Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37852
Docket No. MW-36866
06-3-01-3-414

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Union Pacific Railroad Company (former
(Southern Pacific – Western Lines)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Dobbas Construction Company of Newcastle, California) to perform routine System Work Equipment Sub-department work (utilize crane with operator and helper for the purpose of handling bridge material in conjunction with new bridge construction) at Mile Post 41.3 on the Fresno Subdivision in the vicinity of Roseville, California commencing on April 10, 2000 and continuing through May 4, 2000 instead of Machine Operator T.L. Daugherty and Helper M.J. Giallanza (Carrier's Files 1237133 and 1241772 SPW).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Machine Operator T. L. Daugherty and Helper M. J. Giallanza shall now each be paid an amount equal to the total man-hours worked by the Dobbas Construction Company forces, which shall be no less than one hundred sixty (160) hours at their respective straight time rates of pay, plus any overtime hours identified after review of contractor's statement of hours with the Carrier. Compensation for this violation is in addition to any compensation that may have been received and shall not be included on the Claimant's regular payroll check."

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.

Claimant T. L. Daugherty entered service with the Carrier on July 16, 1984, and holds seniority within the System Work Equipment Sub-department in the classification of Machine Operator. Claimant M. J. Giallanza entered service with the Carrier on February 1, 1992, and holds seniority within the System Work Equipment Sub-department in the classification of Helper.

The instant dispute arose when the Carrier contracted with Jim Dobbas, Inc. ("Dobbas") under Service Order No. 13706 Roadway Maintenance, to provide fully operated, fueled and maintained heavy equipment to assist Carrier forces in performing work on an "as needed" basis at various locations in California and Nevada. During April and May 2000, Dobbas furnished a 30-ton Hydro crane with

an operator and helper for the handling of material in conjunction with new bridge construction on the Fresno Subdivision.

On May 26, 2000, the Organization submitted claims regarding the work in question on behalf of Claimants Daugherty and Giallanza. The Carrier denied the claims. Having failed to reach a satisfactory resolution of the issues on the property, the parties submitted the dispute to the Board for final and binding resolution.

Rule 1 (Scope) of the parties' Agreement, provides in pertinent part:

> "These rules govern rates of pay, hours of service, and working conditions of employes in all sub-departments of the Maintenance of Way and Structures Department . . . represented by the Brotherhood of Maintenance of Way Employes, such as: . . . [p]ile driver, ditching, hoisting engineers, steam crane operators . . . steam shovel engineers, cranemen, firemen, and miscellaneous equipment operators."

Rule 2 establishes various sub-departments including the Bridge and Building Sub-department and the System Work Equipment Sub-department. Rule 3 provides that each occupation within the sub-departments constitutes a class.

In addition, Article IV (Contracting Out) of the 1968 National Agreement requires the Carrier to provide no less than 15 days' notice to the Organization of the Carrier's intent to contract out work within the scope of the parties' Agreement, and states:

> "If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. . . .
>
> Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the

General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

A December 11, 1981 Letter of Understanding states:

"The carriers . . . will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees. . . . In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefore."

The Organization asserts that the Carrier failed to provide proper notice of its intent to contract out the work in question. It is the Organization's position that the Carrier provided only "pro forma" notice in the instant case, and that under the terms of Article IV and the December 11, 1981 Letter of Understanding, the Carrier is required to go beyond such pro forma notice to "good-faith conference discussions."

While the Organization does not explicitly concede that it received notice, it has at least during the on-property handling tacitly admitted that such notice was provided, arguing for instance that "[t]he focal point of the claim should be the blanket contracting out notice, i.e., Service Order No. 13706." It is apparent from the June 1, 2000 e-mail authored by R. A. Pettigrew, and submitted into the record by the Carrier, that Service Order No. 13706 referred in general terms to having Dobbas furnish heavy equipment on an "as needed" basis at various locations in California and Nevada. Nevertheless, while more specificity might have been desirable, the Board finds that such notice was sufficient to meet the Carrier's obligation under Article IV and the December 1, 1981 Letter of Understanding.

Moreover, the good faith required of the Carrier with respect to attempting to reach an understanding with the Organization regarding proposed contracting out does not place on the Carrier any obligation to initiate a conference in which to discuss the proposal. Rather, Article IV expressly places that obligation on the Organization. In the instant case, the Organization did not assert that it requested a

conference with the Carrier regarding Service Order No. 13706 which was denied, or that the Carrier failed to participate in such a conference in good faith. The Board finds that the Organization has not proved a lack of proper notice of the Carrier's intent to contract out the work at issue.

In addition, while the Organization contends that the Carrier failed to make the good faith effort to reduce the incidence of sub-contracting that is required by the terms of the December 11, 1981 Letter of Understanding, the Organization offered no evidentiary support for its contention. The Organization's naked allegation that the Carrier either owned equipment with which the work in question could have been done, or could have rented or leased such equipment to be used by the Claimants, is insufficient to prove the Organization's assertion of bad faith in contravention of the December 11, 1981 Letter of Understanding.

The Board further finds that the Organization failed to present any evidence in support of its contention that the work in question is contractually reserved to the BMWE-represented employees. No express language in the parties' Agreement gives ownership of such work to those covered by the Agreement. Rule 1 of the Agreement, governing Scope, is general in nature, listing the positions covered by the Agreement without specifying any particular work reserved to those positions. The Board has ruled many times that Rule 1 thus does not provide any "exclusive grants of work" to the listed classifications. See Third Division Award 25350.

In the absence of a contractual reservation of the work, as a matter of well-established arbitral precedent, the Organization must show that such work has been customarily and traditionally performed by the Organization's members systemwide, "to the practical exclusion of others." See Public Law Board No. 5567, Award 1. The Organization provided no evidence whatsoever - for example, employee statements - in support of its assertion that its members have customarily performed the work in question, and certainly has not shown that they have performed the work to the exclusion of all others.

In response to the Organization's unsupported assertion in this regard, the Carrier submitted a summary of past subcontracting that has occurred under the parties' Agreement, which was provided to the Organization on July 23, 1999, and which stands unrefuted by the Organization. Included in this summary are

occasions wherein work similar to that at issue here was contracted out. It is apparent from the record, therefore, that the Organization has shown no past practice reserving the work at issue to its members to the exclusion of others. At best, the record shows that the Carrier has had a mixed practice with regard to the assigning of work of the type in question in the instant case.

Furthermore, even if the Organization had succeeded in proving that the work in question was reserved to its members, it would also have been required to prove that the work belonged to the Claimants in particular. Neither Claimant holds a position in the Bridge and Building Sub-department that engaged in the new bridge construction project involved in the instant case. The Organization has not submitted evidence in support of its assertion that the work at issue would have gone to the Claimants in the System Work Equipment Sub-department, rather than the senior Crane Operator or other employees within the Bridge and Building Sub-department.

Having found that the Organization failed to prove any violation of the Agreement, the Board must deny the claim.

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 1st day of August 2006.