

PUBLIC LAW BOARD NO. 2960

AWARD NO. 64
CASE NO. 54

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

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 remove cross ties and do work for drainage at Madison, Illinois on September 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, and 26, 1981. (Organization File 3T-2674; Carrier File 81-1-294)

(2) The Agreement was further violated when the Carrier 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, Machine Operator R. Rhodes shall be allowed eight (8) hours straight time for each of the aforesaid dates (total 80 hours) with the exception of September 26, 1981, which is compensable at the overtime rate for four (4) hours.

OPINION OF THE BOARD:

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

On the property and at the Board, the Organization claimed that the

work in question properly fell under their scope rule and was improperly subcontracted. The improper subcontracting was the result of failure to give notice of the contracting out and due to their belief that none of the criteria listed in the scope rule, under which contracting is allowed, applied. The pertinent portion of Rule 1 - Scope states:

"By agreement between the Company and 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 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 (sic) 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 (sic) 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.

"Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that effect (sic) the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible."

On the property the Carrier contended, that (1) the Claimant was employed during the time the contractor was on the property; (2) that the Carrier's equipment was not sufficient to handle the project within the time constraints; and (3) due to the emergency nature of the safety hazard

involved, it was necessary to utilize a contractor to correct it.

The Board, based on this record, is not convinced that any emergency condition existed sufficient enough to justify the Carrier's clear failure to give notice of the contracting involved. As such a clear violation of Rule 1 is established, it is not necessary to discuss or consider the contentions regarding equipment and general time constraints. As was stated in Award 16 of Public Law Board 1844:

"Assertions of emergency are not persuasive on this record. There is no question that Carrier thus violated Rule 1 when it failed to notify the General Chairman of its plans to contract out the work. Having made this finding there is no need to look behind the conflicting arguments relative to the availability of equipment. These are matters which the parties might have discussed under the procedures provided in Rule 1 for notice and consultation but they have no bearing on whether the notice should have been given in the first instance."

The Carrier at the Board, however, directed all of their attention to the question whether the Claimant is the proper claimant. They suggest he lost no work opportunities as a result of the contractor being assigned to the work in question because he actually was assigned to work with the contractor. They suggest someone else may have been damaged, but not the Claimant.

While the Carrier did contend on the property that the Claimant was employed, they did not specifically contend he lost no work opportunity because he was employed with the contractor. Thus, their sole defense before the Board is raised for the first time and we are without jurisdiction to consider it. Thus, in the absence of any material defense on the contention that the Claimant lost work opportunities, we must conclude, based on these unique circumstances, there was a loss of work opportunities. In this connection attention should be directed again to

Award 16 of PLB 1844. Therefore, solely based on the foregoing, the Claim will be sustained but only at the pro rata rate of pay.

AWARD:

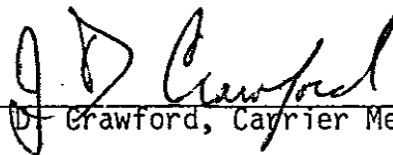
The Claim is sustained to the extent indicated in the Opinion. The Carrier is ordered to comply within thirty (30) days.



Gil Vernon, Chairman



H. G. Harper, Employee Member



J. D. Crawford, Carrier Member

Dated: _____

Sept 6, 1984