Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40411
Docket No. MW-39486
10-3-NRAB-00003-060278
(06-3-278)

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(Union Pacific Railroad Company (former Chicago and North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Iowa Bridge Company) to perform Maintenance of Way and Structures Department work (construct concrete box culverts under existing bridges) at Mile Post 281.42 on the Boone Subdivision near Denison, Iowa beginning on March 28, 2005 and continuing instead of Seniority District B-4 employes L. Fisher, J. Miller, K. Brink, W. Kress, R. Schoon, B. Wickham, D. Broich and G. Mathies (System File 4RM-9658T/1425551 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants L. Fisher, J. Miller, K. Brink, W. Kress, R. Schoon, B. Wickham, D. Broich and G. Mathies shall now each be compensated at their applicable rates of pay for an equal and proportionate share of the total straight time and

overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning March 28, 2005 and continuing."

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.

This matter involves a contractor's construction of concrete box culverts under existing bridges at MP 281.42 that began on March 28, 2005 on the Boone Subdivision where the Claimants hold seniority on Seniority District B-4.

On February 14, 2005, the Carrier served notice of its intent to subcontract at the location of "Bridge 281.42 on the Boone Subdivision near Dennison, IA" identifying the work as Service Order No. 30944. The specific work was identified as "furnishing all supplies, materials, (except Railroad supplied material), equipment, labor, and supervision to construct concrete box culverts." The notice continued that: "Serving of this 'notice' is not to be construed as an indication that the work described above necessarily falls within the 'scope' of your agreement, nor that the work is necessarily reserved, as a matter of practice, to those employees represented by the BMWE."

The Organization replied on the same day and requested an immediate conference. The Organization pointed out that the Carrier's notice of intent to subcontract is inadequate under Rule 1(b) because it fails to specify the five enumerated exceptions for subcontracting which are identified in Rule 1(b). A

conference was held on February 16, 2005, and the parties were unable to come to an understanding.

The Organization followed up with a letter dated February 18, 2005 that provided, in pertinent part:

> "In conference, the Organization cited Carrier forces are experienced and capable of performing the contemplated work. The work proposed is work that is covered under the Scope of the Agreement. Carrier possesses the required expertise and equipment needed to perform this work. No agreement was reached during this conference."

The Carrier responded in a March 8, 2005 letter that the work ". . . required specialized skills that the Carrier employees do not possess and equipment that the Carrier does not own and that Carrier forces do not have the skills to operate. Under the circumstances, Carrier use of a contractor to perform this work is not a violation of that agreement. . . ."

The Carrier advised that it would contract the work.

The Organization's response of May 16 indicated that work had begun on March 25, 2005 and was continuing. The Organization listed the equipment and tools being used by the contractor, "all of which are common tools and equipment in the immediate inventory of Claimant's crews. Claimants have historically performed this very same work as part of their regular bridge and culvert maintenance." The Organization continued "The Claimants and other B&B employees built a similar box culvert at MP 282 on the Boone Subdivision and have removed other bridge structures in the past."

The Carrier responded in a July 5, 2005 letter asserting that the notice was proper and further stating:

> "Notwithstanding, and with the notice in mind, you are also aware the contractor employees working are fully qualified to perform the work. Further, the Carrier has customarily and traditionally utilized contractor's forces to perform the type of work covered in

> the dispute. Your contention that such work is reserved to employees covered by the BMWE Agreement is simply without substance. Since the work in the instant case does not fall under the scope of your Agreement, your argument with regard to the lack of notice is obviously irrelevant in this case. Moreover, even if such were reserved to employees of your craft, the fact remains that the Claimants involved in this case do not possess sufficient fitness and ability to safely and efficiently perform the duties or operate the equipment in question."

The Organization responded on July 21, 2005, reminding the Carrier that serving notice and having a conference does not give the Carrier a unilateral right to contract the work under Rule 1(b) and further reminding the Carrier that the conference included a discussion of how this type of work has been done by Carrier B&B forces for many years and that the forces ". . . are experienced and capable of performing the work" and that in the conference ". . . Carrier failed to even allege that one of the contracting out criteria listed in Scope Rule 1 of the Agreement exists in the instant case."

The Carrier points out in the letter of September 9, 2005 that the notice required the contractor to furnish all supplies material, labor, and supervision for the project. The letter also stated:

> "It was also explained in conference that the work in question also required special skills and equipment, not possessed by the Carrier and its employees. Additionally, the Carrier does not have the qualified personnel to complete this work with the other commitments of the B&B department.
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> * * *
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> Rule 1. Scope (b) does allow for work to be contracted when 'time requirements must be met which are beyond the capabilities of Company forces.' Seeing as your Claimants were fully employed, it must be determined that the Company forces were not available to perform the work. According to the information presented by Manager of Bridge Maintenance . . . he stated that the project was

under time sensitive restraints in which the Carrier did not have available qualified forces to perform the work in the allotted time frame."

The information supplied by the Manager of Bridge Maintenance was a four line email dated June 1, 2005, which stated:

"(1) This project is time sensitive and the carrier does not have adequate and qualified work force to perform this work in required time frame.

(2) This specialized project requires equipment the carrier does not have.

(3) The union was notified by labor relations.

(4) Broich and Wickham are working on both projects as flagmen."

In the Organization letter of November 21, 2005, the following pertinent points were addressed:

"(5) The Carrier has failed to show any evidence of specialized equipment needed to perform this work.

(7) The Organization has provided copies of pictures of box culverts that members have previously constructed.

(8) The Organization provided statements from members that show B&B forces are capable and experienced at just about any kind of bridge work."

The Organization provided statements describing past work, time lines, copies of equipment leases, available equipment in company inventory, and photographs of similar work.

The Organization maintains that the work at issue is scope covered work pursuant to Rule 1(b) of the Agreement. It continues that the notice was defective because where it did not mention the specific enumerated exceptions for subcontracting. Further, even if the notice was not defective, the cited exceptions that were proffered by the Carrier during handling were refuted as nothing more than a mere statement without support in the record.

The Carrier counters that a timely proper advance notice of its intent to contract out the work was provided to the Organization. It contends that the work at issue is not scope covered, that there were not enough qualified employees to complete the project because of other commitments of the B&B Department, and that the full employment of the Claimants caused the employees no loss of wages or work opportunity.

The Board carefully reviewed the record and concludes that it supports the finding that the Carrier filed a notice of intent to subcontract and held a conference with the Organization in the instant matter. However, that does not end the inquiry. Our review also indicates that the work at issue is box culvert work to a bridge on the Boone Subdivision. According to the Organization, such work is covered by Rule 1(b) which provides:

> "Employees included with the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.
>
> By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees described herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or

installed through supplier, are required or unless work is such that the Company is not adequately equipped to handle the work, or time requirements must be met which are beyond the capabilities of company forces to meet."

The Organization provided the above-discussed photographs, statements, timelines, and leases to underscore that the work has been performed by BMWE-represented employees in the past on this subdivision. This evidence serves to underscore the plain meaning of Rule 1(b) that this work is scope covered. Accordingly, we find that constructing box culverts clearly falls within the scope of Organization work as described in Rule 1(b). See e.g., Third Division Award 37647 and Awards cited therein.

When the record supports a finding that the Organization has made a prima facie showing of a Rule 1(b) violation, as it did in the instant matter, Third Division Award 37376 informs that ". . . the burden then shifts to the Carrier to show that one of the five exceptions in Rule 1(b) applies."

With the finding that the work is scope covered pursuant to Rule 1(b) it is necessary to examine whether the Carrier can avail itself to one of the enumerated exceptions that were proffered during handling of the claim.

The Carrier did not list any of the exceptions in the notice of subcontracting. The exceptions were addressed during the handling of the claim. The conference and subsequent discussion between the parties that occurred prior to the actual work began being performed on March 25, 2005, revealed that the Carrier contended that an exception applied because the work ". . . required specialized skills that the Carrier employees do not possess and equipment that the Carrier does not own and that Carrier forces do not have the skills to operate."

The Organization refuted this defense with the above-discussed photographs, statements, timelines, and leases to underscore that the work has been performed by BMWE-represented employees in the past on this subdivision and that the tools and equipment were common Carrier equipment. Despite requests by the Organization for an explanation of the "specialized skills" and equipment necessary, the responses were not forthcoming. There is no evidence in the record that establishes

what skills and equipment were necessary for the project. Accordingly, the affirmative defense has not been shown.

From this record, the other asserted defense of "time requirements" that the Carrier argued in its Submission was not the defense proffered at the time the contracting notice was discussed and the work contracted out. See Third Division Award 37376. Further, even if the defense were considered, the Carrier would not prevail in the defense. The Carrier argues that Rule 1(b) specifically states that it can contract out when ". . . time requirements must be met which are beyond the capabilities of Company forces to meet . . ." and that the Carrier did not have the necessary capabilities. In support, the Carrier includes 16 separate notices of intent to contract on the Boone Subdivision in its Submission that were served on the Carrier in 2004 and 2005. The Carrier cites these notice letters as support for the Manager of Bridge Maintenance's statement that the instant project was time sensitive and that the Carrier did not have adequate and qualified forces to perform the work.

However, the Board carefully reviewed the record. Our review of the record indicates that the 16 notices were not supplied during handling of the instant claim on the property. There are numerous Awards that stand for the proposition that ex parte submissions are not the proper venue for introducing new evidence. The citations need not be recited here. Accordingly, the 16 notices cannot be considered by the Board. What is left to consider is the one line in the Manager of Bridge Maintenance's email, i.e., "This project is time sensitive and the Carrier does not have adequate qualified work force to perform this work in required time frame." That statement, absent more, would be insufficient to establish the defense.

A careful reading of the record convinces the Board that the Carrier has not satisfied its burden of proof relative to its asserted affirmative defenses. Having established that the work was reserved to BMWE-represented employees pursuant to Rule 1(b) the inquiry moves to remedy. There is nothing in the record to show why the Carrier chose to perform this work when it did. Even if the Board were to consider the 16 notices of intent to subcontract discussed above, all those notices would show is that work on the Boone Subdivision had been contemplated for a substantial period of time. As stated above, those notices have not been considered. Nonetheless, the record contains no showing that the work could not have been scheduled in a manner so as to include the Claimants. The Claimants were assigned

to the Boone Subdivision at the time of the contracting of the box culvert work. We conclude that the Organization established a loss of work opportunity.

The Organization claims that the Claimants should be compensated for all hours worked by the contractor. The Carrier counters that full employment of the Claimants precludes any entitlement to compensation. The Carrier's argument has been previously rejected. See Third Division Award 37647 and citations therein. Therefore, in light of the above findings, the Claimants shall be made whole for all monetary losses.

AWARD

Claim sustained in accordance with the Findings.

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 14th day of May 2010.