Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37476
Docket No. MW-36113
05-3-00-3-290

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
(
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Osmose) to perform Maintenance of Way & Structures Department work (perform pier repairs) on Bridge 282.56 (commonly referred to as Bridge #L-2) at La Crosse, Wisconsin beginning on July 24, 1998 and continuing to the exclusion of B&B Concrete Foreman J. Gallagher, Assistant Foreman B. Horstman, Carpenters S. Tarras and K. Shortreed (System File C-20-98-C080-02/8-00228-033 CMP).

(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 said work as required by Rule 1 and failed to enter into good-faith discussion to reduce the use of contractors and increase the use of its Maintenance of Way forces as set forth in Appendix I.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Gallagher, B. Horstman, S. Tarras and K. Shortreed shall now be compensated for a '. . . total of 2,334 hours in the aggregate, [or] in the proportionate at 583.5 hours EACH at the applicable time and one-half (1 ½) 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.

On February 25, 1998, the Carrier issued a notice advising the General Chairman of its intent to contract out the following work:

> "CP plans to replace span 6, a 164' truss, with 2-82' TPG spans set on a new pier in the French Slough. Work will consist of building a new pier in the river, repairs to existing piers 6 & 7, assembling the new spans on false work, removing the old track and truss, and installing the new spans and track and disposal of the old truss.
>
> Contractor will provide pile driving and lifting equipment to do work from the river without impacting train operations to drive piling for the new pier and false work, construct the pier and repair piers 6 & 7, assemble the new spans on false work, remove the old truss and install the new spans and dispose of the old material.
>
> Company forces will provide all flagging, do all track work required and will assist contractor in repairs to piers 6 & 7, removal of old truss and assembly and installation of new spans. . . ."

The General Chairman requested a conference to discuss the matter and the parties conferred on March 25, 1998. During the conference, it was agreed that Carrier forces would assist in the pier repairs consistent with the Carrier's subcontracting notice.

As matters developed, however, Carrier forces were not assigned to the project. Contrary to discussions during conference, the Carrier used contractors to perform the pier repairs without assistance from Carrier forces.

The Organization argues that the Carrier acted in bad faith when it undertook no effort to use its own employees on the disputed repair project. As evidenced by the commitment reached during conference, both parties recognized that this was work that was an integral part of right-of-way maintenance. The Carrier reneged on its commitment to have its forces assigned to the repair job without even so much as notice or explanation, the Organization asserts. In so doing, the Carrier violated the basic tenet of good faith incorporated in Rule 1 and Appendix I of the parties' Agreement.

The Organization further asserts that a monetary remedy is appropriate and necessary for this type of violation despite the Claimants' employment on the claim dates because the facts establish a loss of work opportunity and a blatant breach of the requisite good faith efforts to which the parties are committed by Agreement.

The Carrier concedes that it did not assign Carrier forces as originally discussed during conference but maintains that "unforeseen circumstances" dictated a change in the assignment of forces to the project. A delay in obtaining the regulatory permits pushed back the starting time for the project. Because the Carrier crew originally intended for the project was not available at that time, the contractor had to finish the work. The Carrier denies any intent to circumvent the good faith provisions of the Agreement and maintains that it complied with the requirements of Rule 1 by serving notice and conferencing the matter. The Carrier argues that it was not restricted from contracting out the work under the circumstances and the Organization failed to establish otherwise.

In addition, the Carrier submits that any monetary remedy would be excessive in the instant case because the Claimants were on duty and suffered no financial loss during the time period claimed. Equally important, the Carrier argues that the Organization improperly made claim for all hours worked by the contractor, when in reality the work that the Carrier agreed to allow maintenance forces to perform was limited to assisting the contractor, not performing the entire project.

The language contained in the Note to Rule 1 clearly sets forth the notice and conferencing requirements with regard to contracting out work. When the parties meet in conference, they "shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting . . . " subject to the Organization's right to protest by filing a claim. Appendix I reaffirms the parties' commitment to engage in good faith discussion in subcontracting cases.

Good faith obligations become meaningless if they do not extend to performance once an understanding is reached. The Organization in this case had a reasonable expectation that BMWE-represented forces would be used to perform the disputed work in accordance with the discussions during conference. When the Carrier instead contracted out the work to outside forces, it did not comply with the letter or the spirit of the good faith efforts required under the Agreement.

We reach this finding after giving due consideration to the Carrier's assertion that circumstances beyond its control prevented the use of BMWE-represented forces. Weighed against that assertion is the fact that more than four months elapsed from the time the parties met in conference until the disputed work began. During that time period, the Carrier did not inform the Organization that there was any change in circumstances. Moreover, there is no evidence of emergency, nor is there any indication that the Carrier was unable to adjust the planned work schedules of B & B forces to meet its commitment to utilize its own forces. As the Board noted in Third Division Award 26770, the Carrier has the burden of establishing that it acted with the requisite degree of good faith. It failed to meet that burden here.

As to the remedy issues, the Board reviewed the cases cited by both parties with regard to the full employment defense. We are not persuaded by the rationale in the Awards relied upon by the Carrier (see, e.g., Third Division Awards 29014, 32602 and 32865) and believe that the later decided Awards, particularly the many cases on this property, correctly resolve this issue. (See Third Division Awards 35378, 36255, 36277, 36527 and 36571.) The Claimants lost a work opportunity as a result of the Carrier's failure to abide by its good faith obligations. Therefore, that loss shall be made whole.

The precise number of hours involved is not so clear. During conference, it was agreed that BMWE-represented forces would assist in the repair work

performed by the contractor. That was the bargain struck and a make whole remedy should provide compensation to that extent. Accordingly, we order that the Organization and the Carrier meet to determine the number of hours worked by contractor personnel on the portions of the project that represent the amount of work that was lost to the Claimants as a result of the Carrier's violation of the Agreement. The Carrier is directed to compensate the Claimants for an amount equal to the proportionate shares of the total hours they would have expended on the disputed work. Based on the numerous Awards cited, we award compensation at the appropriate straight time rate and not the time and one-half rate as claimed. Third Division Awards 35378, 36225, 36227, 36527 and 36571.

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 19th day of April 2005.