Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14051
Docket No. 13938
12-2-NRAB-00002-120007

The Second Division consisted of the regular members and in addition Referee Lynette A. Ross when award was rendered.

(International Brotherhood of Electrical Workers
PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

"1. That in violation of the parties governing Agreement, ATSF Rule 88 and Appendix No. 7 in particular, the BNSF Railway Company arbitrarily subcontracted work on the:

BNSF 1594	BNSF 1795	BNSF 1801
BNSF 1595	BNSF 1796	BNSF 2046
BNSF 1596	BNSF 1797	BNSF 2048
BNSF 1597	BNSF 1798	BNSF 2050
BNSF 1734		

which contractually belongs to the Electrical Craft Employees represented by System Council 16 of the IBEW.

2. That accordingly, the BNSF Railway Company be ordered to compensate Electrical Craft Employees:

G. Davis, Sr.	C. T. Cusick	G. S. Agnew
R. L. Petersen	R. F. Wheeler	R. W. Tate
M. W. Geiger	M. S. Coon	L. A. Lingle
M. G. Bierwirth	M. L. Nudson	

for the amount provided for under the terms of the parties controlling Agreement and as amended by PEB 219."

FINDINGS:

The Second 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.

On April 26, 2011, the Carrier issued an informational notice to the IBEW and three other Organizations informing them that the Carrier intended to subcontract for the installation of new remote control locomotive (RCL) equipment on approximately 13 locomotives. The notice reads, in pertinent part, as follows:

> "As information, BNSF plans to contract for the installation of new Catron RCL equipment on approximately 13 locomotives in Albia, IA. BNSF is not adequately equipped to handle all aspects of this project and has historically contracted this type of installation work. In addition, there is high demand of RCL installations and the required time of completion cannot be achieved utilizing BNSF forces as they are fully engaged on other requirements with the return of stored locomotives. We will be staging these locomotives at Albia in advance of the actual installations by Relco for the following locomotives:
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> | | | |
> |---|---|---|
> | BNSF 1594 | BNSF 1795 | BNSF 1801 |
> | BNSF 1595 | BNSF 1796 | BNSF 2046 |
> | BNSF 1596 | BNSF 1797 | BNSF 2048 |
> | BNSF 1597 | BNSF 1798 | BNSF 2050 |
> | BNSF 1734 | | |

The project is anticipated to begin approximately 10 days after staging the locomotives in the shop."

On May 4, 2011, the Organization sent a letter to the Carrier objecting to the Carrier's plans to subcontract the work and requesting a conference pursuant to Appendix No. 7, Article II, Subcontracting, of the September 25, 1964 National Agreement, and Rule 88 of the September 1, 1974 ATSF Agreement. The Organization's letter reads, in pertinent part, as follows:

"Be advised that your purported notice does not meet with the requirements as set forth in Appendix No. 7. No proof of the allegations contained in your notice has been supplied and therefore, no determination [on] the part of the Organization can be made at this time.

* * *

Your assertion that somehow the Carrier's Electrical Craft forces do not possess the expertise to accomplish this work could not be further from the truth. As you should know the Carrier has a number of positions on this property that perform RCL work on a daily basis. In addition, the Carrier's Electrical Craft personnel routinely install, repair and troubleshoot complex electrical locomotive systems such as ETMS, ECP braking, APU/Hotstart systems, electronic fuel saver systems, creep-pace setter control systems, electronic speed registering systems, AESS systems, CPS systems, etc."

The Organization's May 4, 2011 letter also requested that the Carrier supply the Organization with the following information:

- a list of the equipment that the Carrier does not possess to "handle all aspects of this project."

- a listing of the locomotive numbers, the date worked, the work involved and what Carrier facility performed the necessary return to locomotive servicing.

- in addition to the requested information as set for the in the September 1964 Agreement (Appendix No. 7) the Carrier supply the date that each individual locomotive is shipped, the date the locomotive is returned to service."

The Organization's May 4, 2011 letter further informed the Carrier that its correspondence also constituted ". . . a claim in the amount provided for in the Agreement, as amended by PEB 219, for [the above-named] Argentine Facility Electricians."

On June 22, 2011, the Carrier responded to the Organization's claim. The Carrier asserted that ". . . the installation of RCL equipment has never been performed by IBEW represented electricians employed by the Carrier." As evidence, the Carrier produced written statements from four Carrier Officers. A May 20, 2011 statement from Argentine Shop Superintendent Dennis Bossolono reads, in pertinent part, as follows:

> "For the last eight years I have been the Shop Superintendent at Argentine. While we perform maintenance and repair to RCL locomotives to my knowledge our electricians have never harvested RCL equipment from locomotives for reinstall or installed new RCL equipment.
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> We have received RCL locomotives to be placed in service that had the RCL equipment installed and have sent locomotives to have the RCL equipment harvested at outsource shops which include the former Livingston Rebuild Center (LRC) in Livingston MT, Mid America Car Inc (MAC) in Kansas City, Mo, Metro East Industry (MEI) in St. Louis Mo, Motive Power in Houston as well as Relco shop in Albia, Ia."

On October 27, 2011, the parties discussed the claim in conference. On October 31, 2011, they agreed to a time limit extension for this claim, and others, regarding the deadline to docket the claims to the Board. Specifically, the parties mutually agreed to a deadline of February 1, 2012.

On January 26, 2012, in response to the Carrier's June 22, 2011 letter, the Organization sent the Carrier a nine page response with 52 pages of exhibits as additional argument and evidence in further support of its position. The Carrier received the information on January 30, 2012, and on that same day, prepared and issued a response. On February 1, 2012, the Organization filed its Notice of Intent to file an Ex-Parte Submission with the Second Division of the NRAB.

Preliminarily, the Carrier contends that the Organization's January 26, 2012 letter and all correspondence submitted thereafter should not be considered by the Board. In its June 22, 2011 letter, the Carrier declined the Organization's May 4, 2011 claim and, in response to the Organization's request for information, furnished detailed statements from Carrier Officers in support of the Carrier's reasons for subcontracting the work.

According to the Carrier, even after the parties had discussed the claim in conference on October 27, 2011, the Organization failed to issue any response to the Carrier's June 22, 2011 letter until January 26, 2012, some seven months later. In the interim, the Carrier's arguments, assertions and evidence stood unchallenged, the Carrier stresses. Because of the parties' agreement to docket this claim to the Board by the deadline date of February 1, 2012, the Carrier was compelled to respond to the Organization's January 26 letter on January 30, 2012, the same date on which the Carrier received the letter, the Carrier also asserts.

The Carrier avers that the Organization's tactic of belatedly adding at the last minute volumes of information to the record after having had several months to craft a response was inequitable. According to the Carrier, many Awards have acknowledged that such a surprise or "gotcha" tactic is unfair, and have held that information submitted on the property without sufficient opportunity for rebuttal should not be considered by the Board.

In response, the Organization asserts that the claim is procedurally sound. The Organization's submission of evidence incorrectly deemed by the Carrier as late in entering the record did not prevent the Carrier from preparing responses to either the January 26, 2012 letter or any correspondence sent subsequently. The Organization contends that it was compelled to issue its "late" letter because the Carrier had never complied with the Organization's May 4, 2011 information request. The Organization

also argues that the Carrier failed to show that it was unable to respond or was placed in a position of hardship when responding to the correspondence. Thus, the Organization urges the Board to consider all of the evidence when adjudicating this claim.

The Board carefully considered the parties' arguments constituting a question as to whether the Organization's January 26, 2012 letter, and the parties' subsequent correspondence, should be considered by the Board in light of the Organization's February 1, 2012 filing of its Notice of Intent. Although the January 26 letter received by the Carrier on January 30, 2012 is technically admissible, its probative value is limited given the timing of the Organization's letter and evidence to the Carrier in relation to its filing of the Notice of Intent, the Board holds.

The Carrier's procedural question before the Board is hardly new, and has been ruled upon in numerous Awards. See, Third Division Award 37022 (Referee Wallin) Third Division Award 37315 (Referee Kenis) and Third Division Award 20773 (Referee Sickles). Indeed, as noted in Third Division Award 37022:

> "When one party submits new evidence or raises new argument so late in the claim-handling process that the other party is effectively denied the opportunity to respond, it is well-settled that such evidence or argument should receive little, if any, weight. In other words, the party who resorts to such tactics essentially forfeits the value that the evidence or argument might add to the record on its behalf."

The Board finds that the documentation exchanged by the parties after the February 1, 2012 filing date is inadmissible. Although the Board carefully reviewed such evidence during our study of the record, the late evidence has been excluded from our deliberations concerning the merits of the claim. It is well understood in this industry that the record is closed when the Notice of Intent to docket a claim before the Board is filed, and that the submission of evidence after the record has been closed runs contrary to the Board's procedural rules. For example, in Third Division Award 32499 (Referee Cohen) the Board held:

> "There is no question that the record was closed with the filing of the Notice of Intent. This Board has held that it will not consider evidence submitted after the on property record is closed."

Turning to the merits, it is evident that Rule 88, Electricians' Classification of Work, of the September 1, 1974 Agreement contains no mention of radio control locomotives or the installation of RCL systems. A written statement, dated May 19, 2011, was prepared by Bud Wilds, Manager Locomotives, and was among the four statements forwarded by the Carrier to the Organization as support for the Carrier's position that the subject work had not been performed by the Carrier's electrical craft employees. Wilds' statement reads:

> "For the last six years I have been the Manger of locomotive electrical systems with Locomotive Staff and am responsible for the installation and maintenance of Remote Controlled Locomotive (RCL) equipment across BNSF. In response to your request for a statement concerning installs on the BNSF or former ATSF, to my knowledge our electricians have never harvested from locomotives for reinstall or installed new any RCL equipment. During my 33 year career I have worked in many running repair facilities and the back shop at Topeka as an electrician and I can say with confidence that I have never witnessed or directed this work to be done on the BNSF or former ATSF."

We find that the record evidence properly before the Board fails to prove the Organization's claim that the work of installing new RCL equipment on approximately 13 locomotives in Albia, Iowa, was reserved to IBEW-represented employees pursuant to Rule 88. We also find no probative evidence in support of the Organization's claim that the work of installing new RCL systems has been historically or customarily performed by IBEW-represented employees. Although the record indicates that electrical craft employees have performed troubleshooting, maintenance, repairs, or modifications to RCL systems, the record is devoid of tangible evidence that the employees have performed the specific work of installing new RCL systems.

Given our above findings, the Board is compelled to conclude that the parties' Agreement was not violated when the Carrier contracted out for the installation of

new RCL equipment on approximately 13 locomotives in Albia, Iowa. In this record, the Organization has not shown by substantial evidence that troubleshooting and/or repairing RCL systems is the same work as installing new RCL systems. The Board acknowledges the skills and abilities of the Carrier's electrical craft employees, and commends them for their willingness to perform the subcontracted work. However, whether the Claimants may possess the skills, abilities and desire to perform work not reserved to them pursuant to Rule 88 does not equate to any contractual right to perform the work.

As previously noted, Rule 88 makes no mention of installing RCL systems, and the instant record lacks any evidence establishing that the RCL system installation work at issue in this claim had been customarily or historically performed by the Carrier's electrical employees. Consequently, the Board rules that the Carrier did not violate Rule 88 by subcontracting the RCL installation work to Relco at the Albia, Iowa, facility. Lastly, the Board rules that because the claimed work was not proven to have been covered by Rule 88, the Carrier was not required to furnish advance notice of the contracting, and its issuance of the April 26, 2011 informational letter did not violate the parties' Agreement.

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 Second Division

Dated at Chicago, Illinois, this 22nd day of October 2012.