Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37466
Docket No. MW-36488
05-3-00-3-762

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former St. Louis –
(San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Gilbert Central Contractors) to perform Maintenance of Way work (operate equipment in the construction of track and bridges and related work in connection with a double track project) between Mile Posts 355.06 and 338.49 at Thayer, Missouri beginning January 9, 1998 and continuing through March 6, 1998 (System File B-2083-9/MWC 98-05-06AC SLF).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out said work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 99 and the December 11, 1981 Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Special Equipment '. . . Operators Jerry Johnston, Jim Simpson, P. E. Greenfield, R. B. Harris, D. E. Pepper, T. D. Faulkner, John Spiva, Duke Owens, John Callahan, and D. J. Brewer be paid for all hours that have been worked by the contractor on the above dates at their respective

rates of pay, equally divided among them except for the hours on the bridges, and we request that B&B employees Herbert Moore, R. E. Owens, Ron Harris, and M. E. Jones be paid for all the hours worked on the bridges at approximate M.P. 337.3 equally divided among them.'"

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.

On December 10, 1997, the Carrier provided the General Chairman with written notification of its intent to undertake certain construction work, as follows:

"As information, the Carrier proposes to perform the work of construction of an 18,160 TF double track project at Thayer, MO., between MP 335.06 and MP 338.49. As has been customarily done in the past with projects of this nature it is proposed to have certain elements of the work performed by a contractor who is adequately equipped and who has the expertise to complete all aspects of the work and to complete the work within the time frame allocated for the work. The work to be done is as follows:

'Contractor:

Embankment	80,000 CY (compacted)
Excavation	64,000 CY

Rock Excavation	6,400 (may require blasting)
Clearing/Grubbing	37 acres
Subballast placement	34,000 CY (compacted/laser graded)
Bridges	Construct concrete ballast deck T girders at MP 335.3, 335.6, 336.6, 337.3 (all 84 LF)
Culvert extensions	7 for a total of 332 LF (includes 3 box)
Fencing	18,160 LF
Road Crossings	2
Pole line	Remove 18,160 LF old pole line
Carrier Forces:	
Track Construction	18,160 TF using TLM
Crossover	Double #20'

It is anticipated that this work will begin no later than January 5, 1998. If you wish to discuss this project in further detail please contact me to arrange a meeting."

By letter dated December 15, 1997, the General Chairman expressed his disagreement with the contracting out of the above work and requested a conference to discuss the matter. The record shows that the conference was held on December 30, 1997, however the parties did not reach any agreement regarding the contracting issue.

On March 6, 1998, the Organization initiated a claim on behalf of the above Claimants for the work performed by Gilbert Central Contractors beginning on January 9 through January 17, 1998 for construction work performed with a trackhoe, grader, dozer, compactor, and roller, with two Operators, one Laborer, and a Foreman. From January 19 through March 6, 1998, the Organization contended that an additional eight Operators, two Truck Drivers and Bridge Men performed work that was reserved to the Claimants.

The claim was denied by the Manager Maintenance Support on May 5, 1998 and proceeded through the parties' negotiated claims handling process. It is now properly before the Board for adjudication.

According to the Organization, the work performed by the contractor was fundamental roadbed and bridge construction work that has historically, traditionally and customarily been performed by the Carrier's Senior Equipment Operators (SEOs) and B&B Subdepartment employees and is contractually reserved to them under the provisions of Rules 1 (Scope) and 5 of the Agreement.

The Organization further maintained that the work performed by the contractor accrued to the Claimants pursuant to Agreement MW-12, dated June 13, 1974, which specifically provided for the establishment of a work group of Special Equipment Operators (SEOs) and Traveling Maintenance of Equipment Mechanics to work throughout the system in the primary performance of grading work. Thus, by that special Agreement, the subcontracted work was clearly reserved to the SEOs, the Organization argued. During the on-property handling of this claim, the General Chairman provided evidence in support of the claim, including lists of more than 200 SEOs and Bridge Crane Operators qualified for the subject work, and a list of 88 mile post locations where B&B Subdepartment employees had constructed bridges in the past, the Organization further pointed out.

Moreover, the Organization contended that pursuant to Rule 99 of the Agreement and the December 11, 1981 Berge-Hopkins Letter of Understanding, the Carrier was required to provide the General Chairman with timely, written notification of its plans to contract out scope-covered work. According to the Organization, the notice was not sufficiently detailed and did not identify the specific skills or qualifications that the Carrier's forces supposedly lacked. Furthermore, the Carrier's purported defense that the Claimants were "fully employed" did not justify the subcontracting. In support of its position that the work involved in this case was scope-covered and thus was improperly contracted out, the Organization cited Third Division Award 35169, an on-property case which arose on the former SLSF Railway.

In addition, the Organization stressed that the above Letter of Understanding required the Carrier to "assert good-faith efforts to reduce the incidence of

subcontracting and increase the use of their maintenance of way forces." Because the Carrier's failure to demonstrate any such good-faith effort is evident in this case, the claim must be sustained, it stressed. See Third Division Award 35337.

In response, the Carrier asserts that the subcontracted work was part of a major track construction/rehabilitation project undertaken on the Carrier's merged system, including the former SLSF Railway. According to the Carrier, the work set forth in the December 10, 1997 contracting notice, which included building roadbeds, extending culverts, and bridge construction, has been routinely contracted out on this property, after the contractual notice and conference requirements have been met.

The Carrier contends that the Organization failed to meet its burden of proving that the claimed work has been performed on an exclusive basis by Maintenance of Way Department employees. The Carrier stresses that Rule 1, Scope, is a general Scope Rule and, as such, did not prohibit the Carrier from contracting out the work, which again, the Carrier asserts it had an "established practice" of subcontracting.

According to the Carrier, several prior Board Awards have established that on the former SLSF territory the Organization must show an exclusive past practice of work assignment in order for such work to be deemed as scope covered. Moreover, the precedent Awards held that where there is evidence of a "mixed practice" of contractors and Carrier Maintenance of Way employees performing the disputed work in the past, the Rules do not provide for the exclusive jurisdiction sought by the Organization. For example, see on-property Third Division Awards 20640, 20920, 36280, 36282, and 36283.

It is furthermore the position of the Carrier that major new construction projects like the work at issue here have been routinely subcontracted without violating the Scope Rule, and that under such circumstances, it is appropriate to assign portions of large scale projects to contractors. See on-property (former Burlington Northern) Awards 14 and 71 of Public Law Board No. 4768. Indeed, the Carrier contends that Award 71 is of particular relevance because the work involved in that case included essentially the same work at issue here, i.e., dirt work, culvert installation and bridge construction work performed in conjunction with a

double track project between Walker and Bill, Wyoming. See also on-property Third Division Awards 34041 and 34042 which arose on the former SLSF territory and involved new construction work involving the building of a new switch and crossover track and a new siding, performed by employees of this specific contractor (Third Division Award 34042).

The Carrier also argues that in Third Division Award 34212, a case which arose on the Carrier's former Burlington Northern property, the Board specifically found that Carrier Maintenance of Way forces are not qualified to perform roadbed construction (compacting) work. In that case, like here, the Organization asserted that Agreement MW-12 (also known as the "Grading Gang Agreement") accorded the Claimants a demand right to roadbed construction work. In denying that claim, the Board held that: (1) the Carrier had served a proper contracting notice; (2) the Carrier was not required to piecemeal the work; and (3) the Organization did not prove that its employees possessed the necessary skills.

With respect to the Third Division Award 35169, cited by the Organization, the Carrier contends that the Board should ignore it given the Carrier Members' vigorous dissent thereto. According to the Carrier, the above Awards clearly constitute a body of precedent that is controlling in this case where the facts are identical and the Carrier complied with the notice and conference requirements set forth in Rule 99 and the December 11, 1981 Letter of Understanding.

Thus, the Carrier urges the Board to follow the long line of established precedent cited in this case and thus deny the instant claim because: (1) the complexity of the work and the necessity of integrating it with other portions of the project warranted the subcontracting, especially in light of the fact that the Carrier's forces were fully employed; (2) the Claimants did not possess the skills necessary for building roadbed for new track, thus the work was not scope-covered; (3) the Organization did not carry its burden of proof regarding exclusivity; and (3) the subcontracting was permissible because the Carrier did not possess the equipment, manpower or expertise to complete the work in a timely manner.

Last, concerning damages, the Carrier submits that if the Board is inclined to sustain the claim, it should deny any monetary relief to the Claimants. The Carrier emphasizes that the Claimants were fully employed throughout the claim period

and, as prior Awards have provided, monetary payment under such circumstance would not be appropriate. See on-property Third Division Award 34214 and others.

The Board carefully studied the factual record and the arguments set forth by the parties. We find that the precedent Awards cited by the Carrier are highly relevant and have firmly settled this issue on this Carrier's property, specifically on the former SLSF territory; therefore, they must guide our decision in this case. Furthermore, upon our careful review of the record, we find that the Organization did not establish a prima facie case of a Rules violation, with respect to the notice and conference provisions of the Agreement. Thus given the lack of any proof of a Rules violation in this case involving new track construction, in the interest of stability, we are compelled to follow the holdings of the body of precedent that has evolved on this Carrier's property on this specific contracting issue.

We emphasize that all of the above-cited precedent Awards are well-reasoned and addressed the same issues present in this claim. Given, the fact that their holdings are not palpably erroneous, the Board will follow them. In so ruling, we recognize that we have essentially deemed Third Division Awards 35169 and 35337 to be inapplicable to the factual situation in the current case. Our reasons therefore are, first, Award 35169, an on-property decision on the former SLSF territory, involved a different issue concerning the construction of a TOFC facility on behalf of a lessee of the Carrier. Second, in Award 35337, which involved a contractor's construction of a tunnel liner culvert, the Board found for the Organization based on the specific facts of that case.

Thus, in light of the factual record before us and, again, the existence of a well-established line of precedent which has consistently supported this Carrier's right to contract out new construction work pursuant to the provisions of Rule 99 and the December 11, 1981 Letter of Understanding, the Board must conclude that the claim should be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of April 2005.