Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39885
Docket No. MW-38860
09-3-NRAB-00003-050293
(05-3-293)

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 authorized additional outside forces (Edward Kramer and Sons) to perform Maintenance of Way & Structures Department work (drilling and torch cutting to accommodate steel ties to be affixed to steel girders) on the movable bridge at River 391.31 in Hastings, Minnesota on December 1, 2, 3, 4, 10 and 11, 2003, instead of B&B employes G. Weiting, T. Lancaster, J. Cornwell, B. Horstman, R. Beckman, S. Smith, K. Shortreed and J. Galvan (System File C-51-03-C080-18/8-00228-098 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 when it failed to enter good-faith discussions and efforts 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 G. Weiting, T. Lancaster, J. Cornwell, B. Horstman, R. Beckman, S. Smith, K. Shortreed and J. Galvan shall now each be compensated at their applicable rates of pay for a proportionate share of the total of one hundred twenty-eight (128) man-hours expended by the outside forces in the performance of the aforesaid work."

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 Maintenance of Way work.

The Organization initially contends that the Carrier once again failed to provide proper notice or hold "good faith" discussions with the General Chairman. The Organization asserts that because the Carrier is an established flagrant and repeated violator of the Agreement's notice provisions, the Board need look no further than prior Third Division Awards for well-established precedent to sustain the instant claim in full.

The Organization argues that even if the Carrier's alleged "reasons" for contracting the ordinary B&B steel crew work at issue were valid, which they are

not, these "reasons" all are procedurally defective because they were not topics at pre-contracting conference discussions pursuant to a proper notice. Moreover, the General Chairman soundly refuted all Carrier contentions as contradictory, specious, tired, and/or misplaced. The Organization maintains that all of the Carrier's assertions about "emergency," "exclusivity," etc., cannot be construed as defeating the instant claim.

The Organization insists that the work at issue plainly is encompassed within the scope of the Agreement as typical steel bridge crew work reserved to B&B steel crew employees in accordance with Agreement Rules. Citing several Awards, the Organization emphasizes that the Carrier's decision to remove this work from those for whom the Agreement was negotiated, and to assign it to outside forces, violated the Agreement. The Organization submits that because the subject work unquestionably is within the scope of the Agreement, the Carrier was obligated to assign it to the Claimants, absent any express restrictions listed within the contracting portion of the Rule.

The Organization goes on to argue that it is abundantly clear that the Carrier's "notice" did not meet its good-faith obligations under the Agreement Rules and prior Awards. The Organization insists that the Carrier demonstrated its propensity for failing to comply with the advance notice and meeting requirements. This Carrier flagrantly and repeatedly failed to comply with the advance notice and meeting requirements of Rule 1 and the December 11, 1981 Letter of Understanding. Moreover, this dispute merely represents another attempt by the Carrier to give illusion of compliance with the contracting Rule while it violates the underlying concepts.

The Organization emphasizes the Carrier's blatant failure to exercise good faith. The Organization contends that the Carrier's September 30, 2003 "notice" made it painfully obvious that the Carrier was attempting to coerce an agreement from the General Chairman to disregard the Claimants' right to all work of their class within the established territorial limits, but the General Chairman did not take the bait. The Organization contends that because the Carrier provided no reason, much less a good-faith reason, for contracting out the subject work, there was no good-faith effort to assign BMWE forces such as the Claimants.

The Organization then asserts that the Carrier's defenses were specious, invalid, and unsubstantiated. The Organization insists that it simply is not true that there is a past practice of contracting ordinary B&B work. The Organization points out that the instant matter involves ordinary, if not routine, B&B work. The prior Award relied upon by the Carrier on this point does not involve such routine and ordinary work. The Organization suggests that the Carrier's "past practice" assertions are further evidence of its blatant bad faith in contravention of its obligations under the December 11, 1981 Letter of Understanding.

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

The Carrier initially contends that any Award herein other than a denial would mean that the Board has exceeded its jurisdiction. The Carrier asserts that the claim submitted to the Board is not the same claim as presented on the property. It argues that the Organization now tries to allege that the Carrier failed to provide "proper notice," but there is no Agreement requirement that identifies what a proper notice is or what is required in a proper notice.

The Carrier emphasizes that the Organization acknowledged that notice was served and a conference was conducted. The Organization, however, presented nothing that convinced the Carrier to utilize its members. In fact, the Organization refused to allow the Carrier to do so. The Carrier asserts that the Organization thereafter filed the instant claim. The Carrier emphasizes that nowhere within 60 days of the Carrier's notice did the Organization ever object to or question such notice. Any such argument now is improperly before the Board, and the entire claim therefore is flawed and must be dismissed.

The Carrier asserts that the Organization failed to provide any evidence that the Carrier is obligated to reduce its use of contractors. The Carrier asserts that the instant claim is most improper and incorrect. The record completely contradicts the Organization's claim that no notice was provided. The Carrier insists that it met with the Organization in a good-faith attempt to utilize BMWE-represented employees to perform the work, but the Organization refused to allow this, alleging that Southern Division BMWE employees had no right to perform BMWE work on

the Northern Division. The Carrier argues that the Organization also refused to allow the Carrier to contract the work.

The Carrier contends that the Organization cannot refuse the work for its members, and then allege that the Carrier is not acting in "good faith" if it contracts out. The Carrier asserts that it has the option to utilize either BMWE members or a contractor, and the Carrier chose the former. The Carrier emphasizes that the Agreement provides for the Carrier to subcontract. The Carrier insists that it provided notice and met its good-faith effort to meet and minimize the use of contractors by offering to utilize Southern Division BMWE forces to perform the work because all Northern Division employees were fully employed and insufficient to complete the work during the remaining construction season.

The Carrier points out that all Northern Division forces had work scheduled into the upcoming construction season. The Carrier emphasizes that no BMWE forces were furloughed as a result of the Carrier's use of a contractor in this matter. The Carrier argues that under the circumstances, whether or not the Organization has established the subject work to be normally or customarily performed under the Agreement does not prohibit the use of a contractor. The Organization simply cannot refuse to perform the work with its own members and restrict the use of a contractor at the same time.

The Carrier asserts that the Organization failed to prove that the Carrier violated the Agreement or that the Claimants are entitled to the requested remedy because they suffered no loss. Because the Organization turned down the work and the Northern Division forces could not have completed the project within the required time frame, there was no lost work opportunity. The Carrier argues that under the circumstances, the Agreement does not prohibit the use of contractors. In fact, the Agreement provides for it. The Carrier emphasizes that the contracting was necessary, and the Carrier was within its rights to contract the subject work, even if the Organization had established the work to be scope-covered.

Pointing to prior Awards, the Carrier contends that the Agreement allows the Carrier to contract work, so long as it provides notice and meets with the Organization. The Carrier argues that the Organization once again failed to

demonstrate that the subject work is reserved by Agreement, Rule, custom, practice, or tradition. The Carrier insists that it previously has utilized a contractor to perform this work. It asserts that because the Organization turned down the Carrier's request to utilize its members in the instant case, the Carrier was forced to contract the work.

The Carrier then points out that because all Northern Division BMWE forces had work scheduled that would take them through the year and into the next without break or furlough, all Claimants were unavailable and thereby improper Claimants. The Carrier points to the strict time constraints on this work due to the necessity of waiting until navigation on the Mississippi River was suspended in December, leaving little time to complete the work as budgeted in 2003.

The Carrier argues that the Organization is not willing to provide the flexibility to utilize members from one Division who do not have enough work to perform work on another Division. The Carrier asserts that "good faith" goes both ways. When the Carrier attempts to utilize its employees, the Organization objects and argues that it would rather have Southern Division employees furloughed than utilized on the Northern Division. The Carrier suggests that the Organization certainly is not attempting to convince the Carrier to utilize its members when it refuses to allow the use of one of its crews across a seniority district.

The Carrier goes on to assert that the claim is excessive in the work claimed, the number of employees utilized to perform the work, and the total number of hours claimed. The Organization failed to support the number of hours claimed.

The Carrier insists that there is no truth to the Organization's position that the Carrier attempted to strong-arm it into concurrence. The Carrier argues that the Organization cannot have it both ways by refusing to allow the Carrier to utilize its members and filing a claim in an effort to restrict the Carrier from contracting out. The Carrier contends that the Organization either wanted the work or it did not. Based on its refusal to allow the Carrier to utilize its members, the Organization did not want the work and the Carrier was forced to contract out.

The Carrier emphasizes that the Claimants, having exercised their seniority rights, were working on the positions they desired and at locations they desired. The Claimants were fully employed and suffered no loss. Moreover, there is no evidence that any BMWE-represented employees were furloughed or of how the Carrier could have rescheduled its forces and completed the work required of the B&B forces for the season. The Carrier argues that the Claimants' work could not be rescheduled so that they could perform the subject work, and the Organization has not established otherwise.

The Carrier points out that it is not required to obtain the Organization's permission before contracting out work. Once notice is served, the Carrier may proceed and the Organization may file claims. The Carrier contends that it satisfied its obligations under Rule 1 in this matter; notice was provided, and the parties met. The Carrier argues that Awards establish that the Carrier has the right to contract scope-covered work.

The Carrier argues that should there be a decision in the Organization's favor, the Carrier would have the right to reduce such claim based upon actual hours worked, and hours that any Claimants were unavailable due to vacation, leave, or any other reason. The Carrier insists that the instant claim is incorrect, invalid, and excessive. It asserts that numerous Boards have ruled that such blanket claims do not constitute valid claims.

The Carrier goes on to contend that the Organization failed to meet its burden of proving that the subject work historically and customarily has been performed by the Claimants. The Organization failed to prove that the Carrier violated the parties' Agreement when it contracted out the bridge work. The Carrier asserts that such work, at most, was performed by employees on a shared basis with contractors, and the evidence actually shows that this work historically and customarily has been performed by contractors. The Organization simply has not demonstrated a right to the claimed work.

The Carrier then asserts that "exclusivity" is relevant in these types of disputes. The Carrier also argues that this subcontracting merely demonstrates a reasonable business decision, and it does not result in the subversion or weakening

of the parties' Agreement. The performance of the subject work by an outside concern was not a violation of the Agreement Rules or Appendix I, and the Carrier did not contract out work within the jurisdiction of the BMWE Schedule Agreement.

The Carrier submits that the Organization has not shown that the subject work was reserved to its members and encompassed within the scope of the Agreement. The Organization has not shown that the Claimants performed the specific work described in the claim, much less that the Claimants customarily, historically, or traditionally performed the work. The Carrier argues that the record shows that contracting out was necessary. The Carrier points out that because the Organization failed to show that the subject work was the Organization's, the Carrier was within its right to go forward and contract out the work. The Carrier emphasizes that the Scope Rule and the December 11, 1981 Letter of Understanding preserve the Carrier's existing rights.

The Carrier asserts that under the Agreement, the Carrier has the right to proceed even if it gives notice and the parties do not agree regarding the proposed subcontracting. The Carrier contends that under the very language of the Scope Rule, the Carrier has every right to contract out work. The Carrier argues that it did not violate the Agreement.

The Carrier asserts that the Organization failed to meet its burden of proving a past practice on the property. The Carrier submits that the record shows that it consistently has contracted this work, and there is no showing of a practice of the Organization's members performing the subject work. The Organization therefore loses on both counts, in that there is no Agreement language and no practice that supports its position.

As for the Organization's position that the Carrier is not dealing in good faith, the Carrier suggests that just because the Carrier does not agree with the Organization does not mean that the Carrier is not acting in good faith. The Carrier submits that the Organization is attempting to place a restriction on the Carrier where one never existed, and it is attempting to secure work for its members that they previously never possessed. The Carrier insists 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. The Carrier asserts that it is most improper for the Organization to claim work that has been performed by outside concerns on numerous occasions in the past.

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

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it subcontracted with outside forces to perform drilling and torch cutting work in December 2003.

The record reveals that contrary to the Organization's argument, the Carrier did provide notice to the Organization prior to subcontracting the work at issue. Organization representatives met with the Carrier and although the Organization takes the position that the Carrier tried to "strong arm" the Organization, the record makes it clear that the Carrier and the Organization discussed the planned subcontracting after the Organization received notice and the Carrier made its determination to subcontract the work. The Carrier has that right.

It is fundamental that the Organization bears the burden of proof in cases of this kind. In this case, although the Organization is unhappy about the subcontracting of the work at issue, the Board finds that the Carrier did not violate the parties' Agreement when it took the action of assigning the work to outside forces. Therefore, the 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 31st day of July 2009.