Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37992
Docket No. MW-36922
06-3-01-3-547

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Texas Mexican 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 (Railroad Contractors Construction) to perform Maintenance of Way and Structures Department work (replace, install and weld rail) on the main line track curve at Mile Post 108 in the vicinity of Alice, Texas beginning October 16, 2000 and continuing through December 12, 2000 (System File MW-01-2-TM).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper notice of its intent to contract out the work in question and failed to exert a good-faith effort to increase the use of Maintenance of Way forces and reduce the incidence of employing outside forces pursuant to Rule 29 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in either Parts (1) and/or (2) above, Claimants E. Lara, R. Garza, J. Lopez, N. Saenz, J. Sciaraffa, G. Vasquez, M. Paz, J. Rodriguez, J. Martinez, A. Garcia and A. Jimenez shall now each be compensated for three hundred twenty (320) hours' pay at their respective straight time rates of pay and for eighty (80) 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 Carrier owns and operates 157 miles of line in Texas, between Corpus Christi and Laredo. Several years prior to the events at issue herein, the Carrier employed approximately 40 Maintenance of Way (MOW) workers. Over the years, that number declined to 19, which the Carrier believed to be sufficient to perform all necessary MOW work on its line, which handled low density traffic. Subsequently, the Kansas City Southern Railway (KCS) acquired a majority ownership interest in the Carrier, and the Carrier became part of a larger rail network allied with Canadian National Railway and intended to reap the benefits of the passage of NAFTA by establishing a Canada to Mexico freight rail corridor. When evaluated in this context, it became clear that the Carrier's 157 miles of line required major refurbishing and rebuilding in order to handle anticipated high density traffic.

In relation with these efforts, the Carrier issued notice to the Organization on May 31, 2000, of its intent to contract out work specifically described to include rail replacement on the curve at Mile Post 108. The notice stated:

> "A recent FRA inspection of the Carrier's main line determined several areas that need immediate attention in order to correct serious problems and to protect against potential derailments.
>
> This work is time sensitive and of the nature that cannot be performed by the Tex Mex's regular MOW forces due to the amount of work these forces currently have scheduled and due to the fact that the Tex Mex does not own the equipment that will be required."

The Organization requested a conference, which was held on June 12, 2000. No understanding was reached between the parties. The Carrier proceeded to use an outside contractor to perform the rail installation work at issue.

On December 12, 2000, the Organization submitted the instant claim, which the Carrier denied. Having failed to reach a satisfactory resolution on the property, the parties submitted the dispute to the Board for final and binding resolution.

The Agreement between the parties provides in pertinent part:

"RULE 1 – SCOPE

(a) The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employees in any and all sub-departments of the Maintenance of Way and Structures Department and such employees shall perform all work in the Maintenance of Way and Structures Department....

RULE 29 – CONTRACTING OUT

When work coming under the Scope Rule of the Maintenance of Way agreement is found to be of such nature that it cannot be performed by the regular forces of the respective sub-departments, the General Chairman will be notified in writing at least fifteen (15) days in advance of any transaction for contracting out of such work. The carrier and organization representatives shall make a good faith attempt to reach an understanding on the contracting out of the work to be performed. In event no satisfactory agreement or understanding is reached, this rule will not affect the existing rights of either party in connection with the contracting of work and does not change, alter or modify any provisions of the Scope Rule or any rules of the applicable agreement in the handling of such matters."

In addition, a December 11, 1981 Letter of Understanding provides in pertinent part:

"The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the

procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties of subcontracting, the advance notices shall identify the work to be contracted and the reasons therefore [sic]."

The Organization contends that between October 16 and December 12, 2000, a contractor performed rail installation at the curve at MP 108, using two Foremen, one Welder, one Machine Operator and seven Laborers, and using an ordinary backhoe and hand tools. It is the Organization's position that such work is reserved to MOW employees under Rule 1 (Scope) and Rule 2 (Seniority) of the parties' Agreement. The Organization further argues that MOW employees have customarily and historically performed such work. According to the Organization, at the June 12, 2000 conference with the Carrier in which the work at issue was discussed, the Organization presented evidence that adequate Carrier forces and equipment were available to perform the work in question. The Carrier presented no evidence that the routine maintenance the Claimants were scheduled to perform during the claim period could not be rescheduled, the Organization asserts, and thus the Carrier's mere assignment of the Claimants to other work did not make the Claimants unavailable for the work. In addition, the Organization contends that the Carrier is obligated to manage its work force to ensure adequate size to perform necessary work, and cannot justify contracting out on the basis of its own lack of managerial foresight.

The Organization challenges the Carrier's characterization of the work as "time sensitive" or urgent. According to the Organization, the Carrier presented no evidence that Carrier forces could not complete the work within the necessary timeframe, or indeed, ever defined what the necessary timeframe was. The Organization further argues that the Carrier presented no evidence that it had an insufficient equipment inventory to perform the work, and that even if it had, the Carrier had an obligation to lease additional equipment under the terms of the December 11, 1981 Letter of Understanding. The Organization contends that the Carrier failed to meet its duty of good faith under the December 11, 1981 Letter of Understanding, alleging that at conference, Carrier representatives failed to provide specific information regarding the

work to be performed and the need to contract it out. The Organization also asserts that the Carrier created its own "emergency" by severely reducing its workforce, leading to track deterioration from deferred maintenance.

The Carrier counters that the work is not contractually reserved to MOW forces. According to the Carrier, Rule 1 governing Scope is general in nature. The Carrier argues that it is a well-established principle that where a Scope Rule is general - as here - the Organization bears the burden of demonstrating entitlement to the work by presenting evidence that MOW forces have performed such work in the past to the exclusion of others. The Carrier asserts that the Organization has not met this burden. While the Carrier does not deny that its MOW forces have performed rail installation work, the Organization failed to present any evidence that they have performed such work to the exclusion of others, or that work of the magnitude involved in the instant case has historically and customarily - or indeed, ever - been performed by MOW forces. The only evidence presented by the Organization to support its allegation that MOW forces have performed such work comprises two employee statements that fail to describe the amount or magnitude of the work performed.

The Carrier further contends that even assuming arguendo that the Organization had proved that such work was contractually reserved to MOW forces, the Carrier was explicitly permitted to contract out the work under Rule 29, after providing the Organization 15 days' notice and discussing the matter in conference at the Organization's request. According to the Carrier, the work at issue could not be performed by the Carrier's regular forces, who were fully employed on other scheduled work or otherwise unavailable for service. While the Organization asserts that the Carrier should not have reduced the size of its force to 19, the parties' Agreement places no restriction on the Carrier's managerial prerogative to determine the size of its regular force, and it is not obligated to maintain additional employees as a contingency for special and/or unforeseen work projects such as that involved in the instant case.

With regard to the Organization's arguments relative to the December 11, 1981 Letter of Understanding, the Carrier questions whether that the Letter of Understanding applies to Rule 29, which was agreed to in 1982. Assuming arguendo that the Letter of Understanding does apply, however, the Carrier contends that the Organization was provided every opportunity at conference to convince the Carrier that outside forces were not necessary. According to the Carrier, the December 11, 1981 Letter of Understanding's requirement of a good faith attempt to reach an understanding does not require Carrier capitulation to the Organization's position.

Moreover, under the Letter of Understanding, equipment is to be leased where practicable, which it was not in the instant case, where no employees were available to operate such leased equipment. The Carrier further argues that many of the instant claims are duplicative of claims already before the Board.

The Board finds that the Organization failed to meet its burden of showing entitlement to the tie installation work at issue. The Organization's argument that Rules 1 and 2 contractually reserve such work to MOW forces is without merit. Neither Rule reserves specific work to MOW employees. Rule 1 governing Scope is general in nature, and the Board has found numerous times that under such a general Scope Rule, in order to prevail in a contracting out claim, the Organization must present evidence that MOW forces have performed the contracted-out work in the past to the practical exclusion of others. In the instant case, while the Organization presented two employee statements that the employees had performed rail installation work in the past, the Organization has not provided any evidence that work on the scale of that at issue here - part of a major rebuilding project - had ever been performed by the Carrier's regular forces, much less historically and customarily, or to the practical exclusion of others.

Moreover, even assuming arguendo that the Organization had proved reservation of the work to MOW employees, Rule 29 nevertheless permits the Carrier to contract out such work provided that certain requirements are met. First, the work must "be of such nature that it cannot be performed by the regular forces." It is unrefuted that all 19 Carrier employees were fully occupied by their regular job duties or otherwise unavailable for this rail installation project. It is a matter of logic that Carrier forces could not simultaneously perform their regular duties and the large-scale project completed by the contractor between October 16 and December 12, 2000. The work was not the routine maintenance and repair normally performed by regular MOW forces. Rather, it was part of a special project undertaken to correct serious defects and upgrade the Carrier's line to meet the needs of high density traffic that it had not previously handled. The Organization offered no evidence to support its naked assertion that such work could have been performed by the Carrier's regular forces, or its allegation that the Carrier created the urgency of the situation by reducing its forces so that track deterioration resulted from deferred maintenance.

Rule 29 also requires the Carrier to provide the Organization 15 days' notice of its intent to contract out work, and make a good faith effort to reach an understanding with the Organization regarding the contracting out. It is undisputed that the Carrier

provided timely notice to the Organization and met promptly with the Organization to discuss the matter at the Organization's request. The Organization's argument that the Carrier failed to make a good faith effort to reach an understanding at conference is unpersuasive. The Organization has not pointed to any concession that the Carrier could have feasibly made to satisfy the Organization in the instant case. The Carrier's regular forces were fully employed. Even assuming arguendo that necessary additional equipment could have been leased, it is unrefuted that the Carrier had no regular employees available to operate such equipment. Similarly, assuming arguendo that the December 11, 1981 Letter of Understanding is applicable in the instant case, the Carrier met its obligations thereunder and the Organization has simply not shown any practical alternatives to the contracting out at issue here.

The Board notes that an analogous case involving these same parties was presented in Third Division Award 37008, (in fact, involving many of the Claimants in this claim) with respect to tie installation work from June 19 to August 16, 2001 on the Carrier's line between San Diego, Texas, (MP 107) and Bruni, Texas, (MP 49). In that case, the parties' positions were virtually identical to those taken in the instant case. The Board in Third Division Award 37008 found:

> "A careful review of the record convinces the Board that the Organization failed to prove a violation of the Agreement in this case. While the work of installing ties is arguably scope-covered work, the Carrier met its notice and conference obligations with respect to this contracting transaction, and supported its asserted reasons of insufficient manpower and equipment, time constraints, and the need for its existing 19 employees to attend to regular maintenance. Because the Organization was unable to show that work of this scope and nature is reserved to employees and failed to rebut the assertion that it has been contracted in the past, the Board cannot support a finding that the Scope Rule has been violated. . . ."

Similarly, the Board finds that the Organization's claim must 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 25th day of October 2006.