NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 1016

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

CONSOLIDATED RAIL CORPORATION

AWARD NO. 104

Docket No. MW-3469

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces (J. M. G. Construction) to install 80 feet of chain link fence at various locations on the Trenton Line-Low Grade at Wayne Junction in Philadelphia, Pennsylvania on November 16, 17, 18 and 19, 1993.

2. The Agreement was further violated when the Carrier acted in bad faith by failing to comply with the advance notice and pre-contracting meeting requirements of Paragraphs 2 and 3 of the Scope Rule regarding its plans to contract out the work described in Part (1) above.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. H. Love, D. J. Lauer, M. D. Tallarida and J. L. Royer shall each be allowed eight (8) hours' pay at their applicable straight time rates for each day the contractor forces performed fence construction work on November 16, 17, 18 and 19, 1993.

F I N D I N G S

At the outset, the Board notes it is once again, after numerous previous instances, faced with the dispute as to the form in which the Carrier addressed its notice to contract work, in this instance installation of 80 feet of chain link fence. On October 22, 1993, the Carrier sent notice of one General Chairman ("Chairman A"), with copy shown to another General Chairman ("Chairman B"). The work was described as being "on the Philadelphia Seniority District of the Philadelphia Division". Both General Chairmen requested conferences to discuss the proposed contract work. The record shows that discussion was held with Chairman A on November 13, 1993. No agreement was reached, and no claim was initiated by Chairman A.

Chairman B requested a conference by letter dated October 29, 1993. On November 24, 1993, the Carrier replied in pertinent part as follows:

> As advised at our meeting on November 10, 1993, the subject file was directed to and discussed with the involved General Chairman [Chairman A].

The Board finds reference to "our meeting on November 10, 1993" unclear and ambiguous. It cannot be established, nor does the Carrier contend, that this "meeting" was for the purpose of discussing the proposed contract work.

The Organization contends that employees represented by Chairman B are entitled to perform work on the Philadelphia

Division. This view is supported by Award 97 40, which considered a claim concerning contract installation of a chain link fence. The claim in Award 97 40, raised by General Chairman B, involved three of the same Claimants involved in the dispute here under review.

Clearly, Chairman B was an "involved" General Chairman. The Carrier cannot have it both ways. Having notified Chairman B of the proposed contract (even if only in "copy to" fashion), it cannot then disregard a procedurally correct request for discussion by Chairman B. Thus, the Carrier violated the Agreement in its failure to honor this conference request.

As to the work itself, the April 24, 1989 Letter of Agreement is directly applicable. This Agreement reads in pertinent part as follows:

> Fencing
>
> 1. Perform routine forcing work with employees represented by the BMWE. . . . Routine fencing is fencing work of the scope and magnitude which has been performed by B&B Department employees in the past.
>
> 2. Other than routine fencing projects will be handled by serving a notice under the Scope Rule of the Agreement.
>
> Nothing in the foregoing would require the hiring of new employees for the sole purpose of performing . . . fence installation. It should also be understood that nothing in the foregoing alters the Company's right to contract such work in emergency situations without prior notice.

The Carrier contends it did not violate the Letter of Agreement, stating as follows:

> There are no B&B mechanics furloughed on the Philadelphia Seniority District and we do not have qualified manpower available for this project.

During the claim-handling procedure, the Carrier also stated:

> [T]he work need[ed] to be done as quickly as possible to prevent trespassing and vandalism.

The Carrier's defenses must be weighed against the extent of the work -- four days' work by four employees. The Board concludes the Carrier has not demonstrated that to have its forces do the work would have required hiring employees or that an "emergency", as usually defined, existed. As to an "emergency", the Carrier's notice was given on October 22; the work was not undertaken until almost four weeks thereafter. The Carrier's opportunity to explain these contentions was lost when it failed to hold a conference with Chairman B.