Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39883
Docket No. MW-38750
09-3-NRAB-00003-0050174
(05-3-174)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 to perform Bridge and Building Subdepartment work (removal and replacement of drainage pipes/culvert) in the vicinity of the Shiller Park Yard beginning on February 24, 2003 and continuing through March 3, 2003 instead of Messrs. A. Palencia, A. Avila and A. Ochoa (System File C-02-03-C080-02/8-00228-088 CMP).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a 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 A. Palencia, A. Avila and A. Ochoa shall now each be compensated for forty-five (45) 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 the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it assigned outside forces, instead of the Claimant, to perform B&B work.

The Organization initially contends that the Carrier admittedly failed to give the General Chairman advance written notice of its plans to contract out the work in question despite the fact that such work customarily and traditionally has been performed by BMWE forces for decades. The Organization asserts that the Carrier made it impossible for the parties to engage in good-faith discussions for the purpose of reaching an understanding concerning the Carrier's desire to contract out such work. It argues that because the Carrier failed to fulfill its obligations under the Scope Rule and the December 11, 1981 Letter of Understanding, its decision to contract out the work in question was a violation of the Agreement. It maintains that because the Carrier is an established flagrant and repeated violator of the notice provisions of the Agreement, there are a number of Awards that serve as well-reasoned precedent for sustaining the instant claim in full.

The Organization emphasizes that during the on-property handling, the Carrier never disputed that the subject work was encompassed within the Scope Rule. It asserts that it would be improper for the Carrier to so argue for the first time before the Board. Citing several prior Awards, the Organization points out that when the Carrier assigned or otherwise allowed the subject work to be performed by other than those for whom the Agreement intended, the Carrier

violated the Agreement. Because the subject work unquestionably falls within the purview of the Scope Rule, the Carrier was obligated to assign the work to the Claimants, absent any express restrictions listed within the contracting portion of the Rule.

Turning its attention to the Carrier's defenses, the Organization asserts that these various excuses were unsubstantiated, specious, and invalid. It insists that the General Chairman refuted all Carrier contentions during the on-property handling of this matter, and it is evident that the Carrier was merely attempting to mitigate its blatant notice violation. The Organization points out that the Carrier raised its boilerplate "exclusivity" and "full employment" assertions, but prior Awards have rejected these assertions. The Organization insists that the central point in this matter is that the Carrier violated the Agreement when it failed to provide proper advance notice to the Organization of its intent to contract out the subject work.

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

The Carrier initially contends that it met its obligation under the Agreement, and the Organization failed to establish any Rule violation by the Carrier. The Carrier asserts that the work at issue is not reserved to BMWE-represented Milwaukee property employees under their Agreement. It argues that the subject work is not track maintenance work or section work, so it is not covered under the Agreement.

As for the Organization's attempt to argue a failure to provide notice under Rule 1, the Scope Rule, the Carrier asserts that notice was not required because the subject work is neither covered by the Scope Rule nor reserved to employees covered by the Agreement. The Carrier points out that the work took place on the Soo Line's Intermodal Facility at Schiller Park, and not on Milwaukee property. The Carrier emphasizes that this property historically has had a mixed practice of maintenance, and the Organization failed to dispute this. The Carrier asserts that BMWE-represented forces never performed this work at the Schiller Park facility. The Carrier insists that because the work has not traditionally, historically, or customarily been performed on Soo property by Milwaukee property employees, notification was not necessary.

The Carrier goes on to argue that the Claimants have no seniority at the Schiller Park facility and, therefore, no right to the work. There is no established practice of Milwaukee Schedule BMWE forces installing culverts at Schiller Park on the Soo property. The Carrier submits that although Milwaukee employees may have performed work at Schiller Park, such work clearly is not contractually reserved under the Agreement. Moreover, although it may have been agreed to commingle work, this did not retroactively establish historical, traditional, or customary performance of this work on the Soo property.

The Carrier points out that the Schiller Park facility was maintained by outside concerns. It argues that Soo Line Schiller Park BMWE forces merely did track maintenance work. The Carrier further asserts that, contrary to the Organization's allegations, there is no evidence of the equipment necessary to perform the subject work being available at Schiller Park. The record demonstrates that only three Soo Line employees were located at Schiller Park, and there was no machinery or other equipment. The Carrier contends that there is no evidence of the subject work traditionally or customarily being performed by BMWE forces at this location.

The Carrier insists that, contrary to the Organization's position, B&B work never was commingled or transferred under the jurisdiction of the BMWE Milwaukee Agreement. The Carrier points out that section work, not B&B work, was transferred and commingled. The Carrier asserts that it transferred this work because it made more sense to fill the job with employees living in the Bensenville area, and former Soo Line employees did not want to travel to Schiller Park to protect the available work.

The Carrier emphasizes that it never has served notice of contracting of work of this nature at this facility, and the Organization failed to establish such work being performed by B&B employees for the past 25 years. The Carrier submits that the work that was commingled and fell under the Organization's jurisdiction was the work currently being performed at the Schiller Park facility, and that was only minor track maintenance. There has been no showing of any Soo Line employee performing the subject work at Schiller Park.

The Carrier then argues that the Award relied upon by the Organization does not support its position. Not only was this Award issued some 22 years prior to the

transfer Agreement, but the work at issue here is different from the work referenced in that Award. The Carrier insists that the subject work here was not performed at Schiller Park, so it was not transferred to the jurisdiction of Milwaukee BMWE forces.

The Carrier goes on to assert that the Scope Rule does not require notice to contract work not previously performed. The Organization provided no evidence of any B&B work being performed at Schiller Park between 1978 and 2000, the year of the transfer agreement. Moreover, there is no evidence of the work in dispute being performed by former Soo Line employees at Schiller Park subsequent to 1978. If such work was not being performed, then it was not transferred. The Carrier contends that B&B work never was commingled or transferred under the 2000 Agreement, and never came within the scope of the Milwaukee Agreement. The Carrier argues that the Organization failed to meet its burden of proof, and is attempting to use the claims-handling process to expand the scope of its Agreement to the Schiller Park facility.

The Carrier contends that the original claim filed is excessive, and work was performed only on February 24, 25, and 26. In addition, the Claimants were fully employed on the claim dates working at locations and on positions as a result of the free exercise of their seniority. The Carrier points out that the Agreement does not provide for penalty pay.

The Carrier then asserts that the time rolls submitted by the Organization are more than 15 years old, relate to work on the former Milwaukee property, and are totally unrelated to the Soo facility at Schiller Park. It insists that the Organization failed to meet its burden of proving a tradition, practice, or custom of performing this work. The work commingled under the 2000 transfer agreement was the work then being performed by the three employees at Schiller Park who were transferred under the Milwaukee Agreement. The Carrier contends that none of these employees were from the B&B Department.

The Carrier goes on to contend that the instant claim is not valid. The Organization provided no vidence to support the number of hours worked or the number of hours claimed, nor is there any evidence of a past practice of performing this type of work at Schiller Park. The Claimants were fully employed on the claim dates, were unavailable to perform service, and suffered no loss as a result of the

work being performed by outside forces. The Carrier insists that the original claim was filed on behalf of the wrong Claimants, and it therefore is barred from consideration.

The Carrier argues that the notice requirements in the Scope Rule refer only to scope-covered work. The subject work never was covered by the Milwaukee Agreement, nor was it transferred under the Milwaukee Agreement.

Pointing to prior Awards, the Carrier asserts that if work is not traditionally, historically, or customarily reserved under the Scope Rule, then the Organization bears the burden of establishing "exclusivity," that none but its own members have customarily and traditionally performed the work at issue. Although the Organization argued that the "exclusivity" standard applies only to jurisdictional disputes between crafts, the Carrier insists that this is clearly not the case. The Carrier emphasizes that the principle of "exclusivity" applies equally to disputes arising from work performed by outside forces – it preserves the status quo.

The Carrier argues that the Organization is improperly attempting to employ the arbitration process to gain additional rights to solely perform work that it and others had customarily but not solely performed. The Carrier asserts that the Organization's attacks on the exclusivity doctrine are part of its goal to expand the Scope Rule through arbitration. The Carrier submits that the Organization's arbitration strategy is a direct result of its failure at disturbing the status quo through negotiations. The Carrier contends that "exclusivity" is the common-sense approach to analyzing the parties' general Scope Rule in jurisdictional disputes between crafts and in disputes where a craft is challenging work done by outside forces.

The Carrier then points out that the Agreement is silent as far as failure to give notice. The Carrier asserts that the Organization's request for a financial remedy therefore is improper. The Carrier emphasizes that the Organization failed to carry its burden of proving that the subject work has been performed by its members in all instances throughout the system, to the exclusion of all others. The Carrier therefore contends that the performance of this work by an outside concern was not a violation of the Agreement.

The Carrier also asserts that it is well established that scope Rules that are general in nature cannot be construed as exclusive job description Rules or specific work reservation Rules to a given class or craft in the absence of precise language to that effect. The Organization failed to submit substantial probative evidence to bring the disputed work within the Agreement's general Scope Rule. The Carrier points out that although the subject work is not within the Scope Rule and no notice was required, it provided notice anyway and did not violate the Agreement.

The Carrier goes on to contend that the Scope Rule expressly provides that it does not affect the parties' existing rights in connection with contracting out. The Carrier points out that it accordingly has the right to proceed with contracting, even if it gives notice and the parties do not agree. The Carrier points out that the Organization bases its claim on a failure to give notice, but notice was not required. Moreover, the Carrier insists that because the Scope Rule allows for contracting even if a notice is not served, a decision cannot be based on the failure to give notice alone. The Agreement, in addition, does not provide for a penalty payment for failure to give notice.

The Carrier asserts that the Scope Rule at issue is different from those on other properties in that it requires the Organization to prove exclusivity prior to the Carrier being obligated to provide notice. The Carrier contends that the Organization has not and cannot make this showing. Because the Scope Rule allows the Carrier to contract out work, the employees must establish that they have been the only ones to have performed such work in order to deny the Carrier the right to contract. The Carrier argues that it is most improper for the Organization to attempt to alter the Scope Rule through the claims-handling process.

The Carrier argues that because the Organization's members never have performed the subject work, there is no evidence to be provided by the Organization.

As for the Organization's suggestion that the Carrier is not dealing with it in good faith, the Carrier points out that simply because the Organization disagrees with the Carrier does not mean that the Carrier is not making a good-faith effort when it refuses to pay a claim that it does not believe is legitimate. The Organization is attempting to place a restriction on the Carrier where one never has

existed in the past. The Organization is attempting to secure work for its members that they never previously possessed.

The Carrier submits that it made a good-faith effort in every way possible to reduce the subcontracting of BMWE work and increase the use of BMWE forces. It is most improper for the Organization to now claim work that has been performed by outside forces on numerous occasions in the past, and without objection from the Organization.

The Carrier ultimately contends that the instant claim should be denied in its entirety, and that if this Board disagrees, then the theory of mitigation of damages should apply.

The Board reviewed the record and finds that the Carrier violated the Agreement when it failed to furnish the General Chairman with proper, advance written notice of its intent to subcontract the work at issue as required by Rule 1. Moreover, the Carrier failed to enter into the good-faith discussions that are required by that Rule in an effort to avoid the use of outside contractors when work can be performed by the Carrier's own forces.

The Carrier may have had a legitimate basis to subcontract the work at issue. The problem here is that the Carrier failed to comply with the parties' Agreement that it will give notice to the General Chairman and then meet with the General Chairman and Organization representatives in an effort to either find a way to utilize the Carrier's own forces represented by the Organization or explain to the Organization why that is not possible. This language requiring notice has been in the parties' Agreement for a long time and has a specific purpose. In this case, the Carrier ignored that language and simply subcontracted the work at issue.

Because the Carrier acted in violation of the parties' Agreement when it failed to issue notice to the Organization, the claim must be sustained.

AWARD

Claim sustained.

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 31st day of July 2009.