Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37022
Docket No. MW-36489
04-3-00-3-763

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)

STATEMENT OF CLAIM:

"*Claim of the System Committee of the Brotherhood that:*

(1) The Agreement was violated when the Carrier assigned outside forces (Taylor Custom Fencing) to perform Maintenance of Way and Structures Department work (rebuild right of way fence) between Mile Posts 17.9 and 18.2 on the Trenton Subdivision on October 12, 1999 instead of Messrs. H. L. Saner and R. E. Sanders, Jr. (System File 2RM-9104T/1215551 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants H. L. Saner and R. E. Sanders, Jr., shall now each be compensated for an equal and proportionate share of the sixteen (16) man-hours expended by the outside forces in the performance of the aforesaid work at their respective time and one-half rates 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.

It is undisputed that contractor employees expended 16 hours performing right-of-way fence work on the Carrier's property on October 12, 1999. However, certain unusual features of the instant record led the Carrier to challenge the jurisdiction of the Board to address the merits of the claim.

The Carrier's jurisdictional challenge is based on two contentions that the claim was not handled in the usual manner on the property. First, the Carrier notes that the Organization attempted to add evidence to the record on the same day that it closed the record by mailing its Notice of Intent to the Board and thus denied the Carrier the opportunity to respond to the evidence. Second, the Carrier maintains that the claim before the Board is different from the original claim filed on the property.

We do not find that the Carrier's contentions deprive the Board of jurisdiction. In the first instance, numerous Awards of the Board, as well as Public Law Boards, have dealt with this type of situation without dismissing for lack of jurisdiction. When one party submits new evidence or raises new argument so late in the claim-handling process that the other party is effectively denied the opportunity to respond, it is well-settled that such evidence or argument should receive little, if any, weight. In other words, the party who resorts to such tactics essentially forfeits the value that the evidence or argument might add to the record on its behalf. See, for example, Third Division Award 28008. Accordingly, we give no weight to the Organization's untimely evidence.

Regarding the Carrier's changed-claim contention, our review of the record confirms that no allegation of a notice violation was stated in the claim as originally filed on November 9, 1999. No such allegation was advanced until the Organization's appeal dated February 28, 2000, which was more than 100 days after the initial claim filing. Despite this delay, careful review of the record shows that the parties did handle the alleged notice violation on the property. It was apparently discussed at the parties' June 9, 2000 conference. Although the Organization's September 7, 2000 letter following the conference reasserts most of the contentions it had been making all along, it did not reassert a notice violation. Moreover, the Organization's December 20, 2000 letter acknowledges that the Carrier provided notice, although it is clear that the Organization did not agree with the Carrier's rationale for contracting the disputed work. While the handling of the alleged notice violation was somewhat unusual, we do not find that it departed sufficiently from the requisite procedure for handling on the property to cause a loss of jurisdiction.

Turning to the merits, it is clear that Scope Rule 1(b) forms the core of the dispute. It reads, in pertinent part, as follows:

> "(b) Employes included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.
>
> By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes 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 employes, 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 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 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 employes included within the scope of this Agreement performed by contract in emergencies that affect movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible. (See Appendix J to the Agreement)."

The instant record does not establish that emergency circumstances or abandonment of lines were involved.

In accordance with our previous discussion, we do not find that the Carrier violated the notice provisions of Rule 1(b). No such allegation of violation was included in the initial claim filing. No such contention was reasserted in the Organization's appeal following the June 9, 2000 conference. Finally, the Organization's December 20, 2000 letter does not refute that notice was provided. Accordingly, this portion of the claim must be denied.

The next major point of controversy is the operation of Rule 1(b). The Organization maintained it was a specific reservation of the disputed work as the

language states. According to the Carrier's contentions, it is a general Scope Rule that required proof of exclusive past performance to establish coverage.

Award 16 of Public Law Board No. 1844 resolved this controversy in 1977. The Award found the Rule to be a specific reservation of work in the first paragraph subject to the exceptions stated in the second paragraph which permitted contracting of work. In so finding, the Award also found questions about customary, historical and traditional performance to be largely irrelevant in the face of the express language of the first paragraph that states that ". . . all work in connection with the construction, maintenance, repair of tracks, structures and other facilities used in the operation of the Company . . . on the operating property . . ." shall be performed by scope-covered employes.

The Carrier's initial reply to the claim acknowledged that covered employes had performed the type of work in the past. In addition, it contended that track forces were not available to do the fence construction because there were three Trackman vacancies on the claim date. It did not detail how long the vacancies had existed or what steps the Carrier was taking to fill them.

Given the language of Rule 1(b) and the Carrier's admissions, we are compelled to find that the disputed work was within the scope of the Agreement. Therefore, it could only be properly contracted if one or more of the permitted exceptions were present. While the claim was being handled on the property, the Carrier did not explicitly contend that any of the negotiated exceptions were applicable. Instead, it raised only two defensive contentions: no scope coverage due to lack of exclusive past performance and no loss of work opportunity due to the full employment of the Claimants in their regular assignments.

On the property, the Organization maintained that none of the exceptions to the prohibition on contracting was applicable. Although the Carrier's Submission raised a contention about being inadequately equipped to handle the work, which is one of the permitted contracting exceptions, careful examination of the record reveals that no such contention was made on the property. Thus, it is new and must be disregarded by us. Moreover, it was the Carrier's burden to prove that ". . . not adequately equipped . . ." within the meaning of Rule 1(b) was intended to include inadequate staffing. On this record, the Carrier has not sustained that burden of proof.

Given the foregoing discussion, the record before us requires a finding that the Agreement was violated. This brings us to the question of remedy.

It is undisputed that the Claimants were employed elsewhere on October 12, 1999. In the Organization's September 7, 2000 letter following the on-property conference, it asserted that the Claimant's could have performed the disputed work on one of the pair of rest days falling either before or after the claim date. The Carrier did not refute this assertion in the more than two months before the Notice of Intent was mailed on December 20, 2000. Given the fact that the record does not show, nor does the Carrier contend, that time was of the essence, we must accept as fact that the Claimants could have been scheduled to perform the work on an overtime basis. This is some proof of a lost overtime opportunity which, in the absence of any counter-assertion by the Carrier, must be accepted as sufficient to support the remedy requested. While the use of overtime is more expensive, the desire to avoid payment of overtime rates is not one of the negotiated exceptions that permits the contracting of scope-covered work. Accordingly, we find that the Claimants should be compensated, at their applicable overtime rates, for eight hours each for the total of 16 hours worked by contractor forces.

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 18th day of May 2004.