Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37376
Docket No. MW-36473
05-3-00-3-739

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Chicago and
(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 43.5 and 45.0 on the Trenton Subdivision beginning on August 13, 1999 and continuing through August 21, 1999 instead of Messrs. H. L. Saner and R. E. Sanders, Jr. (System File 2RM-9095T/1211864 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 proportionate share of the one hundred seventy-six (176) man-hours' expended by the outside forces in the performance of the aforesaid work at their respective straight time 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.

This dispute concerns the performance of right-of-way fence rebuilding work by a contractor between August 13 and 21, 1999 on the Trenton Subdivision where the Claimants hold seniority as a Track Foreman and Assistant Foreman. The Carrier served notice of its intent to contract the work of building 1.5 miles of right-of-way fence at specific mile post locations on February 18, 1999, to which the Organization responded on February 22, 1999. Aside from contending that the work had been customarily performed by employees, it asserts that the notice is procedurally vague and inadequate and requests both a conference and the furnishing of specific information on the contracting. A telephone conference was held on February 26, 1999; the Carrier sent an amended notice on March 16, 1999 covering the removal of the existing fencing and brush cutting involved with the prior fence installation, as well as a letter on March 17, 1999 indicating that the contract had yet to be awarded, and that "Carrier forces are not adequately equipped to perform this work." The Organization's response inquired as to what equipment was necessary to remove and replace the existing fence; it did not request another conference.

The work in issue was contracted and performed between August 13 - 21, 1999. The Organization's initial claim filed on October 15, 1999 did not assert a notice violation, but its subsequent appeal of January 20, 2000 did allege that the Carrier failed to provide proper notice of the contracting. During the handling on the property the Track Maintenance Manager noted that there were three vacant positions on the Trenton Subdivision on August 13 - 15 and six vacancies during the week of August 16 - 21, 1999 that no one bid on, making it difficult to do this work

because the forces available were used to maintain a safe track condition to operate trains. The Claimants' time records reveal that Saner worked 49 hours and Sanders 41 hours during that time period, and Sanders was unavailable on August 20, 1999. In its final appeal the Organization asserts that the vacancies were created by the Carrier's own action in having insufficient forces to fill them, explaining that employees prefer to bid on production gangs that provide meal and lodging expenses rather than headquartered gangs away from home that do not, and that this non-emergency work or the work the Claimants were assigned to could have been rescheduled to permit their performance of the disputed fence work. The Carrier took issue with the excessive number of hours claimed, asserting that the contractor worked eight days which would compute to 64 hours of work per person, not the 176 hours sought by the Organization based upon a formula of 64 hours of labor per mile allegedly charged by the contractor.

The Organization contends that the fencing work clearly falls within the parameters of the Scope Rule of the Agreement which has been found to be a reservation of work Rule (Third Division Award 2701) requiring proper notice from the Carrier prior to contracting, and a good faith effort on the Carrier's part to reach agreement. Third Division Awards 19426, 20895, 20945, 20950, 21079; Public Law Board No. 2960, Award 136. The Organization argues that Third Division Award 37022 involving the same parties, the Claimants and identical work is stare decisis and requires a sustaining Award. The Organization notes that the Carrier's contention that its forces were not adequately equipped to perform the work, an affirmative defense, was not proven, and that the Carrier did not deny that it possessed equipment and materials to perform fencing work and that the Claimants were qualified for such assignment. The Organization posits that the Carrier failed to show that any of the listed exceptions in Rule 1(b) were present in this case. The Organization asserts that a monetary remedy is appropriate for this type of contracting violation despite the Claimants' employment on the claim dates, because the facts establish a loss of work opportunity, relying upon Third Division Awards 37022, 32862, 32338 and 29472 among others.

The Carrier argues that the Organization failed to meet its burden of proving that it violated the Agreement by contracting the fence work in issue. The Carrier initially notes that Third Division Award 37022 is not dispositive because in that case the Carrier only raised two defenses concerning scope coverage and full employment, and did not contend that any exception to Rule 1(b) was applicable, as it did herein. It further notes that little reliance was placed by it on the vacancies

and their effect in that case, but that the details of the number of vacancies and their cause was discussed on the property by the parties. The Carrier argues that the negotiated exception in Rule 1(b) concerning it being "not adequately equipped to handle the work" can apply with respect to manpower, and the record reveals that employees made themselves unavailable by deliberately not bidding on the vacancies that would perform the work in favor of more lucrative employment, while at the same time seeking payment for such work. Public Law Board No. 2960, Award 182. The Carrier asserts that any monetary remedy would be excessive because the Claimants suffered no loss of earnings, relying upon Third Division Awards 31652, 31288, 31284, 31171, 30166; Public Law Board No. 1844, Award 13, and the amount of the claim is unrelated to the number of hours of work actually performed by the contractors.

We first note that the record supports the finding that the Carrier met its notice and conference obligations in this case, and that paragraph two of the claim must be denied. However, a careful review of the record convinces the Board that the Carrier has not satisfied its burden of proving that the facts support the application of the "not adequately equipped to handle the work" affirmative defense raised on the property as the basis for the subcontracting. Rule 1(b) clearly states that work encompassed by the Scope provision may only be contracted if one of five situations exist: special skills, special equipment, or special material are required, or where the Carrier is not adequately equipped to handle the work or time constraints make it beyond the capabilities of its forces to meet.

In this case, unlike the situation in Third Division Award 37022, the Carrier appears to concede that the work in dispute is scope covered and that employees are entitled to perform it under the terms of Rule 1(b) which supports a finding that the Organization met its prima facie showing of a violation. The burden then shifts to the Carrier to show that one of the five exceptions listed in Rule 1(b) applies. From the record it appears that the Carrier's inability to fill from three to six vacancies on the Trenton Subdivision encompassing this time period was an after-the-fact justification for contracting out the building of the new right-of-way fence on the 1.5 miles in issue. The notice was issued on February 18, 1999 and, unlike the situation in Public Law Board No. 2960, Award 182, the Carrier did not list any of the noted exceptions as a basis for the contracting. When it was amended on March 16, 1999 to include the removal of the old fencing and necessary brush cutting, it raised the contention that forces were not adequately equipped to perform the work, noting that no contracting had yet taken place. The discussion between the parties

thereafter prior to the actual work being performed in August 1999 raised the question of what type of equipment the Carrier was referring to by that open-ended statement. It was not until after the work was contracted and the instant claim filed that the Carrier first raised the issue of the number of vacancies that existed during the claim period. From this record, insufficient manpower was not the basis of the Carrier's assertion of "not adequately equipped" at the time the contracting notice was discussed and the work contracted. Further, as noted in Third Division Award 37022, the Carrier in this case also did not sustain its burden of proving that "not adequately equipped . . ." within the meaning of Rule 1(b) was intended to include inadequate staffing.

While the record reveals that employees generally prefer to fill vacancies away from home where they will be compensated for expenses rather than headquartered positions that are more costly to them, such preference cannot provide blanket permission for the Carrier to subcontract work belonging to them rather than attempting to have it performed by rescheduling the employees or their work, assigning them to perform it after work or on rest day overtime, or hiring additional staff if there is insufficient manpower on a continuing basis to meet the Carrier's ongoing needs. The Carrier did not assert or establish that the fence replacement involved was of an emergency nature or had to be completed within a designated period of time, or that it lacked the equipment, material or skills necessary to accomplish it. Rather, the Manager indicated that the continuing vacancies made it difficult for him to do the work; not impossible, as pointed out by the Organization. There is no evidence in the record to show why the Carrier chose to perform this work when it did because it obviously had been contemplated for at least six months, whether there were vacancies on the Trenton Subdivision between February 18 and August 13, 1999, or that the Carrier took any steps to utilize its own staff by adjusting the scheduling of work, or assigning overtime, when it determined, as was its right, not to hire additional staff for this short duration project. Under such circumstances, the Board concludes that the Carrier violated Rule 1(b) by subcontracting the right-of-way fencing work in this case.

With respect to the appropriate remedy, given the finding of the Board that there was no showing that the work in issue could not have been scheduled in such a way to have been performed by the Claimants, who were on the Trenton Subdivision at the time, we conclude that the Organization established a loss of work opportunity involved with the contracting herein supporting its request for monetary relief. Third Division Awards 32327 and 30528. However, as noted by

the Carrier, the amount of hours claimed was based upon an unsubstantiated figure relative to the terms of the subcontract, not upon the actual amount of hours it took to perform the work. Accordingly, we remand the case to the parties to determine the number of hours expended by the contractor in completing the work, and direct the Carrier to compensate the Claimants their proportionate share at their straight time rate of pay.

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 24th day of February 2005.