Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37314
Docket No. MW-36134
04-3-00-3-308

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 (Morris Excavation) to perform Maintenance of Way and Structures Department work (remove underground waste oil storage tank and related work) at Marshalltown, Iowa on December 29, 30 and 31, 1998 and January 6 and 12, 1999, instead of assigning Foreman J. D. Paulson and Common Machine Operators W. J. Thatcher, N. P. Laybon and G. L. Steinfeldt. (System File 4RM – 9012B/1182396 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 as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. D. Paulson, W. J. Thatcher, N. P. Laybon and G. L. Steinfeldt shall each be compensated for thirty-two (32) hours' pay at their respective straight time rates of pay and each shall be compensated for eight (8) hours' pay 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.

The on-property handling of this dispute discloses that on December 29, 30, 31, 1998 and January 6 and 12, 1999, the Carrier used a contractor to remove an underground waste oil storage tank at Marshalltown, Iowa. The Organization claims that the work performed by the contractor is contractually reserved to BMWE forces and should have been performed by the Claimants, who were furloughed at the time.

In support of its claim, the Organization relies principally upon Rule 1(b) of the Agreement, which states:

> "(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. . . ."

There is a dispute on the record as to the nature and extent of the work performed. According to the Organization, the contractor forces excavated and lifted the tank from the hole, cut the top off the tank and backfilled the hole with sand. No hazardous waste was involved because it had previously been pumped out, a statement submitted by the Organization avers. The Organization maintains that the work of dismantling and removing the storage tank was much the same as the work performed by BMWE forces when the storage tank was first buried in the ground.

The Carrier argues that work contracted out in this case was environmentally sensitive and required the removal of underground storage tanks that contained hazardous materials. In the Carrier's view, this was not work contractually reserved to the Organization, because it required special expertise, training, and certification not possessed by BMWE forces.

The dispute on these critical points provides strong evidence for the need to comply with the notice provisions under Rule 1(b). Irrespective of the Carrier's contention that it acted properly because its employees did not possess the skills and qualifications to adequately handle the work, nevertheless, before those kinds of issues can be addressed, Rule 1(b) imposes a threshold obligation upon the Carrier to give the Organization advance notice of its intent to contract out the work. Such advance notice is supposed to provide the opportunity for good faith discussion of precisely the kinds of issues which are now disputed by the parties on the merits.

In this case, the Carrier failed to comply with the notice and conference requirements of the above-cited Agreement provisions, the record shows. Clearly, the process fails when notice and conference requirements under Rule 1(b) are subverted and the work is contracted out without attempts to reconcile the differences that are so readily apparent on this record. The claim must be sustained on that basis.

With respect to the remedy, the Carrier asserted that one of the named Claimants was employed in another craft at the time of the occurrence. In addition, the parties disagree as to the number of hours worked by the contractor as well as whether the hours of one such employee should be counted. Accordingly, the matter is remanded to the parties for a joint check of the Carrier's records. In all other respects, the Claimants are to be made whole.

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 21st day of December 2004.