Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38012
Docket No. MW-37117
06-3-02-3-73

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific 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 (Lenz Excavating) to perform Roadway Equipment and Machine Sub-department and laborer/truck driver work (excavating main line track, digging out crossings and hauling debris) at Mile Post 88.5 near the Veteran's Administration Hospital at West Allis, Wisconsin on April 26 and 27, 2000 (System File C-18-00-C080-02/8-00228-047 CMP).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper and timely advance written notice of its intent to contract said work as required by Rule 1.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. S. Whedon and L. Vaughan shall each be compensated for twenty-five (25) hours' pay at their respective time and one-half rates."

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.

This is a dispute involving an extensive record with each side supplementing their positions with voluminous evidence, argument, issue, and rebuttal. The dispute involves the Carrier subcontracting out work which the Organization maintains is scope protected and for which the required notice was not provided.

As a preliminary point, the Board notes that even after the dispute was presented to the Third Division on January 15, 2002, the parties continued to exchange significant correspondence. The parties were well aware both of the approaching deadline as referenced in their correspondence and the time limits for progression of the claim. The Board considers the record closed on January 15, 2002, when the dispute was submitted to the Board and all material submitted thereafter as too late for our consideration.

On merits, the issue at bar contains the following undisputed facts. The Carrier utilized a contractor to make repairs at a V. A. Center. The disputed work was performed on April 26 and 27, 2000 and notice was presented to the Organization after the work was complete. On April 28, 2000, the Carrier served notice of "our intent to utilize a contractor" that stated in pertinent part:

"To perform the following work:

Clean up the Glendale Line of all kinds of trash. The work consists of disposing of everything from tires, stoves and refrigerators.

> Ditch by the VA center and renew three (3) crosswalk areas across our tracks. This will consist of a hydra hoe and a big dump truck to haul the material away and should be done in approximately one (1) day.
>
> It is necessary to do the crosswalk work as soon as possible because the VA Center is on us due to someone in a wheel chair breaking their leg on one of the cross walks."

No advantage is served by detailing each and every issue disputed in the record. Central to our decision are two issues; whether the work belongs to the employees and whether an emergency existed. The claim at bar is that the work performed was a contract for ditching and pedestrian crosswalk renewal, "which consisted of digging out the area and hauling away the dirt and ties" as the outside contractor cleaned the ditches and corrected the crossing for pedestrians.

The work at issue has been studied. There is sufficient evidence presented by the Organization to provide a prima facie case that it was Scope related work of the employees. Evidence from Crane Operator Zimmerman, among others, is that he had performed this work of "road crossing renewal" and "ditching." Similarly, there are a large number of signed statements from employees that they, like Heavy Equipment Operator M. Nelson, have "renew[ed] . . . crossings . . . hauled away [debris] . . . [and performed] ditch work . . ." It is not relevant whether such work may or may not have been contracted out previously. The agreements in effect on good faith efforts to reduce subcontracting were not followed. Appendix 1 logically comes into play, whether or not the Carrier owned a hydro-hoe; employees were available; there was a mixed practice on the property; or other factors were relevant. Those factors should be discussed during a conference after appropriate notice is served.

Certainly, the Carrier does not dispute the late notice. That notice references an individual "breaking their leg on one of the cross walks." The issue for consideration is important, as there are conditions under which the Board would have to find that the Carrier had a right to immediately act; such as an emergency. The Carrier does raise this issue as legitimation for bypassing the Organization in providing late notice. As stated:

> ". . . this was a dangerous and emergency situation. The Carrier is granted latitude in the notice requirements when it comes to

emergency situations. Further, the Agreement does not provide for a penalty payment for failure to serve notice. The area in question had washed in with mud and the small crossing needed to be replaced. A person from the V. A. Center had broken a leg on one of the crossings. This is a fact, which goes unrefuted."

The Board noted this critical issue for which the Carrier argues it lacked 15 days time to give proper notice. The problem for the Board is that there is no probative evidence to persuade us of an emergency. Just the opposite, the Organization provided signed statements from Kriefall that "the small walkway crossings at the V.A. hospital have been in disrepair for many years" and from Mr. Hendricks "that those small walkway crossings at the V. A. center have been [in] bad condition for the last 2 year[s]."

Nowhere in this record does the Carrier provide any proof that the work performed was related to an emergency. Even if one were to regard the individual breaking their leg as an event requiring immediate action, the April 28, 2000 notice of the work performed is clearly unrelated to the injury. "Disposing of everything from tires, stoves and refrigerators" and cleaning of trash do not constitute work related to the physical injury. Similarly, there is nothing in the Carrier's affirmative defense to indicate that the repair was immediate to the injury. There is nothing that indicates that the Carrier had to act with immediacy or even did so. This record is devoid of proof that a true emergency existed which would warrant contracting out and completing more work than directly applicable prior to providing any notice whatsoever to the Organization.

Accordingly, in review of the record before the Board, it is not necessary to determine if the work in question belonged to the employees. Similarly, it is not necessary to wade into the countless other issues, but only to determine whether a true emergency was demonstrated. It was not. Therefore, we find that the record before the Board demonstrates a failure to fully comply with the Appendix 1 and support for the claim at bar. Even if the work before us could have been contracted out under the extant provisions, the Carrier was required to give notice before doing so.

As to the remedy requested, the Board fully studied the Awards and arguments raised, particularly with regard to the Claimants being fully employed. The Claimants lost the possibility of work opportunity by the Carrier's failure to

engage in timely notice and good faith obligations to reduce subcontracting. The Claimants are to be compensated at their straight time rate of pay for the hours indicated in the claim (Third Division Awards 36575 and 36527).

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 25th day of October 2006.