Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41044
Docket No. MW-40883
11-3-NRAB-00003-090180

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier utilized outside forces (Kramer Tree Specialists) to perform Maintenance of Way and Structures Department work (cut/remove brush on the right of way) at Mile Posts 110.0 to 111.0, Mile Posts 100.0 to 100.3, Mile Posts 112.6 to 114.9, Mile Posts 105.0 to 105.5, the West leg of the Nelson Wye track, the Admiral Industry Track, the Dixon River Track, Mile Posts 116.7 to 116.9, Mile Posts 111.0 to 115.5 and Yard Track No. 5 in Sterling, Illinois on September 4, 5, 6, 7, 10 and 11, 2007 (System File S-0701C-363/1490211 CNW).

(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 out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b) and Appendix 15.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Coy, K. Spooner, D. Fredericks, T. Glenn and H. Johnson shall now "*** be compensated at the applicable overtime rate of pay an equal and proportionate share of the (240) two hundred forty man hours expended by the Contractor employees on September 4, 5, 6, 7, 10 and 11, 2007.'"

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 five Claimants hold seniority in various classifications in the Track Sub-Department. They are headquartered in Sterling, Illinois.

On June 22, 2007, the Carrier provided the Organization with Notice under Service Order No. 36747 of its intent to contract out ". . . labor, material, equipment, and tools necessary to provide vegetation control services along various main lines, branch lines, yard tracks railroad property, etc." The Notice identifies the location of the work as "various locations on [the] Railroad's system."

The General Chairman requested a meeting. It occurred on July 10, 2007. In his letter confirming what transpired at the conference Assistant Director Labor Relations Steiger explained ". . . that the Carrier has a strong mixed practice of contracting out such work."

The Organization claims that the contractor, Kramer Tree Specialists, had five employees working 8-hour days performing the work at issue on September 4, 5, 6, 7, 10 and 11, 2007. Initially, the Carrier demanded proof that the contractor performed this work as claimed. However, as the claim advanced, no factual dispute survived the on-property processing of this claim. The Board concludes that the contractor expended 240 man hours to cut and clear brush, trees, and debris from track right-of-way.

The Organization argues that the Carrier failed to meet the contractual notice requirements and the contracting out violated Rule 1 of the parties' Agreement.

In Third Division Awards 40918 and 40920, the Board addressed the sufficiency of this very same Notice, i.e., Service Order No. 36747 on UP properties. Here, on a former Chicago & North Western property, the analysis must address the language of Rule 1. Contrary to the Carrier's argument that Rule 1 is a general scope Rule, it has been determined to be a Rule that specifically reserves maintenance work to Carrier employees through the Rule's use of the following language, i.e., ". . . all work in connection with the construction, maintenance, repair of tracks, structures and other facilities used in the operation of the Company . . . on the operating property. . . ." See Public Law Board No. 1844, Award 16. Public Law Board No. 7096, Award 1 also concluded that the work of brush cutting and clearing debris from the right-of-way was maintenance work. Because the work in question (mowing and clearing debris from the right-of-way) is reserved to Carrier employees, there is no need for the Organization to present evidence in this case to prove that the work in question is customarily performed by Carrier forces. Where the work is reserved to Carrier forces under the Rule, the Carrier's contention regarding the presence of a mixed practice on the property is without contractual consequence.

The Carrier may contract out work reserved to Carrier forces provided the circumstances of the contracting meets one of the exceptions specified in Rule 1. The pertinent language reads, as follows:

> "Rule 1 B. Employees included within 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 . . .
>
> 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.

> In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable. . . ."

On the property in response to the claim filed on October 25, 2007, and in the course of the advancement of the claim, the Carrier asserted several of the contractual exceptions as a basis for the contracting out, i.e., (1) the contractor (Kramer Tree Specialists) used a boom truck not in the possession of the Carrier (2) the contractor's forces applied herbicides which Carrier employees cannot do and/or are not licensed to do and (3) the Carrier's forces could not have finished the work in the time allotted. None of these asserted defenses, any one of which if established would justify the contracting out of this work, was included in the Notice provided by the Carrier in Service Order No. 36747, quoted above.

The Rule 1 B. notice requirement is clear. If the plans for contracting are "because of one of the criteria described herein," the Carrier shall provide notice to the Organization. Appendix 15 of the Agreement adds the following requirement:

> "APPENDIX 15 (Berge/Hopkins letter of December 11, 1981)
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> * * *
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> The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

The Notice shall identify the work to be contracted and the reasons therefore. Service Order No. 36747 identifies the work to be contracted. It does not set forth the reasons for the subcontracting. The Notice does not set out the exceptions asserted by the Carrier during the advancement of the claim on the property as the reasons for the subcontracting. The Notice is silent with regard to (1) the Carrier's lack of equipment (2) the Carrier's forces inability to apply herbicide and (3) the time crunch in which the work performed in September 2007 had to be completed. The Board concludes that the Notice provided in this case does not meet the requirements of Rule 1 and Appendix 15.

It is deficient. Once the Board concludes that the Notice provided does not meet the involved contractual requirements, there is no need to proceed to determine whether the work in question may be contracted out. See Third Division Award 35736.

What remains to be determined is the matter of remedy. The Carrier argues that the Claimants were fully employed. Some of the Claimants performed flagging duties for the contractor while its forces performed the work at issue in September 2007. None of the Claimants were on furlough. On this property, there are a substantial number of Awards which hold that in the absence of proof of loss, no monetary award is appropriate See Public Law Board No. 1844, Award 13; Third Division Awards 31036 (monetary award limited to those on furlough) 31284 and 32352. In accordance with the well-established precedent on this property, the Board provides no monetary award to the Claimants.

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 23rd day of August 2011.