Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40930
Docket No. MW-41080
11-3-NRAB-00003-090446

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union 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 (Railroad Salvage and Restoration, Inc. and Bob Leech Construction) to perform Maintenance of Way and Structures Department work (track dismantling, stockpiling track material and ballast relocation) between Mile Posts 146.0 and 146.45 on the Columbus Subdivision beginning on March 10 and continuing through March 24, 2008 (System File J-0852U-255/1503145).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out the aforesaid work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 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 J. Culbertson, M. Koricic, F. Ortez, C. Watson, M. Kleckner, A. Leibhart and J. Adams shall now each be compensated at their respective and

'applicable rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning March 10 and continuing through March 24, 2008.'"

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 facts indicate that on June 14, 2007, the Carrier sent the Organization Service Order No. 37506 advising of its intent to solicit bids regarding the work described in the Statement of Claim to be done in the vicinity of Grand Island, Mile Post 146.12 on the Kearney Subdivision. The Organization requested discussion of the notice in a letter dated June 17, 2007, and it was discussed in conference on July 10. Confirmation was made on the same day by the Carrier that it would proceed with the work being performed by contractors. The record further reveals that the parties made the same respective arguments that they made in several other cases regarding the applicability of the December 11, 1981 Letter of Understanding and whether or not the Organization was required to prove exclusive reservation of scope-covered work when the dispute involves the assignment of work to outside contractors. For the sake of brevity, the Board will not discuss those issues, but instead refers the parties to Third Division Awards 40922, 40923 and 40929 wherein we ruled on behalf of the Organization on those questions.

It is the Organization's position that the notice was vague and not consistent with the requirements of Rule 52 and the December 11, 1981 Letter of

Understanding because a contemplated startup and ending date for the work was not offered nor was a full description of the work offered; and the work performed by outside contractors was covered work customarily and historically performed by its members. It argued that the named Claimants were fully qualified for the work and available and should have been used. It further argued that Rule 52 contains exceptions which must be present before the Carrier can be allowed to contract covered work and, in this instance, no exception existed. Before the Board it further argued that Carrier Exhibits "C1," "C2" and "C3" were "de novo" because they were never exchanged on the property. It concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that (1) it has a strong mixed practice of contracting out the disputed work (2) it did not own the specialized equipment necessary for the project and (3) it properly served a 15-day notice after which a conference was held. It further argued that the Scope Rule is general in nature, the Organization cannot prove system-wide exclusivity and contrary to the Organization's assertion that it failed to establish any conditions listed in Rule 52(a) to justify contracting the disputed work it believed it did so, because Rule 52(b) specifically states: "Nothing contained in this rule will affect prior and existing rights and practices of either party in connection with contracting out." According to the Carrier, the same and/or similar work has consistently been done by outsiders as well as BMWE-represented employees; therefore, unless the Organization can prove that the work has never been contracted out or it has historically and consistently taken exception to the Carrier contracting out such work, the Carrier is allowed to continue to contract for such services which was the case in this instance. It closed by asking that the claim remain denied.

The Organization suggested that various exhibits offered to the Board are not admissible for the Board's consideration. A review of the record substantiates that the Carrier wrote to the Organization on July 10, 2007, wherein it stated in pertinent part:

> "It was explained that the Carrier does not own the specialized equipment necessary for this project. It was further explained that the Carrier had a strong mixed practice of contracting out such work. For examples of the practice on the property, you may want

to refer to Carrier Exhibit 'B-5'of the Carrier's 02/16/97 letter, which provided for the record any future handling of grievances arising over the work identified in the notice."

The Carrier's reference to Exhibit "B-5" of the February 16, 1997, letter including its attachments are the same as those identified as Carrier Exhibits "C1," "C2" and "C3" offered the Board. Because they are one in the same they are properly reviewable, because the Organization was made aware of their existence while the claim was being handled on the property.

Our review of the evidence does not persuade us that the notice of June 14, 2007, was procedurally defective or inadequate in accordance with the provisions of Rule 52(a) or the December 11, 1981 Letter of Understanding. (See Third Division Awards 29981, 30063, 30185, and 32500.) In this instance, the Carrier offered historical evidentiary proof of a mixed handling of the disputed work being done by covered employees and outside contractors, which was not effectively rebutted. Therefore, the Board finds and holds that 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 24th day of March 2011.