Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39559
Docket No. MW-38130
09-3-NRAB-00003-040017
(04-3-17)

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 to perform Maintenance of Way and Structures Department work (install bridge ties, caps, piling and related bridge maintenance work) at Bridge 123.14 between Agua Dulce, Texas and Alice, Texas beginning April 16, 2003 and continuing (System File EPTM-03-73/232).

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 L. Serna, J. Garcia, T. Vasquez, N. Saenz, G. Vasquez, M. Paz and J. Rodriguez shall now each be compensated for twenty-four (24) hours' pay at their respective straight time rates of pay and for sixteen and one-half (16.5) hours' 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 outside forces to perform the work of installing bridge ties, caps, pilings, and related bridge maintenance work at Bridge 123.14 between Agua Dulce and Alice, Texas.

The Organization initially contends that there is no question that the Agreement was violated in this case because the employees enjoy a clear and unmistakable contractual right to perform fundamental bridge maintenance work of the type at issue; the Carrier admittedly failed to provide advance notice; all Claimants were available, willing, and contractually entitled to preference versus outside forces for assignment to the work at issue; and the Carrier made no good-faith effort to assign the work to its own Maintenance of Way forces.

The Organization argues that there is no dispute that work of the character at issue here accrues to employees who have established seniority in the Maintenance of Way and Structures Department, in accordance with Rules 1 and 2. The Organization maintains that the language of Rule 1 clearly and unequivocally reserves bridge maintenance and repair work to Carrier forces. The Carrier's forces customarily and historically have performed such work on the Carrier's property. The Organization asserts that to assign the work at issue to forces other than those who hold seniority under the governing Agreement would be to defeat the very purpose and intent of the collective bargaining process.

Citing a number of Awards, the Organization insists that it is a fundamental violation of a contract to delegate work to those not covered by an agreement if that work is of a class that belongs to those for whose benefit the contract was made. The Organization points to the Carrier's admission that it assigned Foreman Serna to work at the bridge two days before the outside contractor showed up, and again throughout the claim dates, arguing that this plainly demonstrates the Carrier's recognition that the work in question was scope-covered maintenance. The Organization therefore insists that there can be no question that the work at issue was contractually reserved to Maintenance of Way forces and that the Carrier's decision to contract the work to an outside contractor was in violation of the Agreement.

The Organization emphasizes that the Carrier's admitted failure to notify the General Chairman invalidated its usual litany of affirmative defenses. The Carrier's short-circuiting of the process to which it had agreed rendered its belated excuses for contracting out the subject work just that – excuses. The Organization contends that the Carrier failed to establish any valid justifications for contracting out the fundamental bridge repairs at issue, and this is fatal to the Carrier's position. The Organization asserts that based on numerous Awards, the Carrier's admitted failure to provide advance written notice to the General Chairman is sufficient to warrant a sustaining monetary award even where, as here, the Claimants were "fully employed." The Carrier's proven violations of the scope and notice provisions of the Agreement require a sustaining award in this case.

The Organization then asserts that there is no support for the Carrier's assertion of an "emergency," and an emergency would not change the result. The Organization points out that trains were passing over the derailment location for two days before the contractor arrived, so no "emergency" existed. Moreover, the Carrier's own forces could have responded as rapidly as, if not more rapidly than, the outside contractor's employees. The Organization insists that the Carrier had no valid excuse for its failure to provide notice.

The Organization goes on to contend that there is no indication in the record that the Carrier made any attempt to assign the subject work to its Maintenance of Way forces. The Organization asserts that this plainly is contrary to the basic tenets of Rule 29 and the December 11, 1981 Letter of Understanding. The Letter of Understanding mandates the parties to take advantage of local good-faith discussions, but no such discussions occurred in this instance because the Carrier, as previously

noted, short-circuited the process. Pointing to a number of Awards, the Organization maintains that the instant claim must be sustained because the Carrier failed to make any good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces. The Organization argues that the Carrier may not cripple its bargaining unit through attrition or a lack of training, as has happened on this property, and then argue a lack of sufficient and qualified personnel as an excuse for contracting.

The Organization then addresses the Carrier's position that except for Claimant Serna, none of the Claimants held seniority in the B&B Sub-Department and, therefore, were not proper Claimants. The Organization insists that in making this assertion, the Carrier plainly is wrong. Based on prior Awards, the Claimants were contractually entitled to preference over outside forces for assignment to the work at issue. The Organization asserts that the Claimants therefore are proper.

The Organization argues that the Carrier's assertions about the Claimants' "full employment" simply do not rise to the level of proof necessary to defeat the instant claim. Moreover, the fact that the Carrier assigned Claimant Serna to the derailment site two days before the outside contractor began the subject work plainly shows that it recognized the work as scope-covered work. The Organization contends that even if Claimant Serna worked with the outside contractor, this would not render him an improper Claimant. The Organization maintains that the instant claim should be sustained in full to enforce the integrity of the Agreement.

The Organization goes on to emphasize that the Board consistently has rejected arguments that employees allegedly are not available to perform the subject work because they were engaged elsewhere. The Organization points out that there is no dispute that the Claimants were merely performing routine maintenance during the claim period, so there has been no showing that it was impossible to reschedule their routine work or that the Claimants could not perform the subject work during their regular and/or overtime hours. The Organization maintains that it is well established that if an employee is working where the Carrier assigns him, this does not render the employee unavailable or unable to perform other work.

The Organization asserts that with respect to the argument that the Claimants suffered no monetary loss because they were fully employed, the Organization points out that there was an ipso facto loss of a work opportunity when an outside contractor

performed the work in question. The Organization emphasizes that the Board repeatedly has found that a "fully employed" claimant is entitled to compensation when a carrier violates the Agreement provisions governing the contracting out of work.

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

The Carrier initially contends that the named Claimants are improper, are claiming duplicate pay, and/or were unavailable on one or more of the claim dates. The Carrier asserts that Claimant Serna's claim is totally without merit because he was called to work with the contractor, and he actually worked the exact hours claimed herein. The Carrier asserts that this fact never was denied or contradicted, so it must be accepted as correct. The Carrier argues that in light of this fact, there is no possible basis for the Organization to pursue a claim on behalf of Claimant Serna. No matter what the basis, the Carrier asserts that it is without merit. The Carrier then emphasizes that the claim on behalf of Claimant Rodriguez also is improper in that this Claimant was not in active service on any of the claim dates; the Claimant was on a medical leave of absence.

The Carrier then points out that the rest of the Claimants were assigned to positions in the Track Sub-Department, so they have no proper claim to work in the B&B Sub-Department. The Carrier emphasizes that Rule 1, the Scope Rule, specifically states that employees assigned to either of these two Sub-Departments may work only in their assigned Sub-Department except in cases of emergency. The Carrier contends that in the event of an emergency, this provision is permissive, not mandatory. Because these Claimants are Track Department employees and the work in question is B&B Department work, the claims on behalf of these Claimants should be dismissed on this basis alone. Moreover, all four of these Claimants were fully employed on their own assignments on all claim dates, so they sustained no loss in compensation.

The Carrier goes on to contend that the Scope Rule is general in nature, and prior Board Awards have established that under a general Scope Rule, the Organization must demonstrate an entitlement to the work through evidence of historical performance of such work to the exclusion of others. The Carrier argues that the Organization failed to prove that the work in question has been exclusively and historically performed by Maintenance of Way employees, especially under the emergency circumstances present in the instant case.

The Carrier then asserts that at no time during the on-property handling of this matter did the Organization deny the Carrier's long-standing practice of using contractors on the property, nor has the Organization offered evidence that the work of tie replacement historically has been performed by its members to the exclusion of others. The Carrier insists that the historical use of contractors has been the rule, rather than the exception, on this property. The Carrier argues that the Organization failed to meet its burden of proof, so the instant claims should be denied.

The Carrier goes on to contend that there can be no doubt that there was an extraordinary emergency in this case. The Carrier faced a damaged bridge on its main line that was so fragile that its B&B Foreman had to personally flag trains across at a minimum speed to insure that the bridge would not collapse. The Organization has not disputed these facts. The Carrier insists that work of the nature involved here never has been considered as requiring notice to the Organization under Rule 29 or any other Rule or Agreement. Even if it is found that the work was of a nature that such notice was required, the Carrier asserts that the notice requirement nevertheless would not be binding because of the emergency situation. The Carrier points out that because the emergency repairs commenced immediately upon securing the necessary supplies and equipment, it was physically impossible to serve notice and confer with the Organization prior to commencing the work. The Carrier cites a number of Awards holding that under such circumstances, the failure of a carrier to provide notice does not provide a basis for a sustaining Award. The Carrier emphasizes that the derailment-related damage to the bridge rendered it virtually inoperable and on the verge of catastrophic failure, and this is more than sufficient to support a finding of an emergency.

Addressing the Organization's position that the Carrier allegedly failed to hire sufficient employees, the Carrier asserts that this is a position of last resort in that it reflects the Organization's understanding that the Carrier faced an emergency situation and truly did not possess sufficient manpower or time to perform the work in question with its own forces. The Carrier emphasizes that all Divisions historically and uniformly have recognized that a carrier has a fundamental right to determine its employment levels. The Carrier argues that the Organization has not identified any contractual terms or limitations that bind the Carrier to a certain level of employment. Instead, the general Scope Rule permits the contracting of covered work, and the record demonstrates an unrefuted practice of using contractors on this property. The

Carrier asserts that the Organization has not identified any basis for alleged "liability" for failure to employ "sufficient" forces.

The Carrier contends that the true focus of the Organization's assertions about "insufficient force levels" is that the Organization is seeking to leverage the Carrier into increasing its work force to a point where there never would be another contractor used on the property. The Carrier insists that such a state of affairs would bloat the Carrier's operating ratio, create productivity losses and operating inefficiencies, and perhaps mean the difference between the Carrier's survival and failure. Moreover, such a result would fly in the face of the historical practice on the property.

The Carrier then points out that the Organization has not shown that the Carrier's current work force level is at odds, on a relative basis, with the rest of industry. The Organization has not shown that the Carrier's force level is relevant to this dispute in any way. The Carrier asserts that it maintains a work force sufficient to attend to any and all normal repair and maintenance functions that are needed on a day-to-day basis. The Carrier argues that it cannot afford the luxury of maintaining surplus employees to be on hand when extraordinary circumstances or projects arise. Moreover, unlike the large roads, the Carrier does not have manpower scattered across many states that can be shifted when the need arises.

The Carrier ultimately contends that the instant claims should be denied in their entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it assigned outside forces to perform work at Bridge 123.14 beginning April 16, 2003. The record clearly demonstrated that this was an emergency situation because the Carrier had a damaged bridge on its main line and was legitimately concerned that the bridge would collapse. The Organization has really not disputed the seriousness of the situation and it is clear that when emergency repairs are being commenced, it is virtually impossible for the Carrier to serve notice and have a conference over the matter prior to beginning the work.

The Board has ruled on numerous occasions that when an emergency exists that requires immediate action, there is no requirement for notice to be served. (See Third Division Awards 32273, 31278, 30868 and 27969.)

It is fundamental that the Organization must meet its burden of proof in order to obtain a sustaining award. In this case, because of the emergency situation, the Organization failed to meet that burden of proof and the claim must be denied.

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 27th day of February 2009.