PUBLIC LAW BOARD NO. 2960

AWARD NO. 136
CASE NO. 164

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when outside forces were used to apply asphalt to two (2) grade crossings located at Mile Posts 35 and 32 on the East Iowa Subdivision on November 2, 6, and 8, 1984. [Organization File 4LF-2002; Carrier File 81-85-72]

(2) The Agreement was further violated when the Carier did not give the General Chairman prior written notification of its plans to assign said work to outside forces.

(3) Because of (1) and/or (2) above, furloughed Common Machine Operator R. D. Jacobi and Trackmen J. E. Schermerhorn, S. E. Boyce, K. G. Hart and L. E. Pretz shall be allowed an equal proportionate share of the ninety-six (96) man-hours expended by the outside forces."

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employe and Carrier involved in this dispute are respectively Employe and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

On December 28, 1984 the Vice General Chairman filed a claim protesting the use of a contractor to apply asphalt to

three different grade crossings on three different dates. He asked that the hours expended by the contractor be equally divided among five Claimants all of whom were furloughed at the time.

The division manager on February 6, 1985 replied to the claim as follows:

> "Reference your December 28, 1984 letter filing claim in behalf of Messrs. J. E. Schermerhorn, R. D. Jacobi, S. E. Boyce, K. G. Hart and L. E. Pretz.
>
> "I cannot agree with your claim that there was a violation of the current agreement and that the above named claimants suffered a loss of work opportunity. The work in preparing the crossings named in your December 28, 1984 letter was performed by Iowa Division Crossing Gang No. 1, just as they had done all during 1984's production season. The extent of their work on these crossings was no greater than, nor any less than, the other crossing rehabilitations performed during the season. Historically, because of lack of the proper equipment and expertise, contractors have laid and rolled the apshalt in public grade crossings. The occasions of these crossings were not different. The contractor also assumes the legal responsibility to the state to meet their standard as prescribed by them, and any faulty construction is redone at no expense to the Company.
>
> "Based on above, your claim is hereby denied in its entirety."

The claim was appealed, denied and then conferenced on August 8, 1985. The Carrier, subsequent to the conference on September 11, 1985, sent the following letter to the General Chairman:

> "The above identified case was discussed in conference on the date indicated. As I stated at that time, I cannot agree with your contention that Claimants are entitled to penalty compensation in connection with services performed by an asphalt contractor on the Iowa Division. As Division Manager Maybee stated in his denial letter of February 6, 1985, the work performed by

> "the contractor in the instant case was identical in nature to work performed by contractors at other locations on the Division during the 1984 and 1983 production seasons. Though you may not feel that that fact is significant, it does indicate that the Carrier has historically subcontracted this work without prior notification to the BMWE. At some point in the past, you apparently decided to discontinue the practice of waiving the advance notice requirement for this type of work. That is your prerogative. However, the Carrier would have certainly have appreciated being made aware of this change in practice.
>
> "In addition to the above stated position, the Carrier had the right to subcontract the work in question in accordance with the provisions of Rule 1, as it does not possess the special material and equipment required to perform this work on the scale involved in the instant case. Once again, a violation of the current Agreement is not in evidence, and your claim is denied for lack of support from schedule rules and agreements."

As the February and September letters explain, the Carrier defends the lack of notice on the basis that the Organization has previously not protested lack of notice for this type of notice. Such an argument presupposes that the Organization was aware that such work had been performed by contractors previously. The evidence on this point is limited to mere assertion on the part of the Carrier. Just because they say it is so doesn't mean it is so.

To prove waiver and acquiesence of such an important right would require not only proof of knowledge on the part of the Organization but a clear demonstration of waiving such a notice. In its denial of the claim, the Carrier points to similar work performed without notice in 1983 and 1984. However, they do not indicate on how many occasions this waiver occurred. Was it once, ten times or a hundred times? We are

left with no answer. Thus, there is insufficient proof in this record that the Organization waived their right to advance notice of subcontracting. Waiver of such a right ought to be clear and unmistakable.

The idea of waiver is also advanced as a defense on the merits as well. In addition, other defenses are raised including, (1) that the Carrier forces lacked expertise (2) that the Carrier lacked specialized equipment, and (3) that the contractor accepted the legal responsibility to do the work according to the standards of the state of Iowa.

The Board does not find any of these arguments persuasive on the basis of this record. Taking them in order, the idea of a waiver with respect to the merits falls for the same reasons as did the waiver argument on the notice issue. In addition, there is no demonstration that this prior subcontracting ever took place while employees were on layoff. Subcontracting with a full work force is one thing, subcontracting when employees are furloughed is quite another.

With respect to the lack of expertise, the lack of equipment and lack of special material we are left with only assertion on the part of the Carrier. More than assertion is needed to establish such a defense. This is particularily true with respect to the lack of equipment. The December 11, 1981 letter of understanding committs the Carier to make a good faith effort to obtain rental equipment in the event they lacked certain equipment. There is no showing that such a

good faith effort was expended in this case. As for the fact the contractor warranted their work to be in compliance with state regulations, it is not a compelling enough consideration to justify the subcontracting.

AWARD:

The claim is sustained.

Gil Vernon, Chairman

D. D. Bartholomay
Employe Member

M. Humphrey
Carrier Member

Dated: 5/9/89