Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39518
Docket No. MW-37688
09-3-NRAB-00003-030045
(03-3-45)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers 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 (Holland) to perform Maintenance of Way work (in-track welding) between Mile Posts 385 and 460 beginning on May 7 and continuing through May 28, 1998 (System File B-2083-10/MWC 98-09-09AA 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 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Brewer, J. Callahan and J. Brewer shall now each be compensated for one hundred ninety-two (192) hours' pay at their respective straight time 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 Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the parties' Agreement by using a subcontractor to perform in-track welding work.

The Organization initially contends that the Carrier did not provide a valid basis for subcontracting the work in question. The Organization asserts that the Carrier used outside forces to perform basic, fundamental maintenance-of-way work for no other reason than because the Carrier felt that this was easier than using its own forces. It argues that this dispute involves bad faith on the Carrier's part, in that the Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of BMWE-represented forces, as required by Rule 99 and the December 11, 1981 Letter of Understanding.

The Organization maintains that the Carrier never made a good-faith attempt to assign its BMWE-represented employees to perform this work, and it never attempted to secure whatever equipment it deemed necessary for the work to be performed by its own forces. The Organization emphasizes that there is ample precedent for sustaining the claim based on the Carrier's failure to comply with Rule 99 and the December 11, 1981 Letter of Understanding. The Organization points out that the bottom line is that the Carrier did not establish justification for assigning the work to outsiders. The Organization asserts that the Carrier

shoulders a heavy burden to justify the use of outside forces to perform scope-covered work, but the Carrier failed to meet that burden.

The Organization emphasizes that the work at issue unquestionably is encompassed by Rules 2, 3, 4, and 5 of the Agreement. Moreover, the evidence conclusively shows that Carrier forces perform such work on a regular basis and forces receive on-going Welder training. The Organization points out that it is a fundamental rule that delegation of scope-covered work to others is a violation of the Agreement.

Addressing the Carrier's December 23, 1997, "informational" notice, the Organization asserts that it objected to the blanket nature of the notice. Among other problems, the notice failed to identify any reasons for contracting out the work, in violation of Rule 99. The Organization contends that the Carrier failed to fulfill its obligation to provide the General Chairman with proper advance notice of its plan to contract out the work at issue. Moreover, the Carrier flatly failed to comply with the December 11, 1981 Letter of Understanding, which mandates good-faith efforts to reduce subcontracting and increase the use of BMWE-represented forces.

The Organization then insists that there is no merit to the Carrier's position that the work was contracted out because the equipment was "specialized" and not available on a lease basis for operation by Carrier forces. The Organization points out that the equipment used to perform the work accomplished the exact same type of welding that current Carrier-owned equipment accomplishes. Moreover, the record is clear that Carrier forces perform rail welding work on a daily basis. The Organization further argues that the Carrier simply failed to make any attempt to determine the availability of equipment for its forces to operate during the 1998 work season.

The Organization goes on to argue that the Claimants all are entitled to the requested monetary remedy, which is supported by a number of Awards on the property.

As for the Carrier's "exclusivity" argument, the Organization asserts that this defense must fail. Citing a number of Awards, the Organization maintains that because this dispute involves the contracting out of work, the "exclusivity" test has no application. The Organization also insists that there is no merit to the Carrier's time limit argument. The incident at issue began on May 7, 1998, and the initial letter of claim was submitted on July 6, 1998, 60 days later, as required by Rule 90. The Carrier did not raise its timeliness objection until this matter was appealed to the highest level appeal officer. The Organization asserts that the instant claim was timely filed in all respects.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization made a material change in its claim as presented to the Board, as opposed to what was presented to the Carrier for on-property handling. The Carrier points to the reference in Part (2) of the claim before the Board to an alleged violation of Rule 99. The Carrier asserts that there was no such allegation in the initial claim. It argues that the variance in the two claims is prejudicial to the Carrier's rights, and it also is an attempt to amend the claim, which is prohibited by Rule 90. The Carrier emphasizes that arbitrators routinely have dismissed claims on the basis of material change.

The Carrier suggests that the real objective of Part (2) of the claim submitted to the Board is to allege a failure of "good faith" on the part of the Carrier, which the Carrier absolutely denies. It argues that as an alternative to the merits of its case, the Organization asserted that to demonstrate "good faith" under the December 11, 1981 Letter of Understanding, the Carrier must increase the use of its own forces by discontinuing subcontracting any work that its employees have been allowed to perform. The Carrier asserts that none of the Awards rendered on this point since that Letter of Understanding was implemented support the Organization's proposition.

The Carrier then asserts that none of the Rules cited by the Organization have any relevance to this dispute, and the Organization failed to prove that any particular Rule has been violated in this matter. The Carrier points out that where

a general Scope Rule is involved, the Organization must prove an exclusive past practice of assignment of the disputed work to support its contention. The Carrier insists that the Scope Rule in question is general; it does not delineate any particular tasks that the Carrier is responsible for assigning to BMWE-represented employees. As several Awards have found, the Organization, therefore, must prove that the work at issue has been assigned exclusively to the BMWE-represented employees before that work can be considered scope-covered. The Organization, however, failed to submit clear and convincing evidence that BMWE-represented employees exclusively perform the disputed work on a system-wide basis. Moreover, there is a long line of Awards holding that the Organization may not prove a reservation of work where there is a history of "mixed" performance of the work by the Carrier's employees and contractors.

The Carrier acknowledges that BMWE-represented employees may have performed similar work in a few limited locations, but the Organization has not met its burden of proving that they have performed such work on an exclusive, system-wide basis. The Organization also failed to meet a lesser burden of proving by clear and convincing evidence that its members perform the work in dispute. The Carrier asserts that because the Organization failed to meet its burden of proof, the instant claim must fail.

The Carrier then insists that the Claimants were fully employed during the claim period. The Organization failed to prove that the Claimants suffered any actual loss. The Carrier argues that there is no provision in the governing Agreement that allows for liquidated damages or punitive damages so as to provide a windfall profit to a claimant whose claim is not proven. The Carrier asserts that if the Board nevertheless determines that a monetary award is appropriate, any such compensation should be limited to those dates where service was performed; any dates on which the Claimants were voluntarily absent should be excluded from consideration.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the procedural argument raised by the Carrier, and we find it to be without merit.

The Board reviewed the record in this case, and we find that the Organization failed to meet its burden of proof that the Carrier violated the Agreement, Rule 99, and the December 11, 1981 Letter of Understanding, when it assigned outside forces to perform in-track welding work between May 7 and May 28, 1998. Therefore, the claim must be denied.

The record reveals that the Carrier sent a notice on December 23, 1997, informing the Organization that it intended to enter into a contract for three mobile in-track welders to make electric flash butt welds. The Carrier informed the Organization that the contractor would be supplying the Carrier with a fixed price for welding and would carry a warranty on all welds performed.

Also in that notice, the Carrier explained to the Organization that the in-track Welders would be scheduled in the consist of relay gangs starting in January 1998, and the average expected daily production per welder would be 12 welds per day. The Carrier went on to state that the mobile in-track welders would be owned, repaired, and operated by the contractor and that the contractor would provide one Service Technician and one Operator for each welding machine. The Carrier explained that it planned to schedule its own labor forces to support each welder with one Welding Foreman and two Grinder Operators. The Carrier attached a tentative in-track welding schedule for 1998. The letter concluded by telling the Organization that the letter was intended to inform the Organization of the track work programs and keep the Organization and its membership abreast of the Carrier's plans in the spirit of an open dialogue between the two parties.

The Board finds that the above notice was sufficient to comply with the Rule that the Carrier notify the Organization when it planned to subcontract work.

The Board further finds that the Carrier did not violate the parties' Agreement when it subcontracted the work at issue. The Carrier retained the Holland Welding Company because that company had the specialized equipment to

perform the work that was needed. The Carrier made a business decision in making that determination and the Board cannot find fault with that decision.

The Carrier pointed out that in the past, BMWE-represented forces have not been the sole individuals performing welding work for the Carrier. It is evident from the record that when the Carrier needed specialized equipment, it had subcontracted that type of work in the past.

The Carrier proved that nothing in the Agreement prohibits it from subcontracting the work involved as long as the notice to the Organization is proper. We have found that notice to be proper. The claim is denied for the reasons set forth above.

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 2nd day of February 2009.

ORGANIZATION MEMBER'S DISSENT
TO
AWARD 39517, DOCKET MW-37687
AND
AWARD 39518, DOCKET MW-37688
(Referee Meyers)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. In this case, the Majority apparently forgot the principles in contracting out of work cases and simply followed the Carrier's submission when this award was written. The very way the Carrier handled this case smacks of bad faith and for the Majority to condone such action clearly defiles the entire railroad arbitration process.

The Majority's err here was to accept the Carrier's economic reasons for contracting out this work and stating that they are acceptable reasons therefor. The Majority held that "In this case, the Carrier did not own the appropriate equipment to perform the work and it did not make economic sense to lease the specialized equipment." The Majority's opinion flies in the face of the December 11, 1981 Letter of Understanding wherein that agreement clearly states the following,

"APPENDIX Y

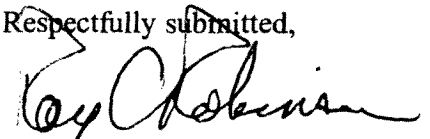
* * *

> 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 employes."

It is crystal clear that the parties did not consider any possible economic aspects of their actions when they entered into the December 11, 1981 Letter of Understanding as there was no language in said Understanding that would limit the scope thereof based on an economic model. Inasmuch as such was the case, the Majority's assertion that it was proper to consider economic aspects of this case as a reason to deny the claim flies in the face of the December 11, 1981 Letter of Understanding.

The award is therefore based on a faulty premise, palpably erroneous and of no precedential value. Therefore, I dissent.

Respectfully submitted,



Roy C. Robinson
Labor Member