Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40339
Docket No. MW-40262
10-3-NRAB-00003-080054

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 Division -
(IBT Rail Conference
(
(Union Pacific Railroad Company (former Missouri
(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 (Tony Winkel) to perform routine Maintenance of Way Department work (build a crossover panel and related work) at LF979 in the vicinity of Mile Post 279.40 on the Lafayette Subdivision on September 8, 9, 10, 11, 27 and 28, 2006 (System Files MW-06-103/1460035 and MW-06-115/1461871 MPR).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out said work as required by Rule 9, or make a good-faith effort to reduce the amount of contracting, as provided in Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants A. Landry, B. Tomkins, G. Welsh, M. Landry, A. McBride, J. Cherry, D. Louis, B. Ardis, J. Ingram, R. Fontenot and L. Spell shall now each be compensated for a total of thirty-two (32) hours at their respective straight time rates of pay and for a total of twenty-eight (28) hours 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 Organization filed the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it utilized an outside contractor to perform Maintenance of Way work.

The Organization initially contends that the Scope Rule, as well as Rules 1 and 2 clearly reserve work of the character involved here to Carrier forces. The Organization asserts that the work in question is basic track work, so it unquestionably is encompassed within the Scope Rule and accrues to the employees who have established seniority and the right to perform such work in accordance with the Scope Rule and Rules 1 and 2. The Organization argues that the parties intended that all such work would accrue to Maintenance of Way forces absent some type of extenuating circumstances in a particular instance. The Organization emphasizes that no extenuating circumstances existed in the present case because all of the subject work was planned and scheduled by the Carrier.

Pointing to the past and current utilization of Carrier forces to perform work of the character involved here, in conjunction with the Agreement Rules, the Organization maintains that there can be no question that such work is reserved to Maintenance of Way forces. The Organization submits that such work customarily and traditionally has been assigned to and performed by the Carrier's Maintenance of Way forces.

The Organization then emphasizes that although the Carrier argued that the work at issue is not encompassed within the scope of the Agreement and that Maintenance of Way employees have not performed the work to the exclusion of all

others, the Carrier did not dispute that Maintenance of Way employees historically and traditionally have maintained the right-of-way. Pointing to several Third Division Awards, the Organization submits that the character of work reserved to various classes of employees covered by the Scope Rule of the Agreement is that which they traditionally and historically have performed.

The Organization contends that the Board has consistently recognized on this property that collective bargaining agreements are negotiated and implemented with the intent of reserving work to the employees covered thereby. The Organization asserts that in its prior Awards, the Board correctly held that the yardstick by which to determine scope coverage is whether the work customarily and traditionally was performed by the employees. The Organization argues that this test has been met in the instant case by virtue of the language of the pertinent Rules and the undisputed fact that this Carrier's Maintenance of Way employees historically and customarily performed the character of track maintenance/construction, Truck Operator, and Machine Operator work involved here.

Citing prior Awards, the Organization asserts that it is fundamental that work of a class belongs to those for whose benefit a contract was made, and delegation of such work to others not covered by the contract is in violation of the Agreement. The Organization insists that it is not reasonable to conclude that the parties intended to perform a meaningless act when they negotiated their Agreement.

The Organization goes on to contend that the advance notice rules unambiguously provide that when the Carrier plans to contract out scope-covered work, then it must notify the General Chairman in writing at least 15 days in advance of the transaction. The Organization asserts that in the instant matter, the Carrier made no attempt whatsoever to contact the General Chairman before contracting out this work, so a sustaining Award is mandated.

The Organization emphasizes that the December 11, 1981 Letter of Understanding reaffirms the parties' intent that advance notice requirements be strictly followed. The Organization points out that despite the promise to strictly adhere to the advance notice and good-faith discussion requirements, there is no evidence that the Carrier gave any such notice of its intent to contract the subject work. The Organization further suggests that the Carrier has demonstrated a propensity for failing to comply with the Agreement's advance notice requirements.

The Organization insists that the Carrier repeatedly and intentionally has continued to ignore its contractual obligation to comply with the advance notice provisions, and the Carrier will not do so unless the well-reason Board precedent is applied in this and similar disputes on the property.

The Organization goes on to argue that an understanding of basic track components and the various methods of assembling those components serves to contradict any assertion that the crossover panel involved here was a "finished" item purchased "off the shelf." The Organization asserts that not only is the "off the shelf" argument contractually irrelevant, but it also is factually incorrect because the diversity within the component groups makes it impossible to purchase pre-constructed "finished product," such as switch and crossover panels, "off the shelf." The Organization insists that constructing track requires a significant number of decisions concerning tie and rail components, fastening systems, and a number of other variables in track construction. Moreover, these decisions are affected by a large number of factors and conditions that vary from location to location. The Organization therefore contends that it is readily apparent that a crossover panel cannot possibly be considered a "finished product" purchased "off the shelf."

The Organization then asserts that even if there were any merit to the Carrier's "finished product" contentions, this nevertheless would be nullified by the fact that the basic work of track construction and maintenance, as well as the construction and operation of equipment to perform such work, has long been performed by BMWE-represented employees. The Organization maintains that the record demonstrates that the Carrier solicited and hired the outside contractor to construct the crossover panel involved here to Carrier specifications and Carrier-dictated timeframes, for use on its property. The Organization argues that the Carrier thereby deprived the Claimants of a work opportunity, and they are entitled to the full remedy requested.

Addressing the Carrier's defense that the crossover panel was not constructed on Carrier property or even installed at the location claimed, the Organization contends that this argument does not support the Carrier's position. The Organization emphasizes that the Carrier confirmed that the contractor did construct the crossover panel at the location and on the dates referenced in the initial claims. The Carrier also confirmed that it failed to provide the General Chairman with the required 15-day advance written notice, as required by Rule 9. The Organization therefore submits that there can be no question that the Carrier violated the Agreement, and that a sustaining Award is required.

The Organization goes on to argue that because there ultimately was no dispute that a crossover panel was constructed by outside forces at the location and on the dates referenced within the initial claims, the appropriate remedy is to compensate the Claimants as requested. The requested remedy not only would compensate the Claimants, but also would enforce the Agreement.

As for the Carrier's dispute over the number of hours claimed and its assertion that the Claimants were fully employed, the Organization emphasizes that the Board has consistently upheld monetary claims from fully employed claimants when this Carrier has failed to provide written notice prior to contracting scope-covered work. The Organization insists that there is no question that, under these circumstances, the Claimants are entitled to the requested remedy.

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

The Carrier initially contends that the Organization never provided any documentation that the Carrier actually violated the cited Rules. The Carrier asserts that the Organization failed to consider that the Carrier did not own the material used by the outside contractor, nor was the work performed on Carrier property. The Carrier argues that two Carrier officials stated that the outside vendor was assembling the switch off Carrier property, directly contradicting the statement of an individual who believed that he was aware of the Carrier's property lines.

The Carrier contends that the Organization never disputed that the Carrier did not own the material that was to be assembled off Carrier property. The Organization's claim also failed to allege that either the May 1968 National Agreement or the December 1981 Letter of Understanding had been violated. The Carrier therefore asserts that such arguments are not properly before the Board.

The Carrier emphasizes that the cited provisions do not restrict the Carrier's right to purchase a finished product in the future. The Carrier insists that these Rules have no application when the Carrier elects to purchase product from an outside vendor.

Citing prior Awards, the Carrier then points out that the Scope Rule is general in nature, and the work at issue is not reserved to the Claimants. The Carrier argues that such general Rules do not, in and of themselves, reserve such duties to BMWE-

represented forces. The Carrier emphasizes that the Organization is objecting to the Carrier contemplating, but never finishing, the purchase of a product, which is not a violation of the Agreement. The Carrier contends that any rights that accrue to BMWE-represented employees do not attach until the Carrier has not only purchased, but also taken possession of that product. The Organization failed to prove exclusive right to the subject work on a system-wide basis, and the Carrier insists that no violation occurred.

Pointing to prior Awards, the Carrier contends that because the work in question was performed off Carrier property and prior to the Carrier taking possession of the material, and the Carrier never actually purchased the switch, the instant claim should be defeated. The Carrier asserts that the Organization failed to meet its burden of proof in establishing that the Agreement was violated.

The Carrier also submits that the requested remedy is excessive, and no monetary payments should be made to the Claimants. Not only did the vendor work on its own product on property not owned by the Carrier, but all Claimants were fully employed and suffered no monetary loss. The Carrier contends that the Claimants should not be enriched for losses they never incurred.

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

The Board concludes that the Organization failed to meet its burden to prove that the Carrier violated the Agreement. The Organization filed the claim on September 26, 2006, and stated in that claim that the Carrier had a subcontractor construct and install a switch panel at a Carrier location. However, the record reveals that the Carrier only retained the subcontractor to assemble a switch with the contractor's own material and it was assembled off Carrier property. There was an original intent to sell and deliver the switch to the Carrier as a finished product, but that never occurred. The record reveals that the subcontractor never delivered a finished product to the Carrier and eventually disassembled it off Carrier property and removed it from the area. The record reveals that the Carrier never had control over the materials and those materials and the product never were on the Carrier's property.

The contracting out provision set forth in Rule 9 relates to work that is within the scope of the Agreement. The Board finds that the work that took place in this case

was not within the scope of the Agreement and, therefore, there was insufficient evidence to support the claim. For all of the above reasons, 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 1st day of March 2010.