Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37575
Docket No. MW-36537
05-3-01-3-32

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
(
(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 (Larson Contracting) to perform Maintenance of Way and Structures Department work (operate front end loader and dump trucks to dig out and haul away dirt, ballast and debris) at crossings at Mile Posts 132.6 and 132.4 in Lake Mills, Iowa on October 7, 1999, instead of Messrs. S. R. Johnson and D. C. Rusinack (System File 2RM-9107T/1216183 CNW).

(2) The Agreement was violated when the Carrier assigned outside forces (Larson Contracting) to perform Maintenance of Way and Structures Department work (operate front end loader and dump trucks to dig out and haul away dirt, ballast and debris) at crossings at Mile Posts 132.1 and 132.5 in Lake Mills, Iowa on October 11 and 12, 1999, instead of Messrs. S. R. Johnson, D. C. Rusinack, L. F. King, D. L. Bohl and R. L. Buol (System File 2RM-9108T/1216184 CNW).

(3) 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).

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants S. R. Johnson and D. C. Rusinack shall now each be compensated for eight (8) hours' pay at their respective time and one-half rates of pay.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants S. R. Johnson, D. C. Rusinack, L. F. King, D. L. Bohl and R. L. Buol shall now each 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.

According to the Organization, on October 7, 1999, the employees of Larson Contracting operated an end loader and dump truck to dig out and haul away dirt, ballast and debris from the 4th Avenue and Lake Street crossings in Lake Mills, Iowa, while the Claimants were at the job site "with their machines and dump truck, willing and able to perform the work." On October 11 and 12, 1999, the Carrier utilized six contractor employees to operate an end loader owned by Larson Contracting and two dump trucks owned by Bjorklund and Randall Transit to perform the same work at crossings located at Winnebago Street and Washington Street, in Lake Mills, Iowa.

The Organization argues that the disputed work has customarily, historically and traditionally been performed by the Carrier's Maintenance of Way forces, and was contractually reserved to them under Rules 1, 2, 3, 4, 5 and 7 of the Agreement. Moreover, the Organization asserted that, as outlined in Scope Rule 1(b), the Carrier was required to provide the General Chairman 15 days advance notice of its intent to contract out the work. It additionally contended that the work was not performed on an emergency basis, and the nature of the work was such that it did not fall within the exceptions specified in the second paragraph of Rule 1(b). Specifically, the Organization stressed that the crossing work performed did not require special skills not possessed by Carrier employees, special equipment not owned by the Carrier, or the use of special materials. According to the Organization, the Carrier was equipped to handle the work, and there were no pressing time requirements which precluded the Claimants from performing the work. It also added that, because notice of such contracting out has been sent in the past, even the Carrier has acted as if this Organization has met the so-called "exclusivity test" if that test is actually controlling.

The Carrier raised a threshold jurisdictional question concerning what it contends was the Organization's improper consolidation of "two separate and distinct cases handled on the property." According to the Carrier, the claims as identified in Parts (1) and (2) above, are factually distinguishable because "the two cases involved different locations, different defenses, and the second case involves three Claimants not involved in the first case." In the Carrier's view, the instant case must be dismissed by the Board for the reasons set forth by the Board in First Division Award 25212. In that Award, the Board dismissed the claims on "jurisdictional/procedural grounds without further comment on the underlying merits" because the Board found that the claims were "factually diverse and/or unrelated" and warranted the Board's attention on an individual basis given each claim's "particular set of facts and circumstances."

Without retreat from its position that the Board must follow the precedent established in Award 25212 and thereby dismiss the claims for lack of jurisdiction, the Carrier asserted with regard to the merits that the claims must fail. According to the Carrier, the Organization failed to prove that Carrier employees have performed the specific disputed work on a system-wide basis, and to the exclusion of others. The Carrier also stressed that no notice was necessary based on the evidence of record in this case because the Claimants failed to establish "any demand right to the work."

In response to the Carrier's position that the Board is precluded from deciding the instant claims from the statutory standpoint of jurisdiction, the Organization asserted that Third Division Awards 36069 and 36093, issued by the Board subsequent to the Board's decision in First Division Award 25212, are controlling. According to the Organization, in Awards 36069 and 36093, the Board found that the particular combination of contracting claims presented in those two Awards created no jurisdictional problem for the Organization because the claims involved "like issues."

Specifically, in Award 36069 the Organization points out that the Board held that, "Inasmuch as the pivotal issues central to both claims are identical, they have been appropriately combined upon presentation to the Board." With respect to the combined contracting claims adjudicated by the Board in Award 36093, asserts this Organization, the Board held at the outset, "It is not unprecedented for this Division and other Board tribunals to permit the combination of separate but factually linked claims into a single contract interpretation dispute, in the interest of administrative efficiency and economy."

The Board carefully studied the factual record before us, the jurisdictional and substantive arguments advanced by the parties, and the precedent Awards relied upon by these parties with regard both to the procedural/jurisdictional issues, and the merits and remedy. Having considered all elements of this dispute, we rule that there is no jurisdictional bar to the claims and, on the merits, the claims must be sustained in their entirety, for the reasons that follow.

First, as to the jurisdictional issue, we note that, as the party advancing the argument that the claims should be dismissed essentially for the reasons set forth in First Division Award 25212, the Carrier bears the burden of proving that the instant claims were improperly combined. We find that the Carrier did not sustain that burden on that point, given the Board's holdings in Awards 36069 and 36093, previously discussed, and the facts of these specific claims.

Applying the criteria set forth in Awards 36069 and 36093 to the facts present in the instant claims, we find that the Carrier did not sustain its burden of proving that the claims were "factually diverse and/or unrelated," and thus could not be administratively combined without ensuing jurisdictional error. The Board notes that two of the Claimants are common to both claims, the alleged violations were similar (excavation at crossings) and occurred at essentially the same location (Lake

Mills) and on dates that encompassed a period of only several days (October 7, 11 and 12). Moreover, the claims were discussed on the same date, and the predominant issue common to both claims was the Organization's assertion of a lack of notice and conference, under Rule 1(b). Consequently, we find the claims could be combined, as a sufficient factual nexus is clearly present here.

In light of the above, we also find that the Carrier's position that the cases should be regarded by the Board as distinguishable based on "different locations, different defenses," and essentially, "different Claimants" is simply not borne out by the record. Indeed, we find from the record that the "defenses" involved issues common to both claims (qualifications, etc.) that would have been the proper subjects for the pre-contracting conference mandated in Rule 1(b). Again, the location is virtually identical and two Claimants are the same in each case, we note. Most important, the Board strongly disagrees with the Carrier's contention that the defenses were generally distinct, and that combining the claims imposed an administrative hardship from the standpoint of the case discussion and/or rendering of an award. These specific findings support our finding that the logic of First Division Award 25212 favors the Organization in this instance.

Thus, the Board holds that, given the factual record before us, and the precedent created by Awards 36069 and 36093 on this specific Division, the Carrier's request for dismissal of the claims on procedural/jurisdictional grounds is denied.

Second, turning to the merits, we find from the record that the Organization established a prima facie case that the work was scope-covered and that the General Chairman was entitled to a 15-day advance notice and an opportunity to engage in a pre-contracting conference, pursuant to Rule 1(b). Therefore, in light of the unequivocal lack of notice and pre-contracting conference Parts (1), (2) and (3) of the claim must be sustained, we rule. See on-property Third Division Awards 19426, 20895, 20945, 20950, 21079, and Award 136 of Public Law Board No. 2960, upholding the Carrier's duty to provide the required notice, and Third Division Awards 25967 and 30977 supporting the Organization's right to a pre-contracting conference.

The Board further finds that the proper remedy for this Carrier's proven violation of the notice and conference requirements specified in Rule 1(b) is payment of the compensation as requested in Parts (4) and (5) of the claim, but at

their respective straight-time rates of pay. See Third Division Awards 35735, 35736, 36854 and 37376.

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 August 2005.