Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39738
Docket No. MW-38748
09-3-NRAB-00003-050172
(05-3-172)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(The Paducah and Louisville Railway, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (R. J. Coleman) to perform Maintenance of Way machine operator work (operate machine to unload crossties) between Mile Post 125 at Central City and Mile Post 172 at Clayton, Kentucky on March 16, 17 and 19, 2004, instead of Machine Operator R. Brasher (Carrier's File C031604.1).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written notice of its intent to contract said work or enter good-faith discussions on this matter as required by Appendix 8.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. Brasher shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay."

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.

The Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it assigned outside forces, instead of the Claimant, to perform certain Maintenance of Way work.

The Organization initially contends that the work at issue clearly is encompassed by the scope of the Agreement. The Organization asserts that the Carrier has not, and cannot, argue that unloading ties is not reserved to BMWE-represented employees. The Organization argues that the Board previously has held that the unloading of ties is reserved to employees covered under the scope of the parties' Agreement.

The Organization maintains that because the subject work accrues to Maintenance of Way personnel, the Carrier may contract out this work only under specific circumstances. The Organization points out that the Carrier has not submitted any evidence that any of these specific circumstances existed. The Organization emphasizes that even if one or more of these circumstances did exist, the Carrier was required to notify the General Chairman of its intent to contract out the work prior to assigning it to outside forces. The Organization contends that there is no dispute that the Carrier failed to provide advance notice of its intent to contract the tie unloading. Citing a number of prior Awards, the Organization asserts that it is well established that a carrier's failure to comply with the Agreement's notice provisions requires that the claim be sustained.

The Organization argues that the essence of Appendix 8 is the opportunity that it affords the Organization to attempt to persuade the Carrier to assign the work to its own forces rather than to outside forces. Because the Carrier did not notify the General Chairman of its plans to contract out the subject work, this opportunity clearly was denied. The Organization emphasizes that the General

Chairman did not have any opportunity to persuade the Carrier to assign the scope-covered work to its own employees, instead of to outsiders.

As for the Carrier's assertion of a practice on the property that prior notice is not necessary when it is clear the subcontracting falls within one of the three exceptions listed in Appendix 8, the Organization contends that there would be no need for Appendix 8 if this were true. Even if it is assumed that the Carrier's assertion has merit, the Organization maintains that there is no evidence that the equipment used by the contractor was necessary to unload the ties. The Organization argues that it is undisputed that Maintenance of Way forces have routinely planned and executed such work, and the Claimant has the expertise to handle the unloading of cross ties. The Organization therefore asserts that there can be no doubt that the cartopper was not necessary for the unloading of ties. The Organization submits that simply because it was the contractor's equipment of choice does not mean that this equipment was necessary to complete the task. The Carrier failed to prove that this instant situation fell within any of the exceptions listed in Appendix 8.

The Organization insists that the Claimant is a fully qualified Machine Operator who clearly was deprived of a work opportunity in this instance. There is no dispute that the work at issue is encompassed within the scope of the Agreement and that the Carrier presented no advance notice of its intent to contract out the work. Moreover, there is no evidence that special equipment was necessary. The Organization therefore asserts that it is absolutely clear that the Carrier violated the parties' Agreement.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that this case involves a major crosstie unloading project that the Carrier was not equipped to handle with its existing equipment and manpower. The Carrier asserts that for the past 17 years, it has utilized the services of an outside contractor to unload crossties on the property for major crosstie replacement projects, while it has used its own forces for smaller crosstie replacement projects. The Carrier further argues that after crossties have been unloaded in these major projects, the Carrier has used its own Maintenance of

Way forces to replace the crossties, while the outside contractor picks up the old discarded crossties.

The Carrier asserts that throughout the past 17-year period, while it has undergone capital-intensive crosstie replacement projects and utilized an outside contractor, the Carrier has done so without serving notice to the Organization. The Carrier emphasizes that the parties have operated on an informal understanding that if it was obvious that the Carrier needed to use an outside contractor to perform work that its own forces were not equipped to handle, then the Carrier could do so without any official notice. The Carrier insists that this has been the parties' past practice.

The Carrier asserts that the Organization's allegation of a lack of notice is simply an effort to substantiate the Organization's claim in this case. The Carrier insists that the Organization simply cannot change the practice that has existed between the parties for many years by filing a time claim and then expect that claim to have any validity on that basis. The Carrier points out, however, that once it learned that the Organization intended to enforce the advance notice requirement, the Carrier advised the Organization that it would provide the required notice in the future.

The Carrier argues that the subject work fits squarely within all three of the exceptions set forth in Appendix 8, any one of which is sufficient to allow the Carrier to subcontract work. The Carrier points out that the work was completed over three days using the contractor's special equipment, which the Carrier does not own. The Carrier asserts that it would have taken at least 12 days to unload the crossties if the Carrier had used its own equipment. The Carrier did not have the luxury of spending that amount of time to complete this task. Moreover, the Carrier did not believe that the utilization of its own equipment in such a large-scale project was the safest course to take. The Carrier also emphasizes that none of its employees were qualified to operate the contractor's equipment.

The Carrier contends that the Organization's claims are without merit and should be denied. In addition, the Carrier asserts that the Claimant was on duty as a Machine Operator on all three claim dates, and he suffered no loss of earnings as a result of the Carrier's use of the outside contractor. The Carrier insists that the Organization cannot show that the Carrier routinely used outside contractors to the

detriment of its own forces, nor can the Organization show that the Carrier improperly utilized the outside contractor in this case. There was no "obvious" loss of work opportunity for the Claimant in this case because he was on duty and under pay as a Machine Operator on all claim dates.

The Carrier goes on to emphasize that it historically has used outside contractors in major tie unloading projects without complaint from the Organization. The Carrier points out that numerous Awards have held that where the Organization cannot prove that Maintenance of Way forces have – by custom, tradition, and history – exclusively performed the work, then the Carrier has the right to subcontract such work. The Carrier insists that the Organization cannot make such a showing in this case because the Carrier has utilized outside contractors to perform the unloading of ties in large-scale projects for years.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization met its burden of proof that the Agreement was violated when the Carrier assigned outside forces to perform the Machine Operator work on March 16, 17, and 19, 2004, instead of the Claimant, Machine Operator R. Brasher. Therefore, the claim must be sustained.

The record reveals that the Carrier admittedly failed to provide the required notice to the Organization prior to subcontracting the work. The language of the Agreement requires that such notice be provided prior to subcontracting the work. Appendix 8 reads, in relevant part, as follows:

> "In the event the P&L plans to contract out work because of one or more of the criteria described above, it shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. Such notification shall clearly set forth a description of the work to be performed and the basis on which the P&L has determined it is necessary to contract out such work according to the criteria set above."

The purpose of that language is to allow the General Chairman or his representative to request a meeting to discuss the contracting transaction, and it goes on to require the Carrier to meet with the General Chairman for that purpose.

In this case, the Carrier admits that no advance notice was given to the General Chairman and, therefore, the parties did not have an opportunity to meet as required by the Rule. The Carrier argues that there had been a long-standing past practice that had been going on with the Carrier being allowed to subcontract without notice for many years. However, it is fundamental that a past practice is only applicable if there is no language that directly deals specifically with the subject matter. In this case, there is very specific language that requires that notice be given to the General Chairman before any subcontracting takes place. Consequently, the Carrier's reliance upon the alleged "past practice" fails here.

There have been a number of Awards that have held that if the Carrier fails to provide the required notice, the claim must be sustained. The Board shall follow those Awards and sustain this claim.

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 26th day of June 2009.