Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39877
Docket No. MW-38780
08-3-NRAB-00003-050201
(05-3-201)

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: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1) The Agreement was violated when the Carrier assigned outside forces (Armand Castle) to perform Maintenance of Way work [install two (2) switches and crossover] at the Departure Yard to the Escape Track on April 25, 26, 27, 28, 29 and 30, 2004, instead of Foreman J. Payne, Machine Operators E. Valley, H. Sanchez and Trackmen O. Powell, D. Jopek, G. Ramos, S. Floyd and R. Fuentes (Carrier's File 3040500005).

2) The Agreement was violated when the Carrier assigned outside forces (Armand Castle) to perform Maintenance of Way work (install switch ties, relocate switches and add crossover) at the South Receiving Lead tracks 5, 6, 7 and 8 on May 3, 4, 5, 6, 7, 10, 11, 12, 13, 14 and 16, 2004, instead of Foreman J. Payne, Machine Operators E. Valley, D. Liford, J. Mooney, Trackmen O. Powell, D. Jopek, G. Ramos, S. Floyd, R. Fuentes and A. Serratos (Carrier's File 3040500006).

3) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the aforesaid work and

discuss the matter in good faith effort as required by the Scope Rule.

4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants J. Payne, E. Valley, H. Sanchez, O. Powell, D. Jopek, G. Ramos, S. Floyd and R. Fuentes shall now each be compensated for ten (10) hours' pay at their appropriate rates of pay for each date of April 25, 26, 27, 28, 29 and 30, 2004.

5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants J. Payne, E. Valley, D. Liford, J. Mooney, O. Powell, D. Jopek, G. Ramos, S. Floyd, R. Fuentes and A. Serratos shall now each be compensated for eighty (80) hours at their respective straight time rates of pay and for seventeen (17) hours 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 the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it assigned outside forces, instead of the Claimants, to perform certain work during April and May 2004.

The Organization initially contends that because of the Carrier's actions, the Claimants were forever deprived of the opportunity to perform the subject work and enjoy the monetary benefit accruing therefrom, in accordance with the terms of the Agreement. The Organization asserts that the instant claim should be sustained because track maintenance and construction work clearly is encompassed within the scope of the parties' Agreement. The Organization argues that this fact has not been and cannot be validly disputed by the Carrier. The Organization emphasizes that the construction and maintenance of tracks constitute some of the most fundamental of all Maintenance of Way work, so there can be no question but that work of this character is encompassed within the scope of the Agreement and is contractually reserved to BMWE-represented employees who have established and hold seniority within the Track Department.

The Organization maintains that it is fundamental that work of a class belongs to those for whose benefit the contract was made, and delegation of such work to others not covered thereby is a violation of the Agreement. The Organization insists that the work involved here clearly is scope-covered work that is reserved to the Carrier's Track Department forces.

The Organization also argues that the Carrier failed to meet its obligation to provide proper written notice of its plans to contract out such work and to meet with the Organization to discuss the matter in good faith pursuant to the requirements of the Scope Rule. The Organization asserts that the Carrier's October 3, 2003 notice lacked specific information such as (1) when the intended contracting was to begin (2) the number of contractor employees involved (3) the type of equipment needed and (4) the anticipated length of the project. The Organization insists that such deficiencies place the "notice" into the realm of an improper/lacking notice.

The Organization goes on to contend that even if it is found that the Carrier provided proper advance notice and a meeting was held about the particular work involved here, this does not justify the Carrier's contracting of the work. The Organization asserts that it is well established that the mere giving of notice and the holding of a conference does not allow a carrier carte blanche to proceed with contracting. The Organization insists that the Carrier bears the burden of

justifying its decision to contract out such work, and it points to a number of prior Awards in support of the Organization's position.

The Organization then maintains that the Carrier's reliance on the January 1999 Implementing Agreement is misplaced. The Organization emphasizes that this Implementing Agreement does not contain any provision whatsoever for the contracting out of BMWE work, except for specific work outlined in Article I, Section 1(h) which does not apply here. The Organization points out that the Carrier has not shown that the work in question, which was contracted out in 2003, was contracted out because it was "initially required for implementing the Operating Plan," as provided in the Implementing Agreement. Moreover, Article I, Section 1(i)(5) of the Implementing Agreement provides for the distribution of certain Carrier BMWE work to Norfolk Southern (NS) and/or CSXT BMWE-represented employees, but not to outside forces.

Addressing the Carrier's allegation that it did not possess the necessary equipment to perform the work involved here, the Organization argues that this is not tenable in light of the fact that Maintenance of Way forces perform work of the character involved here using the same or similar types of equipment that the Carrier owns. In addition, even if the Carrier did not own the necessary equipment, the Organization asserts that the Carrier was obligated to make a good-faith effort to acquire it through rental or leasing arrangements and then assign its forces to operate such equipment. The Organization emphasizes that there is no evidence that the Carrier made any attempt whatsoever to rent or lease the required equipment.

As for the Carrier's argument that it did not have adequate forces to perform the work, the Organization contends that this is not true. Just as the Carrier maintains the equipment in its inventory necessary to perform the work at issue, the Carrier also maintains forces that are sufficiently qualified and capable of operating such equipment safely and efficiently. Moreover, the Organization further argues that the Board consistently has held that the mere lack of qualified employees does not provide the Carrier with grounds to assign scope-covered work to outside forces. These prior Awards establish the principle that a carrier is responsible for

recruiting and training adequate forces to perform work encompassed within the scope of the Agreement.

The Organization insists that the work at issue here clearly and unambiguously is encompassed within the scope of the Agreement and is reserved to the Carrier's forces. The Organization further points to the stated concerns that in connection with the Conrail (CR) acquisition by CSXT and NS, certain problems due to lack of equipment or manpower on the remaining CR property might occur. The Organization suggests that this is why the Implementing Agreement allows for NS and CSXT BMWE employees to perform certain work over and above routine CR maintenance work. The Organization asserts that while the work at issue might fall into this category, it was assigned to outside forces, and not to NS and/or CSXT BMWE-represented employees, prompting the instant claim.

With regard to the Carrier's "piecemeal" defense, the Organization emphasizes that it is clear that this is nothing more than an attempt to latch onto an arbitration buzzword that has no application to this case. The Organization disputes the assertion that this is a single project of large magnitude. The Organization insists that the truth is that this work simply is one of a series of smaller projects that are being contracted out separately by the Carrier and performed by separate contractors. Moreover, the Carrier failed to show how the work in question was interdependent/interrelated to another work project so as to make it impossible to be accomplished by Carrier forces. The Organization maintains that the Board consistently has rejected this so-called "piecemeal" defense and has required carriers to divide the work.

The Organization then disputes the Carrier's argument that the Claimants are not entitled to a monetary award. The Organization asserts that a plethora of prior Awards have upheld the principle that working claimants are entitled to receive monetary awards to ensure enforcement of the collective bargaining agreement and to compensate them for lost work opportunities.

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

The Carrier initially contends that this dispute involves the interpretation and application of the January 14, 1999 Implementing Agreement that was negotiated and arbitrated under the New York Dock Conditions, pursuant to Finance Docket 33388, Decision 89 of the STB approving the Conrail transaction. The Carrier asserts that the New York Dock Conditions contain exclusive arbitration procedures for the handling of disputes separate and apart from Section 3 of the Railway Labor Act, as amended. The Carrier argues that several Awards have held that the NRAB lacks authority to interpret a dispute involving the interpretation and application of a New York Dock Implementing Agreement, even if the claim arguably involves portions of the Agreement.

The Carrier submits that although the Organization may attempt to portray this case as simply a contracting out case under the scope of the Collective Bargaining Agreement, the record makes clear that this case is inextricably tied to the provisions of the January 1999 Implementing Agreement. The Carrier emphasizes that in line with prior Board precedent, the Board should dismiss the instant claim for lack of jurisdiction.

Without waiving this argument, the Carrier goes on to assert that contrary to the misrepresentation in Part (3) of the claim, the Carrier complied with the procedures to be followed when it plans to contract out scope-covered work. The Carrier insists that, well in advance of contracting out the disputed work, it notified the involved General Chairmen of its intention to contract out work in connection with the major expansion of the Detroit Intermodal Terminals in Livernois Yard. The Carrier also met and fully discussed this project with the Organization, but the parties were unable to reach an understanding regarding this contracting project. The Carrier nevertheless proceeded with the contracting as provided for in the Scope Rule, while the Organization exercised its right to file the instant claim.

The Carrier contends that the record establishes that it fully complied with the advance notice provisions of the Scope Rule. The Carrier points out that the Organization initially recognized this fact in its early correspondence in connection with this claim. The Carrier asserts that it was not until the General Chairman's August 4, 2004 letter that the Organization, for the first time and without any proof, contended that the work at issue was not contemplated in the Carrier's October 3,

2003 notice. The Carrier asserts that its notice clearly stated that, in addition to the other work involved, about five miles of new track and 20 new turnouts would be installed at Livernois Yard. Moreover, there is no requirement that every single aspect of a project be set forth in minute detail. Accordingly, the Carrier contends that the Organization's allegation in Part (3) of the instant claim is totally devoid of merit and is without any factual basis whatsoever. The Carrier suggests that the Organization's attempt to interject this issue into the present dispute is, at best, carelessness or, at worst, a disingenuous attempt to obfuscate the record in order to disguise the weakness of its position.

The Carrier then contends that there can be no reasonable argument that the work at issue in connection with the expansion project at Livernois Yard was "over and above routine maintenance." The Carrier asserts that this is the type of work that the January 1999 Implementing Agreement stated was beyond the capability of Conrail – Shared Assets to perform. The Carrier argues that while the Implementing Agreement gave NS and CSXT the right to provide this type of work on Conrail's behalf, it did not prevent Conrail from contracting out this type of work so long as it was done as provided for in the Agreement, as happened in this case. The Carrier insists that the New York Dock Arbitration Award and the resulting Implementing Agreement recognize that Conrail no longer would be able to perform such large-scale projects and that such projects would have to be completed by another party or parties, be it NS, CSXT, or outside contractors.

The Carrier further contends that even if the Implementing Agreement did not apply, the disputed work nevertheless was properly contracted out under the terms of the Agreement and in accordance with the criteria that have been applied on this property. The Carrier emphasizes that it has the right to contract out work when it does not have sufficient manpower or equipment to complete the project with its own forces. The Carrier contends that the Organization never disputed the fact that the Carrier did not have sufficient forces to complete this large-scale project. Moreover, although the Organization made unsupported statements that the Carrier could lease the necessary equipment, the Carrier points out that the Organization never supported such statements with evidence, nor did it ever dispute the fact that the Carrier did not have the necessary equipment.

The Carrier goes on to assert that the Organization is well aware that projects of this magnitude have been contracted out in the past, even before the June 1999 transaction, while Conrail was a large Class I railroad. The Carrier emphasizes that between 1996 and 1998, it contracted out work in connection with improvements to eight of its intermodal facilities without any claims being progressed by the Organization.

Pointing to a prior Award, the Carrier argues that the Detroit Intermodal Terminal project at Livernois Yard certainly fulfilled the criteria for a large-scale project in that it was a multi-million-dollar project that would take more than one year to complete. The Carrier asserts that its post-transaction maintenance force at Detroit certainly would not have been remotely able to handle this project.

As for the Organization's unfounded position that the Claimants should have been used to perform the work in dispute, the Carrier emphasizes that the Organization has laid claim to small portions of work included in this major facility improvement. The Carrier asserts that the Organization's position totally ignores the unrefuted fact that this work was but a miniscule part of the multi-million-dollar project that took more than one year to complete. The Carrier insists that under the circumstances, it was not required to piecemeal small portions of the project to provide work for its own forces in Detroit, especially when those forces were fully employed and working overtime. The Carrier asserts that a number of prior Awards have held that the Carrier is not required to piecemeal portions of a project that has been properly contracted out.

The Carrier further contends that the Organization incorrectly characterized the facts in asserting that the Carrier's lack of manpower and equipment is self-imposed. The Carrier argues that the Organization cited manpower numbers from before the June 1, 1999 transaction, when the Carrier's operations were significantly reduced and most of the BMWE-represented employees were allocated to either NS or CSXT. The Carrier emphasizes that it was allocated sufficient forces to handle its normal maintenance needs in line with its new character as a terminal switching company. The Carrier insists that the fact that its reduced maintenance staff could not be reasonably expected to complete a large construction

project does not support the Organization's contention that the Carrier is understaffed.

The Carrier points out that even before the June 1999 transaction, a project of this large scope most likely would have been contracted out, as similar projects have been in the past. The Carrier also emphasizes that the Organization failed to note that four of the 28 employees on the Detroit roster were either on leave of absence as a union official or working in a management position, one had transferred to another craft, and five were off sick.

The Carrier goes on to assert that most of the Carrier's roadway equipment, including the type of equipment used on this project, had been taken over by NS and CSXT as part of the June 1999 transaction. The Carrier argues that after June 1, 1999, it no longer possessed such equipment, including on the claim dates. The Carrier further contends that this type of specialized roadway equipment is not readily available for lease without an operator, and the Organization has not offered any evidence to refute this.

The Carrier then contends that the instant claim is excessive. The Carrier insists that the Claimants were fully employed during the claim period, and they suffered no monetary loss as a result of the contracting of this large-scale project. The Carrier therefore argues that the Claimants are not entitled to the penalty payment claimed in this case.

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

The Board thoroughly reviewed the extensive record and finds that substantial jurisdictional questions have been raised by the Carrier. As the Board stated in Third Division Award 38988:

> ". . . the language in Article I, Section 1(h) of the January 14, 1999 Arbitrated implementing Agreement; and the clearly established precedent that the Board has no jurisdiction to consider disputes arising under implementing agreements established pursuant to

New York Dock, the question of whether the work in dispute fell within the purview of Article I, Section 1(h) of the January 14, 1999 Arbitrated Implementing Agreement can only be decided by a duly authorized Board constituted pursuant to New York Dock."

See also Third Division Award 36276 wherein the Board held:

"These issues all involve interpreting provisions of the November 2, 1998 Implementing Agreement. Because the Implementing Agreement was negotiated under the auspices of Article I, Section 4, of the New York Dock Conditions, the parties must utilize the dispute resolution mechanism in Article I, Section 11, of the New York Dock Conditions to resolve this dispute. See Third Division Awards 29317 and 29660. Because the Board lacks jurisdiction to adjudicate the issues raised by the instant claim, we dismiss the claim."

It is clear when one reviews the extensive record in this case that both parties were relying on Implementing Agreement provisions. Therefore, the Board has no jurisdiction to resolve this dispute.

AWARD

Claim dismissed.

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 31st day of July 2009.