Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39520
Docket No. MW-37739
09-3-NRAB-00003-030097
(03-3-97)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (formerly The Atchison,
(Topeka and SantaFe Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (remove and install electric motors) on the west turn side of the Charenton Canal Railroad Bridge at Baldwin, Louisiana on February 15 and 16, 2002, instead of Messrs. E. R. Lewis and M. L. Stakes [System Files JFSF-02-3/15-02-0004(MW) and JFSF-02-4/15-02-0005(MW) ATS].

2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out said work as required by Appendix No. 8 (Article IV of the May 17, 1968 National Agreement).

3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants E. R. Lewis and M. L. Stakes shall now each be allowed thirteen (13) hours and thirty (30) minutes' pay at their respective time and one-half 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 Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the parties' Agreement by using a subcontractor to perform the work of removing and installing electric bridge motors.

The Organization initially contends that Rules 1 and 2 of the Agreement clearly embrace the classes of employees – B&B Structure Mechanic and Welder – required to perform the work involved in this dispute. The Organization asserts that the repair and maintenance of bridges and appurtenances thereto is the most basic and fundamental work of B&B employees. The Organization argues that the removal and replacement of electric bridge motors lies at the very heart of the Agreement, and this clearly is work encompassed within the scope of the Agreement.

The Organization maintains that to assign this type of work to anyone other than those holding seniority under the Agreement would be to defeat the very intent and purpose of the collective bargaining process. Citing a number of Awards, the Organization insists that it is fundamental that work of a class belongs to those for whose benefit the contract was made and that delegation of such work to others not covered thereby is a violation of the contract. The Organization contends that the work in question is encompassed within the scope of the Agreement, and this work customarily and historically has been performed by B&B forces throughout the Carrier's extensive system and on this particular bridge. The Organization asserts

that the Carrier has not refuted this. The Organization argues that there can be no doubt that the work involved in this dispute accrues to B&B forces.

The Organization then emphasizes that Appendix 8 specifically stipulates that when the Carrier plans to contract out work within the scope of the Agreement, the Carrier must notify the General Chairman in writing as far in advance as practicable, but not less than 15 days prior thereto. The Organization points out that the parties reaffirmed this provision in a Letter of Understanding dated December 11, 1981, doing so in order to ensure that the Carrier would make a good-faith effort to reduce outside contracting and increase the use of its Maintenance of Way forces.

The Organization maintains that despite these provisions, the Carrier flatly failed to give any advance notice of its intent to use outside forces to perform the work at issue. Moreover, this is not the first time the Carrier has failed to comply with its contractual obligation to notify the General Chairman of its plan to contract out scope-covered work. The Organization cites a number of prior Awards that have upheld the principle that a carrier must make a good-faith attempt to use its forces and/or procure rental equipment in order to comply with the December 11, 1981 Letter of Understanding.

The Organization further argues that the Carrier failed to present any valid defense to the instant claim. Instead, in an attempt to muddy the waters, the Carrier offered two of its usual boilerplate arguments, exclusivity and a challenge to the number of hours claimed. The Organization contends that these arguments were cogently refuted on the property, and the Carrier's alleged defenses should be rejected on the basis that the Carrier failed to comply with the advance notice requirements of Appendix 8. The Organization insists that it is well established that defenses to contracting claims cannot be considered "ex post facto" when the Carrier fails to comply with the contracting Rule.

Citing a number of Awards, the Organization argues that the "exclusivity" test has no application here. A large number of Awards have held that the exclusivity test does not apply to disputes over the contracting out of work. As for the Carrier's challenge to the number of hours claimed, the Organization insists that it presented clear and concise information about the number of hours claimed

for each claim date, and the Carrier failed to present any valid evidence, such as time records, to support its position.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that instead of offering proof of the exclusivity of the performance of the work, the Organization offered only allegations. Pointing to prior Awards, the Carrier argues that allegations are not enough. The Organization failed to submit even one iota of evidence that B&B employees could have performed the work, or that the Carrier did not have the right to use an outside party for the alleged work. The Carrier asserts that because the Organization failed to prove that the work belonged to the Carrier's B&B forces, the instant claim must fail. The Organization failed to meet its burden of proving every essential element of its claim.

The Carrier then emphasizes that the Organization failed to show how the Carrier violated the Rules cited in the claim. The Carrier points out that the Scope and Seniority Rules simply do not reserve the work at issue to BMWE-represented employees. Moreover, before the Bulletining Rule may be invoked to support the claim, the Organization would have to prove that the work belonged to Carrier forces, which the Organization failed to do. The Carrier argues that the Organization failed to offer any evidence that the Carrier violated any Agreement Rule when it contracted the work in question, so the instant claim must be denied.

The Carrier asserts that as a matter of common sense, the work of placing an electrical motor on a bridge is professional Electrician work. The work of repairing an electrical motor is not B&B employees' work. The Carrier contends that although it does not concede that the work of removing and repairing electrical motors and electrical equipment is reserved to any of its employees, it would appear that the Carrier's System Electricians have a better claim than do the B&B employees. The Carrier argues that the Organization's failure to even address the Carrier's evidence that Electricians performed this work means that the Carrier's evidence stands as fact.

The Carrier points out that the Organization failed to support any of its assertions with probative evidence. The Carrier asserts that it is well established

that unsupported, self-serving statements are not evidence and cannot take the place of probative evidence. The Carrier insists that the work in question was not that of B&B employees, and it should be performed by qualified Electricians. Electrical work, quite simply, is outside the scope of the Agreement. Moreover, the Carrier argues that any reference to the performance of this work on the Southern Pacific Eastern Lines is anachronistic because the Claimants no longer are employed by the SP. The Carrier contends that all of the Organization's arguments must fail for lack of proof.

The Carrier goes on to point out that because the Organization alleged an exclusive right to perform the work, it should be required to prove exclusivity of actual performance. The Carrier asserts, however, that even if the proper test here was something less than "exclusivity," it is clear that the Organization has not satisfied even a lesser burden. There is no proof to support the claims in this case. The Carrier points out that the Organization is relying on the parties' general Scope Rule. Citing prior Awards, the Carrier argues that because the Scope Rule is general, the Organization bears the burden of proving, by clear and convincing evidence, that the claimed work has been exclusively assigned to B&B employees in the past. Because it has not met this burden, the Carrier contends that the Organization's claim must fail.

The Carrier then asserts that the Organization also has not proven its damage claim. The Carrier insists that past Awards have held that where Claimants are fully employed, a monetary remedy is not appropriate.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Carrier failed to give the General Chairman advance written notice of its plans to contract out the work that is involved in this dispute. Consequently, the Carrier violated Appendix No. 8, Article IV, of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding. Therefore, the claim must be sustained.

In December 1981, the parties agreed to the following language:

> "The Carriers assure you that they will assert good-faith efforts to reduce the incidents 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.
>
> 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 any differences. In the interest of improving communications between parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefore."

In Appendix 8, Article IV, Contracting Out of the National Agreement dated May 17, 1968, the parties agreed:

> "In the event the Carrier plans to contract out work within the scope of the applicable Schedule Agreement, the Carrier shall notify the General Chairman of the Organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen days prior thereto.
>
> If the General Chairman, or his representative, requests a meeting to discuss the matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representatives shall make a good-faith attempt to reach an understanding concerning said contracting, and if no understanding is reached, the Carrier may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith."

The Organization contends and has provided evidence that the work that was performed by the outside contractors on February 15 and 16, 2002, was

maintenance-of-way work. The Board recognizes that the IBEW, another Organization, also claims that work. But it is not necessary that the Organization in this case perform that work exclusively. Exclusivity relates to the Scope Agreement when two different bargaining units are contending for work and one bargaining unit contends that it has the exclusive right to perform that work. In this case, the work that is at issue was performed by an outside contractor and, therefore, the exclusivity argument is not relevant. It is only necessary for the Organization to show that BMWE-represented employees have performed this work on occasions in the past. In this case, the Organization made that showing.

The Carrier in these kinds of cases often has the right to subcontract the very work that is in dispute. In this case, it is very possible that the Carrier had that right. The problem here for the Carrier is that it failed to give the Organization's General Chairman advance written notice of its plans to contract out the work. That is the clear violation of the Agreement that occurred here. The purpose of that section is obvious; the parties have shown their desire to make sure that it is necessary for the Carrier to subcontract work before it hires outside parties to perform work that is usually performed by its own employees. Without notice, the Organization cannot engage in that discussion because it does not even have any indication that the Carrier is going to take that action.

Because the Carrier failed to give the Organization advance written notice of its plans to contract out, this claim must be sustained. As far as the Carrier's position that the Organization failed to raise the notice issue on the property, the record reveals that on April 14, 2002, the first Vice Chairman of the Organization sent a letter to the Assistant Director of Labor Relations and on the last page of that letter stated that no proper notice was given to the General Chairman in regards to the contracting out of the work.

Once the Board has decided to sustain the claim, we must turn our attention to the remedy sought by the Organization. In this case, the Organization seeks pay for two Claimants because they would have been able to perform that work because they hold seniority as Structure Mechanic and Welder. The two days involved were their rest days and, therefore, they would have performed that work on an overtime basis. The Board sustains the claim in its entirety and orders that the two Claimants be allowed 13.5 hours' pay at their respective time and one-half rates.

AWARD

Claim sustained.

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 2nd day of February 2009.