Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39302
Docket No. MW-37644
NRAB-00003-020763
(02-3-763)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 (Eastern Oregon Rentals) to perform Maintenance of Way Track Subdepartment work (patrol right of way for fires, extinguish fires, protect the track structure and related work) between Mile Posts 239 and 265 on the LaGrande Subdivision beginning August 17, 2001 and continuing instead of Truck Operator M. R. Patterson, Fire Patrol Foreman D. J. Hamilton and J. G. Badillo (System File J-0152-74/1289770).

2. The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. R. Patterson, D. J. Hamilton and J. G Badillo shall now each be compensated their applicable rates of pay for a proportionate share of the total hours worked by the contractor in performing the aforesaid work beginning August 17, 2001 and continuing."

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.

This dispute involves the Carrier's use of outside forces to watch for fires on U.S. Forest Service property, property contiguous to the Carrier's right-of-way. The question to be addressed is whether such work properly should have been performed by BMWE-represented employees. The answer to this question in the first instance is crucial because it will determine whether the Carrier was obligated to provide prior notice to the General Chairman under Rule 52, Contracting.

The relevant facts giving rise to this matter are not in dispute.

In early August 2001, Claimant M. R. Patterson was advised that he and his crew would be assigned to patrol trackage on the LaGrande Subdivision, a portion of the Carrier's trackage that was known to be susceptible to fires. The Claimant was to patrol this trackage using his District truck equipped with a 250 gallon water sprayer. Subsequently, on or about August 17, 2001, the Carrier assigned outside forces (Eastern Oregon Rentals) to perform such work by patrolling along the right-of-way between Mile Posts 239 and 265 for the purpose of searching for and extinguishing fires that might exist along U.S. Forest Service property. The Carrier's decision on the use of outside forces to perform this work was not preceded by a Rule 52 notice to the General Chairman. It was the Organization's stated position that said work should have been performed by BMWE-represented forces. The Carrier disagreed, noting in its initial denial that:

> "The contractors are assigned the duties of watching for fires on forest service property that was adjacent to the railroad right of way and used the right of way to patrol due to fires that were started in past years and were also fought by outside forces."

The Organization responded by asserting that the maintenance of roadway and track, including fire patrol tasks along the Carrier's right-of-way, is work that has traditionally been performed by forces in the Carrier's Track Subdepartment.

Given the foregoing, we are left to determine whether the type of work at issue was work that can be said to have been traditionally performed by the Carrier's forces in the past. In this regard, "exclusivity" as asserted by the Carrier during the on-property discussion of this case, is not a necessary element to be demonstrated by the Organization in contracting claims. (See Third Division Award 32862 together with cases cited therein.) Rather, the question becomes whether the work at issue represents the kind of work that employees have performed such that it can be said that it falls "within the scope of the applicable schedule agreement." (Id.) The "type" of work traditionally performed by Carrier forces was aptly described by Claimant Patterson, who noted in relevant part:

> "When the right of way is not cleared of grass and bushes, the brake slag of passing trains rolls into the grass and starts fires that burn from the right of way into the forest. The forest service requires that we carry 250 gallons of water when we work between these mile posts on the LaGrande Sub.
>
> I was asked by Roe Decker if I would do this on Saturday the 18 of August 2001. I provide fire protection for the work crews anytime there was any cutting, grinding, or welding performed during their work. A fire at Mile Post 189 that was started by a train in the summer of 2000 that burned sheds and equipment of a residence. I was there with the district truck and the 250 gallon water tank putting out the fire."

Aside from the Carrier's assertion that the Claimant's statement did not depict an accurate account of the work at issue, there has been no contention by the Carrier that the Claimant's statement does not represent a fair description of the

type of work traditionally performed by its forces. Accordingly, it is clear that the "type" of work traditionally performed by Carrier forces consists of fire prevention as well as fire suppression. In this former regard, it is clear that the Carrier has directed its forces to prevent fires that could not only cause damage on its property, but contiguous property bordering its own as well.

Given the foregoing together with a careful review of the record, the Board is convinced that the Organization has sustained its burden of proving that the fire patrol work at issue in this case is encompassed within the scope of the Agreement and is, therefore, subject to the provisions of Rule 52. The Board has reached this conclusion taking into considering the following undeniable facts:

- First, the work performed by outside forces consisted primarily of fire prevention.

- Second, the outside contractor's services were funded by the Carrier and not the U.S. Forest Service.

- Finally, it is clear that it was the Carrier who was to benefit from this work in its continuous effort to maintain its right-of-way, track structures and areas contiguous thereto by preventing as well as suppressing fire activity.

Given the foregoing, Part 1 of the instant claim is sustained.

Rule 52(a) provides, in relevant part, that by agreement between the Carrier and the General Chairman, work customarily performed by employees covered by the Agreement may be let to contractors and performed by a contractor's forces under one or more of six specified conditions:

"1. Special skills are not possessed by the Company's employes;

2. Special equipment is not owned by the Company;

3. Special material not possessed by the Company is only available when applied or installed by the supplier;

4. The work in question is such that the Company is not adequately equipped to handle it;

5. Emergency time requirement situations exist which present undertakings not contemplated by the agreement, and/or

6. Work in question is beyond the capacity of the Company's forces."

The record does not provide support for any of the six conditions noted above. Accordingly, the Carrier was obligated to provide notice to the General Chairman in writing at least 15 days prior to the date the contracting transaction was to occur. The failure by the Carrier to do so represents a violation of Rule 52 and accordingly, the second part of the claim must be sustained.

Because of the violations referred to hereinabove, it is the Board's determination that the matter be remanded to the parties to conduct a joint review of the Carrier's records to determine the amount of hours expended by the outside contractors to be divided equally between the Claimants at their respective straight time rates of pay.

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 29th day of September 2008.