issued on January 19, 1996; and the Organization submitted its Notice of Intent to the Board dated October 17, 1996. For purposes of the January 23, 1995 Letter of Understanding, the Organization had "nine (9) months to further handle the matter consistent with the Railway Labor Act" after the Carrier's January 19, 1996 letter. The Organization's October 17, 1996 Notice of Intent to the Board was submitted within that nine month time frame. The dispute is therefore properly before the Board.

We note that the Carrier canceled the January 23, 1995 Letter of Agreement by letter dated January 19, 1996, which, under the terms of the Letter of Agreement, made the cancellation effective April 19, 1996 (the Letter of Agreement provides that either party "may cancel this understanding upon ninety (90) days' written notice to the other").

That cancellation does not change our conclusion that this dispute was timely progressed under the parties' Agreement on time limits pursuant to the Letter of Agreement.

Without evidence that the parties clearly intended that a party's exercise of its cancellation prerogatives for the Letter of Agreement would apply to cases then being progressed under the terms of the Letter of Agreement (such as this dispute), it would be manifestly unfair to allow the Carrier to, in effect, retroactively apply the terms of its cancellation of the Letter of Agreement. Further, the parties agreed in the Letter of Agreement that the relaxed time limits agreed to therein applied to " . . . any claims appealed on or after September 14, 1994. . . ." [Emphasis added]. If the parties intended that claims in the procedure could be taken out of the process by a cancellation of the Letter of Agreement, we would expect to see language to that effect. Such language is not present.

Second, with respect to the merits, there is no dispute that the involved contracted work was fundamental scope covered work and that the Claimants were capable of performing that work. There can also be no dispute, as the Carrier argues, that as a general proposition, "CSXT may contract out maintenance of way work when it does not have sufficient forces or the necessary equipment for the work."

However, Appendix O provides, in pertinent part:

> "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."

In response to the claim, all the Carrier argued on the property was that it " . . . did not have adequate forces laid off, sufficient both in number and skill with which the work might be done . . . all claimants and, in fact, all rostered B&B employees, were working during the period of subcontracting." In the notice given to the Organization dated October 5, 1994, the Carrier stated that the contracting was done because " . . . the Carrier does not [have] equipment laid up and forces laid off, sufficient both in number and skill with which the work might be done."

But, there are general obligations under Appendix O "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." Nothing in this record shows that the Carrier took any steps in that regard. The Carrier merely argued that the employees were working and generally asserted in the notice that it did not have the necessary equipment laid up. Under Appendix O, that cannot not be enough. While much has been said over the years about the provisions of Appendix O, the Carrier cannot avoid its obligations under those provisions by only asserting that the employees were working and it did not have the necessary equipment laid up.

From this record, we cannot tell if the work had to be performed immediately; if the Claimants could have been rescheduled from their other duties to perform the disputed work; or if the disputed work could have been rescheduled to accommodate the Carrier's obligations to at least try to assign the work to covered employees. The Carrier never even made an assertion that such could not reasonably be done. Nor do we know that the necessary equipment for the work could not have been rescheduled for this project and, if it could not, whether the Carrier was unable to obtain that equipment from outside rental sources. Again, the Carrier said nothing in this regard.

The Carrier has substantial managerial latitude to schedule employees and equipment on projects as it sees fit, and the Organization (as well as the Board) cannot interfere with those reasonably made managerial determinations. And, if the Carrier determines that it cannot meet skilled manpower and equipment obligations, the Carrier is free, as it asserts, to then contract out work. However, there is nothing in this record to show that even minimal steps were taken by the Carrier to meet the general obligations under Appendix O "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." Therefore, we have no choice but to find that the Claimants improperly lost work opportunities because the work was not assigned to them. The Claimants shall therefore be made whole.

We find the Carrier's cited authority inapplicable to the facts developed in this record. Third Division Award 31483 in part addressed issues surrounding notice of contracting out. This is not a notice case. To the extent the discussion in Third Division Award 31483 addressed "mixed practices," all we have in this case supporting the Carrier's position that it could contract the work is the Carrier's response that the employees were working and it did not have the necessary equipment laid up. As we have held, that is not enough. Similarly, Third Division Award 30796 does not change the

result. That case involved a notice deficiency not present here. To the extent that no relief was fashioned in Third Division Award 30796 for employees working at the time of the contracting, a different approach was taken in subsequently issued Awards between the parties. See Third Division Awards 31594 (" . . . the fact that Claimants were 'fully employed' . . . does not negate liability for the proven violation. . . .") and 32435 (" . . . monetary damages are in order to compensate Claimants for the lost work opportunity and to stimulate compliance with the subcontracting notification and Scope provisions of the Agreement"). Under the circumstances of this case, and given our discretion to formulate remedies, we believe that make whole relief is appropriate.

Based on the above, the claim is sustained.

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 18th day of December, 2001.