Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39711
Docket No. MW-38842
09-3-NRAB-00003-050273
(05-3-273)

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company [former Southern
(Pacific Transportation Company (Western Lines)]

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Tabor Construction and/or Foundation Builders) to perform Maintenance of Way Bridge and Building Sub-department and System Work Equipment Sub-department work (bridge construction and related work) between Mile Posts 125.0 and 125.5 on the Sacramento Division beginning on March 1, 2004 and continuing, instead of Messrs. N. Chairez, J. Garcia, J. Ruiz, M. Simental, M. Puppo, J. Cruz Mendoza and T. Kelley (Carrier's File 1399480 SPW).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work referenced in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants N. Chairez, J. Garcia, J. Ruiz, M. Simental, M. Puppo, J. Cruz Mendoza and T. Kelley shall now be compensated at their respective and applicable rates of pay for an equal and proportionate share of all straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning March 1, 2004 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 instant dispute concerns the Carrier's decision to use outside forces, Tabor Construction and/or Foundation Builders, in connection with bridge construction and related work. The record reveals that on November 5, 2003, the Carrier gave a 15-day notice of its intent to contract out the provision of "all labor, equipment and materials necessary to construct Bridge 125.03 and extend Bridge 126.55" at the Sacramento Subdivision near Elk Grove, California. By letter dated November 11, 2003, the Organization objected to the subcontracting, contending that the work had customarily been assigned to, and performed by, Carrier's Maintenance of Way employees, and was reserved to them under the terms of the parties' Agreement. The letter also contended that the Notice lacked necessary specific information.

By letter dated November 18, 2003, the Carrier confirmed that the parties had discussed the matter in conference that day. The letter stated that, despite the Organization's contention the work in question was reserved to its members, the Carrier had a practice of contracting out such work. The letter further stated that the parties had discussed the fact that the work needed to be completed in a timely manner and the Carrier's forces were working on other, equally important, projects.

The Organization concedes that it received the notice of the Carrier's intent to contract ordinary bridge construction work at the identified mile post locations, but contends that the Notice only vaguely described the work in question, and the Carrier made only a superficial attempt to contact or confer with the Organization's General Chairman before beginning the work. However, the Notice clearly describes the work to be subcontracted - all work on the project - and provided the Organization with sufficient information to take a position relative to the subcontracting. In addition, we note that the parties held a conference where the scope of the contracting, and the Carrier's reasons for its action, were further discussed. The Carrier complied with the Agreement's Notice provisions. See, for example, Third Division Award 37852.

The Board further finds that the Organization failed to meet its burden of showing that the work in question is exclusively reserved to its members. The Organization points to no language in the parties' Agreement specifically creating such a reservation, and it has been held many times that Rule 1 of the parties' Agreement, governing Scope, does not provide an exclusive grant of work to the employee classifications listed therein.

Given the lack of a contractual reservation of the work, it was incumbent upon the Organization to prove that the work accrued exclusively to the Organization's members by custom, tradition, or practice. The record includes statements from two employees. One states that the incident at issue "is not the first time outside contractors have been hired to do the work the B & B is capable and trained to do." The other states that the employee had driven pile for bridge work on numerous previous occasions. While these statements assert that the Organization's members have performed the work at issue in the past, they do not

establish that they have performed the work to the exclusion of all others. Indeed, in one of the statements, the employee acknowledges that contractors have previously performed the type of work at issue. In addition, the Organization not rebutted the Carrier's on-property contention, apparently supported by a listing of particular instances, that it has previously subcontracted this type of work on numerous occasions. Therefore, the Organization has established, at best, a mixed practice with respect to the performance of the work. In these circumstances, as has been held in numerous Awards, the claim must be denied. The cases cited by the Organization are distinguishable and do not require a contrary result.

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 26th day of May 2009.

LABOR MEMBER'S DISSENT
TO
AWARD 39711 DOCKET MW-38842
(Referee Zimmerman)

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is equally recognized that a dissent is required when the award is based on a faulty promise. Such is the case here.

The Neutral apparently forgot the principles in contracting out of work cases and simply followed the Carrier's submission when this award was written.

The evidence that the Board relied on here was the simple assertion of the Carrier that the work was not "exclusively" reserved to the Claimants by Rule 1. This in spite of the fact that there is absolutely no language in the Agreement that supports such an assertion. Moreover, the record is barren of any evidence, other than assertion, that such work had been contracted out in the past. In other words, the Neutral simply took the Carrier's word that it had contracted out this type of work. Simply saying it is so, does not make it so. I wonder how many times that principle has been used against the organizations at the NRAB? Obviously, this award was not based on the facts as presented on the property. The reality is that the contracting out of work rule specifically refers to "work within the scope of the applicable Agreement". Had the parties who negotiated the Agreement meant to include the term "exclusively" rather than "within the scope" they would have done so. The NRAB, has consistently held that exclusivity is not the determining factor in contracting out of work cases, customary and historical practice is. This principle was laid out in Award 29912 involving these parties, which was before the referee here, wherein the Board held:

> "This Board has previously concluded that the Exclusivity Doctrine is not an appropriate test for Scope Rule coverage vis-a-vis employees and outside contractors. See Third Division Awards 29007 and 29033 involving other parties. In the absence of a well established precedent between these parties to the contrary, which has not been demonstrated on the record before us, we affirm our previous reasoning and find that evidence demonstrating something less than strict exclusive performance is sufficient to establish Scope Rule coverage."

The award is therefore palpably erroneous and of no precedential value. Therefore, I dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member