Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39614
Docket No. MW-38190
09-3-NRAB-00003-040078
(04-3-78)

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman 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 (Tri Co. Inc.) to perform routine Maintenance of Way work (cleaning right of way scrap, scrap ties and wood debris) in the Marysville Yard, Marysville, Kansas on October 14, 15, 16, 17, 18 and 21, 2002 instead of Eastern District Roadway Equipment Operator M. J. Coan, Kansas Division Group 15 Truck Drivers V. E. O'Toole, R. D. Creek, K. A. Gosser, N. G. Giesler and P. L. Spurling (System file W-0252-167/1353251)

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance 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. J. Coan, V. E. O'Toole, R. D. Creek, K. A. Gosser, N. G. Giesler and P. L. Spurling shall now receive '***an equal proportionate share of the man hours worked by the outside contracting force as described in this claim, at their respective Roadway Equipment Operators, and truck driver Straight Time and Overtime rates of pay as compensation for the violation of the Agreement for hours worked by the outside

contracting force in cleaning the Right of Way of scrap ties and debris.'"

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 case involves the question of whether the contracting out of the construction of two new main lines, a new bridge and yard modifications in conjunction with the Marysville Railroad Relocation Project properly encompassed cleaning the right-of-way of scrap, scrap ties and debris associated with the project. Although initially disputed by the Organization, its claim in the instant case does not include a claim that the work involving the actual construction was improperly noticed or contracted out pursuant to the parties' Agreement.

The Carrier's original notice to the Organization, dated July 8, 2002 (Service Order No. 24911) listed as "Specific Work: Construct Two New Main Lines, New Bridge, and Make Yard Modifications in Conjunction with Marysville Railroad Relocation Project." The Organization's response, dated July 15, complained, in part, that the Carrier's notice did not ". . . provide . . . a full description of the work to be contracted. . . ."

The Carrier argues that the work at issue – the clean-up performed by the contractor – was incidental to the work associated with the installation of a new embankment. The Carrier also contends that it is not obligated to "piecemeal" the work in the manner claimed by the Organization and that Article IV of the 1968 National Agreement was superseded by Rule 52 - Contracting.

The Carrier's assertion that it is not obligated to "piecemeal" project work to afford the Organization the right to a portion of it is not especially relevant to the instant case. It must be clear the Board in no way overturns established precedent with respect to a Carrier's right to avoid the "piecemeal" of work, nor does it disturb precedent with respect to a "mixed past practice" analysis. However, it is *not necessary to reach either question inasmuch as the Board finds the notice, in the* first instance, did not adequately define the scope of work to include debris removal – clearly work of which BMWE-represented employees are capable of performing and have performed in the past – and, therefore, deprived the Organization of its right to enter into informed discussions about the proposed contracting.

As stated in Public Law Board No. 7100, Award 13, "[b]oth the spirit and letter of the December 11, 1981 letter clearly puts upon the Carrier the burden of providing sufficient notice to the Organization in terms of both calendar notice as well as reasons for the subcontracting in order to demonstrate 'good faith efforts to reduce the incidence of subcontracting and increase the use of maintenance of way forces. . . .'"

Special Board of Adjustment No. 1016, Award 28, cited by Carrier illustrates the point:

> "From the evidence in the record as developed on the property, this Board cannot definitively determine whether, as initially alleged by the Organization, the contracted work was simple 'road maintenance work (cleaning of debris)' which was contracted out without prior notice (which would entitle the Organization to a sustaining award – see, e.g. Third Division Award 31449) or whether the work was of the type characterized by the Carrier as 'demolition and excavation work . . . part of the larger National Docks Project' which the Carrier need not 'piecemeal' (which would result in a denying award – see, e.g., Third Division Award 29187)." (Emphasis added)

Simply put, the Carrier's obligation included describing to the Organization its intention to contract for the debris removal work even where, in the Carrier's view, it was part and parcel of a larger project. Its failure to do so violated the Agreement.

While the claim is partially sustained based on the facts presented, the claimed remedy is not sustained. There is insufficient evidence of a loss of earnings to justify a monetary remedy, an established prerequisite to making such an award. (See, e.g., Public Law Board No. 1844, Award 13). In these circumstances, longstanding precedent requires instead the Carrier to issue proper notice in future similar circumstances.

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 1st day of April 2009.