Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38963
Docket No. MW-37221
08-3-NRAB-00003-020182
(02-3-182)

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 (C. J. Anderson) to perform Maintenance of Way & Structures Department work (construction of a new locker room and general remodeling of existing toilet rooms) at the One Spot Office Building at Bensenville, Illinois beginning on January 3, 2000 and continuing instead of K. K. Popp, D. A. Davis, R. E. Bowers, R. M. Bean and G. A. Brinkmeier (System File C-06-00-C080-01/8-00228-046 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 said work as required by Rule 1 and failed to enter good faith discussion to reduce the use of contractors and increase the use of 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 K. K. Popp, D. A. Davis, R. E. Bowers, R. M. Bean and G. A. Brinkmeier shall now be compensated for '. . . for a current total of 568 hours in the

aggregate, [or] in the proportionate at 113.6 hours EACH at the applicable time and one-half (1-1/2) rate of pay for all lost time, wages, benefits and future work opportunities as a result of the Carrier assigning recognized and contractually approved maintenance of way work, to be performed by an outside contractor, namely C. J. Anderson, and its employees who possess no seniority or other contractual rights under the Schedule of Rules Agreement, Form 2625. This claim is to be considered continuing in nature until such time as this dispute is resolved as the work in question is ongoing.'" (Emphasis in original)

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 work in dispute here was a project to renovate one of the Carrier's buildings at Bensenville, Illinois. Although the Statement of Claim alleges that the Carrier failed to properly notify the General Chairman of its plan to contract the work, the Organization's contention is not supported by the record. It is undisputed that notice was served by letter dated November 12, 1999 which read, in pertinent part, as follows:

"The men's and women's locker room will be constructed in an existing shop area of the building. The work involves constructing a

reinforced concrete floor slab, constructing new insulated walls and installing a new insulated suspended ceiling with recessed lighting and associated wiring. A new heating and ventilating system with ductwork will also be installed. The toilet rooms will have some fixtures relocated to become handicapped accessible. New toilet partitions will also be installed as well as improved ventilation for the toilet and lunch rooms.

The work must be carried out by a licensed contractor who can obtain the required permits, coordinate and supervise the construction, and provide the Railroad with a warranty for the overall project."

The notice also asserted that the Carrier was not obligated to fragment the project. It went on to invite the Organization to discuss the notice in conference and suggested November 16, 1999 as the date to meet. Although the precise date of the conference was not established in the record, it is clear that the parties did meet but did not reach an agreement about the Carrier's plans.

It appears the basis for the Organization's notice allegation is its suspicion arising from the text of an e-mail it obtained on the property. The e-mail is dated December 21, 1999 and is between two Carrier officials. The e-mail notes that the contractor ". . . has already begun work on the project based on a verbal request and "letter of intent" from the Railroad. According to the claim filed by the Organization, actual work on the project did not begin until January 3, 2000. What work the contractor had already begun as of December 21 is not established in the record.

The text of the e-mail cuts both ways. While it is possible that the Carrier made its contracting decision before issuing the notice or conducting the conference, the actual timing of events may also be entirely proper. The e-mail was dated more than one month after the parties apparently met to conference on the notice. That allowed ample time for properly initiating the contracting transaction. Under the circumstances, it was the Organization's sole burden of proof to properly support its contention that the Carrier failed to provide proper notice. On the record before

the Board, the Organization has not done so. Accordingly, this aspect of the claim must be denied.

Turning to the merits, we find that the facts of this claim involve contracting principles that have been well established by numerous Board Awards. Generally speaking, in the absence of an emergency or similarly compelling circumstances, carriers may not contract out work within the scope of a Collective Bargaining Agreement that is reserved for performance by covered employees. Whether the specific work in dispute is reserved depends on the language of the applicable scope provisions. Work can be reserved by explicit language so stating in the scope rule. However, where, as here, the scope rule is general and does not contain any explicit reservation language, then the Organization must establish that the work has been customarily, traditionally, and historically performed by covered employees to demonstrate such reservation of work. In addition, where substantial projects are contemplated that involve significant amounts of both reserved and non-reserved work, the project can be viewed as a whole whereby the carrier is not required to fragment or piecemeal the overall project for the purpose of determining whether portions of the work could be performed by carrier employees.

On this record, the Organization submitted extensive documentation establishing that covered employees have performed significant portions of the disputed work. However, the evidence does not establish that they have ever performed heating, ventilating, air conditioning (HVAC) system installations or fabricated and installed any of the associated duct work. Other evidence in the record estimated the cost of the HVAC portion of the overall project to be some 31% of the contract amount of $100,000.00. This percentage is substantial and represents a significant component of the project. Its magnitude provides the requisite support for the Carrier's determination that the overall project need not be fragmented. In addition, our review of the record does not reveal evidence establishing that the Carrier's employees could have obtained any needed licenses and permits for the project.

After careful review of the record before the Board, we find that the Carrier did not violate the Agreement as alleged in the claim.

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 29th day of February 2008.