Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37103
Docket No. MW-36516
04-3-01-3-13

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 (Illinois Constructors Corporation) to perform Maintenance of Way and Structures Department work tuck point bridge abutments, construct a walkway and handrailing) on a bridge at Mile Post 37.5 on the Harvard Subdivision beginning October 1 and continuing through December 31, 1999 (System File 9KB-6599T/121555 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with 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).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. Groskinsky, M. Waller, J. Kuter and L. Broederdorf shall now each be compensated for an equal proportionate share of the two thousand three hundred ninety-six (2,396) man-hours expended by the outside forces in the performance of the aforesaid work at their respective straight time 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 facts surrounding the alleged notice violation are not in dispute. The Carrier served a notice dated March 3, 1999 that it intended to contract out abutment repair on the Fox River Bridge at Mile Post 37.5. The notice described the work as consisting of ". . . driving piling, pouring concrete, and performing other necessary work to stabilize these bridge abutments." The notice was silent regarding whether it fell within any of the contracting exceptions permitted by the applicable Scope Rule or whether completion of the work was a matter of some urgency. The parties conferenced the notice by telephone on March 24, 1999. The Carrier documented the fact of the conference by letter dated March 30, 1999. In the letter, the Carrier wrote:

> "This bridge repair work at Fox River is being contracted due to the difficult location of the bridge – steep embankments, overhead power lines and a high bridge with limited access for equipment. Additionally, the Carrier does not have the qualified personnel to complete this work with the other commitments of the B&B department."

The initial claim dated November 12, 1999 was entirely silent on the subject of any notice violation. Indeed, the only reference to the notice made by the Organization on the property is found in its appeal dated March 3, 2000 and consists of the observation that specific reference to tuckpointing and walkway/handrail construction was "Noticeably absent from the Notice. . . ."

The Carrier challenged the jurisdiction of the Board to address the alleged notice violation on the ground that no such contention was part of the claim handling on the property. We agree.

As previously noted, the initial claim did not allege any notice violation. Moreover, the Organization acknowledged in its March 3, 2000 appeal that a notice had been served and that a conference had been held. Although it commented on the content of the notice, at no time did it allege the notice was deficient or otherwise in violation of applicable notice requirements.

It is not necessary that a contracting-out notice specify every detail of a project. Flushing out the details is one of the objectives contemplated for the conference. See, for example, Third Division Awards 30869 and 30185.

In light of the foregoing, our review of the record does not show that any notice violation issues were properly raised during the claim handling on the property. Therefore, we lack jurisdiction to address them now. Accordingly, this portion of the claim is dismissed.

On the merits, the remaining issues in dispute are readily resolved by the straightforward application of long-standing precedent between these parties to the operative facts.

Rule 1(b) of the applicable Agreement reads in relevant part as follows:

> "(b) Employes included within the scope of this Agreement in the Maintenance of Way and Structure 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 employes describe 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 employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or, time requirements must be met which are beyond the capabilities of Company forces to meet."

In 1977, it its Award 16 between these same parties, Public Law Board No. 1844 recognized the foregoing Rule language to constitute a ". . . specifically worded work reservation clause." Contracting of reserved work is permitted if, and only if, one or more of the four stated exceptions apply: there is a need for special skills not possessed by Carrier forces; special equipment not owned by the Carrier; special material available only when applied or installed through a supplier; or exigent time requirements.

Given the character of the disputed work, it is clearly seen to be maintenance and repair of a structure used on the Carrier's operation as a common carrier. Thus, the work falls squarely within the reservation of work established by Rule 1(b). As such, it may only have been properly contracted out pursuant to one or more of the four exceptions.

Because the four exceptions are in the nature of affirmative defenses, the Carrier has the burden of proof to establish their applicability. On this record, the Carrier failed to do so.

In the initial claim, the Organization asserted that no special skills, equipment, or materials were needed. The Carrier never effectively refuted this assertion. The Organization's assertion was bolstered by its further assertion, in its March 3, 2000 appeal, that the Claimants had actually performed tuckpointing on the same bridge in May through September of 1978. The Carrier never refuted this assertion.

The remaining contracting exception deals with the urgency of time. Once again, the record does not establish the exception. The Carrier gave notice on March 3, 1999. The record is clear that the work did not begin until October 1, 1999, some seven months later. It is undisputed that Award 54 of Public Law Board No. 1844 determined that the Carrier may not successfully create a man-power shortage by scheduling its forces to be deployed elsewhere. Such scheduling choices

in the absence of time pressure do not satisfy the requirements of the fourth exception.

Given the foregoing discussion, this record compels us to find that the Carrier violated the applicable Agreement when it contracted out the disputed work as it did.

With regard to the remaining remedy issues, we note that the work by contractor forces began October 1 and continued through December 31, 1999. Although contractor forces did spend a total of 2,396 man-hours on the project, the Carrier's report of the claim conference held on April 26, 2000 challenged this number as being excessive in that it included time spent driving pile, pouring concrete, and performing other work that is not part of the claim. The claim is plainly limited to tuckpointing as well as walkway and handrail construction.

We agree the claim is excessive, on this record, to the extent it includes time spent performing project work beyond the specific work encompassed by the claim.

On the final remedy issue, past precedent between these same parties once again steps in to control the result. The record establishes that each of the Claimants was fully employed during the entire period under claim. Indeed, one of the Claimants was actually working with the contractor forces throughout the project duration performing flagging duties. As determined by Award 13 of Public Law Board No. 1844 issued in 1977, monetary compensation is not awarded in the absence of a proven loss of earnings or work opportunity by Claimants notwithstanding the improper contracting of work. No such loss has been established by this record. Accordingly, we make 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 21st day of July 2004.