Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39529
Docket No. MW-38066
09-3-NRAB-00003-030511
(03-3-511)

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
(
(The Texas Mexican 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 (Lone Star Construction Company) to perform Maintenance of Way and Structures Department work (install ties and other track material, change rail and related work, tamp track and haul track material) on main line track between Mile Post 157.00 in the vicinity of Corpus Christi, Texas and Mile Post 3.00 in the vicinity of Laredo, Texas beginning on March 10, 2003 and continuing (System File EPTM-03-60/230).

2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a notice of its intent to contract out the work in question and failed to exert a good-faith effort to increase the use of Maintenance of Way forces and reduce the incidence of employing outside forces pursuant to Rule 29 and the December 11, 1981 Letter of Agreement.

3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants E. Lara, J. Lopez, V. Moncivais, T. Vasquez, G. Vasquez, N. Saenz, M. Paz, A. Garcia, J. Rodriguez and J. Sciarraffa shall now each be compensated for forty (40) hours' pay at their respective straight time rates of pay, sixteen and one-half (16 ½) hours' pay at their respective time and one-half rates of pay and the Claimants shall be compensated at their

respective rates of pay for an equal proportion of any and all additional man-hours expended by the outside forces in the performance of the aforesaid work beginning March 10, 2003 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.

The Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the parties' Agreement by using outside forces to perform work relating to the installation of ties and other track material, changing rails, tamping track, and hauling track material.

The Organization initially contends that it is undisputed that work of the character involved here accrues to employees who have established seniority in the Track Sub-Department in accordance with Rules 1 and 2. The Organization asserts that Carrier forces have customarily and historically performed such work on an everyday basis. The Organization maintains that to assign this type of work to anyone other than those holding seniority in the Track Sub-Department under this 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 Agreement. The Organization argues that there can be no question but that ordinary track repair work, such as the work in dispute, is contractually reserved to

the Carrier's Track Sub-Department employees. The Carrier's decision to contract out this work was in violation of the Agreement.

The Organization then emphasizes that the Carrier admittedly failed to notify the General Chairman of its decision to use outside forces. The Organization maintains that the Carrier's short-circuiting of the process it had agreed to rendered its belated excuses for contracting out the subject work just that – excuses. The Organization asserts that the Carrier failed to establish any valid justification for contracting out fundamental track repairs, and the absence of a valid justification is fatal to the Carrier's position. The Organization points out that a vast number of Awards have held that a failure to provide such notice is sufficient per se to warrant a sustaining monetary award even where, as here, the Claimants were "fully employed."

The Organization goes on to argue that the Carrier plainly failed to make any attempt to assign the subject work to Maintenance of Way forces, and this is contrary to the basic tenets of Rule 29 and the December 11, 1981 Letter of Understanding. These provisions clearly and unambiguously require the parties to take advantage of the local good-faith discussions. The Organization points out that no good-faith discussions took place in this instance because of the Carrier's short-circuiting of the process. The Organization insists that the instant claim must be sustained due to the Carrier's lack of good-faith efforts to reduce the incidence of sub-contracting and increase the use of Maintenance of Way forces.

The Organization then contends that there is no support for the Carrier's characterization of the work in dispute as "emergency" in nature. The Carrier had long known about the work and planned to contract it without regard for its Maintenance of Way forces. The Organization emphasizes that this work was plain, ordinary, fundamental track repair work that routinely is assigned to and performed by the Claimants. The Organization insists that there was no emergency. The Organization asserts that the Carrier had no valid justification for its failure to notify the General Chairman in this case.

As for the Carrier's ubiquitous "full employment" defense, the Organization argues that it must fail. The Organization points out that the Board consistently has rejected the inference that the Claimants allegedly were not available to perform the work because they were engaged elsewhere. Although the Claimants were assigned

elsewhere, it is undisputed that they were performing other routine maintenance, and there was no showing that it was impossible to reschedule their routine work or that the Claimants could not have performed the subject work during regular and/or overtime hours. Pointing to prior Awards, the Organization contends that it is well established that the fact that an employee is working where the Carrier assigns him does not render that employee unavailable or unable to perform other work.

The Organization insists that there was an ipso facto loss of work opportunity when an outside contractor performed the scope-covered work in question. Moreover, various Boards overwhelmingly have held in favor of the Organization on the question of whether a so-called "fully employed" claimant is entitled to receive compensation when a carrier violates the contracting-out provisions of the Agreement.

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

The Carrier initially contends that it is well established that because the Scope Rule is general in nature, the Organization bears the burden of demonstrating that it is entitled to the work in dispute through evidence of historical performance of the work to the exclusion of others. The Carrier asserts that a number of Awards have so found.

The Carrier acknowledges that Maintenance of Way employees have been used to do piecemeal rail replacement, tie replacement, tamping, and ballast regulating work in the past. The Carrier asserts, however, that when such work is performed on an expedited basis in conjunction with the operation of a Sperry Rail Test Car across the property, a contractor always has worked with Carrier forces in performing such work. The Carrier emphasizes that the work in dispute never has been considered as falling within the exclusive, historical rights of BMWE-represented employees on this property.

The Carrier further asserts that it has a long-standing practice of contracting out work under the criteria set forth under Rule 29. The Carrier contends that the Organization has been fully aware of and has acquiesced in this practice over the years. Moreover, throughout this proceeding, the Organization has not denied the

Carrier's long-standing practice of using contractors, nor has the Organization offered proof that the work in dispute historically has been performed by BMWE-represented employees it represents to the exclusion of others. The Carrier points out that the Organization has, in fact, conceded this historical practice, as well as the existing force's inability to perform the correct, permanent repairs promptly when detected.

The Carrier insists that the Organization simply failed to meet its burden of proof in this case. The Organization failed to show historical performance of the work to the exclusion of others. The Organization failed to disprove the Carrier's assertion of a historical practice of using outside contractors in connection with the work in dispute, and the Organization actually has conceded this practice. The Carrier contends that the instant claims should be denied on this basis alone.

The Carrier goes on to argue that even if the work was covered by the Scope Rule, Rule 29 clearly is permissible in nature and permits the contracting of the work. The Carrier acknowledges that no notice was given to the Organization, but it asserts that the historical practice has been to treat the disputed work as not requiring such notice.

The Carrier further asserts that even if a violation of the Agreement were to be established, there is no basis for awarding any of the ten named Claimants the compensation claimed. The Carrier contends that the number of Claimants is excessive in that it greatly exceeds the number of employees utilized by the contractor on the dates involved. The Carrier asserts that there is no way that ten of its employees would have been required to perform the work when the contractor used an average of five employees per day. The Carrier points out that three of the Claimants were not even active employees; one Claimant had been long retired as of the claim dates, while two others were on medical leaves of absence throughout the entire period of the claims. The Carrier emphasizes that three other Claimants were on vacation during most or all of the claim dates. The Carrier insists that there is no merit to claims from employees for dates when they were off on vacation or other personal leave.

As for the remaining four Claimants, the Carrier argues that these employees constituted the gang that was working behind the test car and participating in the very work addressed by the instant claim. The Carrier asserts that there is no

understanding how these Claimants can claim the same work that they were being utilized to perform. The Carrier argues that even if a violation were shown, which has not occurred here, these Claimants would not be due any compensation because they were fully employed during the claim period. The Carrier insists that under the circumstances of this case, the Organization cannot show that these Claimants sustained any loss in compensation.

Addressing the Organization's argument based on an alleged lack of manpower due to the Carrier's failure to hire, the Carrier asserts that this is a position of last resort in that it reflects the Organization's reluctant understanding that the Carrier truly did not possess sufficient manpower or time to perform the work in dispute with its own forces. The Carrier emphasizes that the Organization correctly observed that the Carrier has a fundamental right to determine its employment levels, and this right historically and uniformly has been recognized by the Board.

The Carrier then contends that there is no substance to the Organization's suggestion that the Carrier somehow has "limited itself by agreement." The Carrier asserts that the Organization has not identified any contractual terms or limitations that bind the Carrier to a certain level of employment. The Carrier argues that, instead, the general Scope Rule and Rule 29 permit contracting of covered work, as supported by the unrefuted historical practice of using contractors on this property. The Carrier points out that the Organization has not identified any Rule, Agreement, or other authoritative basis for the alleged "liability" that supposedly exists for failure to employ "sufficient" forces. Moreover, the Organization never has explained what constitutes "sufficient forces to satisfy the needs of the service," or how one would measure such an ethereal concept.

The Carrier insists that the true focus of the Organization's "insufficient force level assertions" is that the Organization is seeking to leverage the Carrier into increasing its work force to the point where contractors never would be used on the property. The Carrier argues that this would create productivity losses and operating inefficiencies, among other problems, and it possibly could mean the difference between the Carrier's survival and failure.

The Carrier contends that there is no value to the Organization's emphasis on the reduction in BMWE employment on this property over the past five years. The

Carrier suggests that this force reduction may mean that the work force on this property five years ago was too large. The Organization has not shown that the current work force is at odds, on a relative basis, with the rest of the industry. The Organization, in fact, has not provided any contextual information to validate its assertions based on this force reduction, nor has the Organization shown that this information is in any way relevant to the instant dispute.

The Carrier insists that it maintains a work force sufficient to attend to any and all of the normal repair and maintenance functions that are needed on a day-to-day basis. The Carrier asserts that it cannot afford the luxury of maintaining surplus employees to be on hand when extraordinary situations or projects arise. The Carrier points out that in today's competitive transportation environment, it must operate in as efficient and cost effective manner as possible if it is to survive and prosper.

The Carrier then turns to the Organization's arguments based on the December 11, 1981 Letter of Understanding. The Carrier argues that this Understanding is not even in effect on this property, and Rule 29 is the sole governing Agreement provision affecting contracting. The Carrier asserts that even if it were still party to the provisions cited by the Organization, these provisions would have no application because of the established practice of contracting out that exists on this property. The Carrier insists that its practice of utilizing contractors is well known and accepted by the Organization. The Carrier asserts, in addition, that the December 11, 1981 Letter of Understanding was intended to apply only to scope-covered work, and the work in dispute is not covered by the general Scope Rule. The Carrier therefore argues that even if this Letter of Understanding were in effect on the property, it would have no application here.

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

The Board reviewed the record and finds that the Organization met its burden of proof that the Carrier failed to notify the General Chairman of its intent to subcontract the work in dispute. Therefore, the claim must be sustained.

The record reveals that the Carrier did not provide the required advance written notice to the General Chairman. Rule 29 states the following:

> "When work coming under the Scope Rule of the Maintenance of Way agreement is found to be of such nature that it cannot be performed by the regular forces of the respective sub-departments, the General Chairman will be notified in writing at least fifteen (15) days in advance of any transaction for contracting out of such work. The Carrier and Organization representative shall make a good-faith attempt to reach an understanding on the contracting-out of the work to be performed. In the event no satisfactory agreement or understanding is reached, this rule will not affect the existing rights of either party in connection with the contracting of work and does not change, alter, or modify any provisions of the Scope Rule or any rules of the applicable agreement in the handling of such matters."

It is clear from the above-cited Rule that the Carrier has the requirement of notifying the General Chairman in writing at least 15 days before any contracting out occurs. The Carrier admitted that it did not do that in this case.

It is not necessary for the Board to repeat once again the reasons for the notice Rule. But the Carrier and the Organization have agreed on numerous occasions to assert good-faith efforts to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces to the extent practicable. The fact that the Carrier failed to give the appropriate notice so that the parties could discuss this proposed subcontracting is evidence of the clear-cut violation of the Rule.

Once the Board has determined that there has been a violation, we next must turn our attention to the remedy. In this case, the claim is seeking relief for a variety of employees and it is not possible for the Board to make a determination as to which employees are entitled to relief. Consequently, we shall remand that matter to the property for the parties to resolve, with the Board retaining jurisdiction should they be unable to concur as to the monies due the appropriate 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 2nd day of February 2009.