Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39660
Docket No. MW-38192
09-3-NRAB-00003-040114
(04-3-114)

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
PARTIES TO DISPUTE: (
(The Texas Mexican Railway

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (R. J. Corman Railroad Contractors) to perform Maintenance of Way and Structures Department work (operate tamper and regulator) in connection with track surfacing work between Mile Post 64 near Hebronville, Texas and Mile Post 9 near Laredo and Agilares, Texas beginning June 23, 2003 (System File EPTM-03-99/254).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper 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 R. Garza, V. Moncivais, T. Vasquez and G. Vasquez shall now each be compensated at their respective straight time and time and one-half rates of pay for an equal proportionate share of the total man-hours expended by the outside contractor beginning on June 23, 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 alleging that the Carrier violated the parties' Agreement when it utilized outside forces to perform certain Maintenance of Way work in connection with track surfacing in the vicinity of Hebronville, Laredo, and Agilares, Texas, beginning on June 23, 2003.

The Organization initially contends that it is undisputed that work of the character involved here accrues to employees who have established seniority in the Maintenance of Way and Structures Department in accordance with Rules 1 and 2 of the parties' Agreement. The Organization asserts that the unequivocal language of Rule 1 clearly reserves track maintenance and upgrade work to Carrier forces who have historically and customarily performed such work on the Carrier's property.

The Organization argues that to assign work of this character to other than those employees holding seniority under the Agreement would be to defeat the very intent and purpose of the collective bargaining process. The Organization maintains 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 in violation of the contract. The Organization emphasizes that there can be no dispute that the ordinary track work at issue was contractually

reserved to the Carrier's Maintenance of Way forces, and its decision to use an outside contractor to perform this work was in violation of the Agreement.

The Organization points out that the General Manager confirmed that since 1996, the Carrier has made infrastructure improvements to help it handle its expanded operations and tremendous increase in traffic. The Organization contends that this statement reveals that the Carrier has been aware for eight years of the need for additional manpower to maintain, repair, and upgrade its tracks and bridges. The Organization emphasizes that the General Manager also credibly stated that the Carrier has reduced its workforce, while the General Chairman repeatedly has noted that Maintenance of Way forces have been allowed to "wither on the vine" since 1992, due to attrition and the Carrier's refusal to hire sufficient replacements. The Organization insists that the Carrier's contradictory statements on this issue, asserting that there has been no purposeful reduction in Maintenance of Way forces, is an improper attempt to have it both ways; the Carrier is equitably estopped from simultaneously arguing diametrically opposing viewpoints in two different forums.

The Organization maintains that the inescapable conclusion here is that the Carrier independently elected to contract with outside forces rather than assigning its own Maintenance of Way forces with whom it first had contracted for the performance of such work. The Organization asserts that the Carrier's "lack of personnel" defense here is nothing more than a fabrication that cannot justify the contracting out of the fundamental track work in question. The Organization contends that the absence of a valid justification is fatal to the Carrier's position.

The Organization argues that the record reveals that the Carrier made no attempt to assign the subject work to its Maintenance of Way forces. The Organization insists that this is contrary to the basic tenets of Rule 29 and the December 11, 1981 Letter of Understanding (LOU). The LOU clearly and unambiguously mandates that the parties take advantage of local good-faith discussions, but no such discussions occurred in this case because of the Carrier's predetermination to use outside forces. The Organization maintains that the instant claim must be sustained because of the Carrier's lack of good-faith efforts to reduce the incidence of subcontracting and increase the use of BMWE-represented forces.

The Carrier continues its failure to comply with this promise from the December 1981 LOU despite its demonstrated applicability.

The Organization contends that through attrition and a refusal to hire and train replacements, the Carrier reduced its Maintenance of Way forces by nearly 50 percent since 1996. This violates the Carrier's promise to make and maintain Agreements in good faith pursuant to the Railway Labor Act, as well as the December 1981 LOU. The Organization argues that the Carrier may not cripple its bargaining unit in this way and then argue a lack of sufficient and qualified manpower as an excuse for contracting. The Organization maintains that the Carrier's "defenses" add insult to injury and cannot be construed to defeat the instant claim.

The Organization then addresses what it calls the Carrier's "usual litany of affirmative defenses," asserting that these are invalid and baseless. As for the argument that this claim is duplicative, the Organization insists that the Carrier plainly is wrong. Under the Carrier's logic, if the Carrier were to violate the Agreement by improperly using contractors at different locations and different claims were filed for each of these violations, then this would lead to the absurd result of allowing the Carrier to violate the Agreement with impunity through asserting that these are duplicate claims. The Organization emphasizes that the Carrier failed to prove that the instant claim was an actual duplicate of another. Moreover, because the Organization agrees that the Carrier should be made to pay only once for each proven violation, this affirmative defense cannot serve to defeat the instant claim.

As for the Carrier's past practice defense, the Organization notes that the Carrier failed to produce any evidence on this point. The Organization therefore argues that this "defense" is without merit and not worthy of serious consideration. With regard to the Carrier's questioning of the number of hours claimed, the Organization points out that the Carrier is in possession of the records that definitively show the number of hours that it paid the outside contractor's forces. The Organization emphasizes that instead of presenting this evidence, the Carrier merely provided a second-hand assertion about what the contractor's records allegedly reported as hours expended in the performance of the subject work. The

Organization contends that the Carrier's assertion on this point constitutes a tacit admission of the violation and should not be construed to defeat the instant claim.

The Organization goes on to challenge the Carrier's allegation that each Claimant was "fully employed," worked overtime, or observed vacation during the claim period. It contends that although the Carrier is in sole possession of work and payroll records to substantiate its affirmative defense, the Carrier chose not to present such evidence, which invites application of the negative inference rule. The Organization further asserts that the allegation that Claimant Garza worked with the contractor does not serve to render him an improper Claimant. The Organization argues that the Carrier's "full employment" defense should fail because Boards consistently have rejected the assertion that claimants were unavailable to perform the disputed work because they were engaged elsewhere. The Organization emphasizes that in this case, the Claimants were assigned to perform routine maintenance, and there was no showing that this routine work could not have been rescheduled or that the Claimants could not have performed the subject work. Citing several Awards, the Organization insists that an employee is not unavailable or unable to perform other work simply because the employee is working where the Carrier assigned him.

Responding to the allegation that the Claimants suffered no monetary loss because they were fully employed during the claim period, the Organization argues that there was an ipso facto loss of work opportunity when the outside contractor performed the scope-covered work in question. The Organization asserts that Boards overwhelmingly have found that 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 where, as here, the Scope Rule is general in nature, the Organization bears the burden of demonstrating its entitlement to disputed work through evidence of historical performance of the work to the exclusion of others. The Carrier acknowledges that

Maintenance of Way employees have been used to do routine lining, leveling, and surfacing in the past, but it insists that they never performed the kind of extensive, high-production, rehabilitation work that was the subject of the contracting at issue. The Carrier asserts that the work in question never has been considered as falling within the exclusive, historical rights of BMWE-represented employees on this property.

The Carrier argues that it has a long-standing practice of contracting out work under the criteria set forth in Rule 29 of the Agreement, and the Organization has been fully aware of this long-standing practice on this property. The Carrier asserts that the Organization has acquiesced in this practice for many years, and the Organization has not rebutted this. The Carrier contends that because the Organization failed to meet its burden of proof, the instant claim should be denied.

The Carrier emphasizes that even if the work is covered by the Scope Rule, the language of Rule 29 clearly permits contracting out scope covered work. The Carrier argues that it may contract covered work, subject to the notice and conference process, if the work is beyond the capacity of the existing force. The Carrier insists that the work in dispute fully met the criteria of Rule 29.

The Carrier points out that the sheer number of employees and equipment used by the contractors is evidence of the Carrier's inability to handle this massive rehabilitation project in-house. There were nearly 100 employees and dozens of pieces of heavy equipment engaged in this work. The Carrier emphasizes that in terms of personnel alone, this represents more than five times the size of its total work force. Moreover, none of its employees are qualified to operate the kinds of specialized equipment provided by the contractors. The Carrier contends that the Organization's position that the disputed work could have been performed without the use of contractors is absurd and unsupported by the facts. The Carrier suggests that the Organization tacitly has conceded this point by making an elaborate argument about the Carrier's alleged failure to maintain a sufficient work force.

The Carrier emphasizes its strong disagreement with the Organization's position that the work in question is "work of the craft" or that the existing work force is wrong-sized for the property. It asserts, however, that in advancing these

arguments, the Organization admitted that the work project here was beyond the manpower capabilities of the Carrier's work force.

The Carrier argues that it was not remotely capable of supplying the personnel necessary to do a project of this magnitude, and the necessary machinery and tools were non-existent on the property. The Carrier insists that the Organization's position on this point is hollow, and the instant claim was progressed only with the hope of achieving a windfall. The contracting of the work in question falls squarely within the provisions of Rule 29 because it was of "a nature that it cannot be performed by the repair forces" on the Carrier's property.

The Carrier goes on to contend that it made every reasonable effort to fulfill the notice and conferencing process referred to in Rule 29. It asserts that a May 2003 letter from the Organization, however, made clear that it would be fruitless for the Carrier to engage in further conference discussions with the Organization. It argues that there is no basis in the record for finding that the Carrier did not fulfill its obligations under Rule 29.

The Carrier then points out that the Claimants were fully employed and worked substantial overtime during the claim period. It asserts that the Claimants' work records dispel any notion that they could have performed the work in question. The Carrier additionally argues that there can be no basis for claims on days that the Claimants were on vacation, on personal leave, or on jury duty. It emphasizes that the record proves that the Claimants and other members of the Carrier's work force could not have independently completed the disputed work, and the scope of this rehabilitation project far exceeded the manpower capacity of its existing work force.

The Carrier additionally contends that even if a violation were shown, the payroll data proves that the Claimants would not be due compensation. The Claimants were fully engaged in routine maintenance duties, as well as assisting the contractor forces to the extent possible. The Carrier insists that there can be no showing that the Claimants sustained any loss in compensation in connection with this matter.

The Carrier further argues that the Organization adopted an offensive strategy of breaking down this large rehabilitation project into parts and pursuing multiple claims for each component. The Carrier suggests that the Organization apparently is attempting to disguise the fact that the Claimants have been named in multiple claims that overlap or run concurrently. The Carrier insists that the Claimants are making duplicate and triplicate claims for certain portions of the claim period. It argues that it is improper for the Organization to utilize this "shotgun" approach in an effort to achieve duplicate, windfall payments.

The Carrier also asserts that the instant claim is vague and excessive. The Carrier points out that on a number of dates, the contractor did not work a full ten hours as claimed. Moreover, the Claimants were assigned to work with contractor forces for the majority of the claim period. The Carrier contends that the Organization progressed this matter in an improper manner that is designed to create confusion and duplication.

The Carrier goes on to contend that the Organization's various positions are without merit. It asserts that it gave proper notice to the Organization of the contracting. It also argues that under Rule 29, both parties are required to make a good-faith attempt to reach an understanding on such an issue, and the Carrier emphasizes the Organization's unwavering, uncompromising refusal to agree to any contracting request. The Carrier suggests that a better case can be made for an absence of good faith on the Organization's part than on the part of the Carrier.

Addressing the Organization's reliance on the December 11, 1981 LOU, the Carrier insists that it does not apply on this property. The Carrier therefore asserts that this LOU has no relevance to the instant claim.

As for the Organization's position that a lack of manpower on the property is due to the Carrier's failure to hire, the Carrier suggests 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, equipment, or time to perform the work in question. The Carrier contends that it ludicrous for the Organization to suggest that the Carrier is attempting to zero out its maintenance force. The Carrier points out that the Organization actually is attempting to impose upon the Carrier its own

opinion regarding the appropriate size of the Carrier's work force. It emphasizes the Organization's acknowledgement that the Carrier has the fundamental right to determine its employment levels. Moreover, this right has been historically and uniformly recognized by all Boards.

The Carrier asserts that the Organization has not pointed to any Rule, Agreement, or other authoritative basis that binds the Carrier to a certain level of employment or that forms a basis for alleged "liability" for failing to employ "sufficient" forces. In addition, the Organization never explained what constitutes "sufficient forces to satisfy the needs of the service." The Carrier contends that the true focus of the Organization's position on this point is 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 emphasizes that the Organization failed to prove that the current work force level is at odds relative to the rest of the industry or to the Carrier's operational needs.

The Carrier insists 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 for a 160-mile railroad. The Carrier cannot afford the luxury of maintaining surplus employees to be on hand when extraordinary situations or projects arise. As for the Organization's position that if any contracting of work is done, then the force obviously is too small, the Carrier asserts that if the Organization's view were to be adopted, then the Carrier quickly would go out of business.

Turning to the Organization's position that, with planning and scheduling, the work could have been performed by existing forces with leased or purchased equipment, the Carrier argues that no amount of planning would have led to the conclusion that the work was within the capabilities of the work force on the property. The Carrier asserts that even if it had been able to find and lease all required equipment, there would have been many more machines than there were employees to operate them. In addition, the Organization apparently is suggesting that the Carrier could have hired 96 new employees, and then trained them all in the performance of highly sophisticated production work and machine operation, only to have to lay them off after the project was completed. The Carrier emphasizes that this clearly is unreasonable.

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

The Board carefully reviewed the extensive 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 the work at issue in this case. Therefore, the claim must be denied.

It is fundamental that the Organization bears the burden of proof in cases of this kind. It is clear that the Organization is extremely frustrated with the continuing reduction of the number of Maintenance of Way employees that are currently employed by the Carrier. It is apparent that much of the work that was performed by the subcontractors could be performed by BMWE-represented employees. However, the Organization failed to prove that the Carrier acted in any way to violate the terms of the Agreement as it systematically subcontracted work that clearly has been performed by BMWE-represented employees over the years. In this case, as in several others that have come before the Board, the Carrier was involved in a major reconstruction of its railroad. It did not have sufficient forces or equipment to perform the work that was necessary. The Carrier followed the procedures set forth in the Agreement and subcontracted the work to outside forces. There is no question that if the Carrier had sufficient forces working for it at the time, those forces could have performed the work. However, the Carrier is a small railroad and it decided to keep more of a skeleton crew that would not be capable of performing on a major project.

This issue involving these same parties has come up on numerous occasions in the past and all of those claims have been denied. (See Third Division Awards 27986, 37008, 37963, 37992, 38244, and others.)

The Board is simply unable to sustain the claim in this case because the Organization failed to meet its burden of proof. Therefore, 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 22nd day of April 2009.