Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39879
Docket No. MW-38782
08-3-NRAB-00003-050206
(05-3-206)

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 (MetroPlex) to perform Maintenance of Way work (moving approximately 200 yards of track) on the New Leg of the Y track in Pavonia Yard at Camden, New Jersey on December 15 and 16, 2001 instead of Messrs. W. Rankin, J. Ganzell, III, J. Castaldi, J. Hubler, W. Baals, L. Venable, G. Lee, M. McCarthy, C. Richardson and R. Cona (System Docket MW-0065).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work and make a good-faith effort to reach an understanding as required by the Scope Rule.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants W. Rankin, J. Ganzell, III, J. Castaldi, J. Hubler, W. Baals, L. Venable, G. Lee, M. McCarthy, C. Richardson and R. Cona shall now each be compensated eight (8) hours' pay per day at their respective time and one-half rates for

the time spent by the outside forces in performing the aforesaid work on December 15 and 16, 2001."

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 the work of moving track in Pavonia Yard at Camden, New Jersey.

The Organization initially contends that the Carrier violated Rule 26(a) when it failed to timely deny the initial claim. Rule 26(a) specifies that if the Carrier does not respond in writing to whomever filed the claim within 60 days of its filing, then the claim will be allowed. The Organization asserts that the initial claim was filed on February 8, 2002, and the Organization informed the Carrier on September 5, 2003, that it had not yet received a response. On February 12, 2004, the Carrier responded with a letter and a copy of a claim denial dated February 20, 2002, and a certified mail receipt as alleged proof of a timely denial. The Organization points out, however, that the certified mail receipt is dated February 7, 2002, which is 13 days before the supposed denial was written. The Organization insists that there is no proof that the denial dated February 20, 2002, ever was sent to or received by the Organization. Citing a number of prior Awards, the Organization emphasizes that under Rule 26(a) the instant claim must be sustained as presented.

Turning to the merits of this matter, the Organization maintains that there is no dispute that the Scope Rule unquestionably encompasses work of the character involved here, and such work is contractually reserved to employees who have established and hold seniority within the Track Department. Pointing to prior Awards, 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 a violation of the Agreement. The Organization argues that the Carrier's assignment of an outside contractor to perform the work in question was in violation of the clear language of the Agreement. The Organization further asserts that there can be no question that work of the character involved here is reserved to Carrier forces in accordance with the clear language of the Scope Rule, as a number of Awards already have found.

The Organization then emphasizes that the second and third paragraphs of the Scope Rule are virtually identical to Article IV of the May 17, 1968 National Agreement. The Organization contends that this Rule clearly and unambiguously specifies that when the Carrier plans to contract out scope-covered work, it must notify the General Chairman, in writing, at least 15 days in advance of the contracting transaction. Moreover, the Rule requires that if the General Chairman requests a meeting, then the Carrier is obligated to meet and discuss matters relating to the contracting transaction.

The Organization argues that there is no evidence that the Carrier notified the General Chairman of its plans to assign an outside contractor to move 200 yards of track in Pavonia Yard on the claim dates. Contrary to the Carrier's assertion that this work was part of the large project listed in its February 26, 2001 notice to the General Chairman, the Organization insists that there is no evidence that the claimed work is the same as that identified in the Carrier's February 26, 2001 notice, nor is there any explanation as to why the Carrier would wait nearly ten months and then contract out only this portion of the large project prior to New Jersey Transit (NJT) starting on its project. The Organization points out that if, as the Carrier claimed, NJT delayed the project until at least April 8, 2002, then why would the Carrier assign a contractor to move only 200 yards of track nearly four months prior when it made no attempt to assign any of the work to anyone for more than 21 months.

The Organization argues that the work performed by outside forces on the December 2001 claim dates was not part of a large project subject to the February 26, 2001 notice. The Organization insists that this was a stand-alone project assigned to outside forces without any advance notice to the General Chairman. Moreover, this work easily could have been performed by the Carrier's Track Department forces in the same amount of time.

The Organization points to a number of prior Awards in contending that because there is no dispute that the work in question is encompassed within the scope of the Agreement, there can be no doubt that the Carrier's failure to provide advance notice requires a sustaining award here. The Organization further asserts that these prior Awards present ample evidence that the Carrier is a repeat violator of the notice provisions of the Scope Rule. The Organization argues that the essence of the Scope Rule is in the opportunity it affords the Organization to attempt to persuade the Carrier to assign work that the Carrier tentatively had decided to contract to an outside contractor to BMWE-represented employees. This opportunity was denied in the instant matter. The Organization asserts that the Carrier's failure to comply with the notice obligation requires payment of the instant claim as presented.

The Organization goes on to contend that as for the Carrier's assertion that it provided notice of its intent to contract out the subject work in its letter dated February 26, 2001, there are obvious problems with that notice. The Organization points out that the January 14, 1999 Implementing Agreement contains no provision whatsoever for the contracting out of BMWE work except specific work initially outlined in Article I, Section 1(h) none of which is applicable here. The Organization maintains that if the Carrier was referring to Article I, Section 1 (i)(1) and (5) these provisions allow for the distribution of certain Carrier BMWE work to NS and/or CSXT BMWE-represented employees, but not to outside forces.

As for the Carrier's assertion that it was necessary to contract out the work listed in the February 2001 letter, the Organization asserts that there are a number of problems with this assertion. The Organization contends that any lack of equipment or manpower due to the Conrail acquisition is to be addressed, pursuant to the January 14, 1999 Implementing Agreement, through the provisions allowing

NS and CSXT BMWE-represetned employees, but not outside forces, to perform certain work over and above certain routine Carrier maintenance work.

The Organization then points out that the Carrier knew in December 1999 that the track work in question had to be done, while its February 2001 notice states that NJT would complete its project in 2003. The Organization therefore asserts that at a minimum, the Carrier had at least three years to arrange for its employees to perform the work in question, but it made no attempt to assign any of the work to its own BMWE employees, or to NS or CSXT BMWE employees. The Organization emphasizes that the disputed work involved 16 hours for each of the named Claimants, and it was performed on the Claimants' rest days. The Organization suggests that if the Carrier, in three years' time, could not rearrange its work schedules to allow the Claimants to perform this work, then the work should have been made available to them as weekend overtime, as a number of prior Awards have held.

The Organization goes on to address the Carrier's argument that, having given notice of and discussed the project with the Organization, there was no reason to "piecemeal" this minor portion of the entire project. The Organization insists that, assuming notice was given, there simply was no reason for the Carrier not to "piecemeal" this "minor portion" of the entire project to its employees. This especially is true in light of the fact that the work could have been assigned to the Claimants without disruption of their normal duties. The Organization contends that the Carrier's so-called "piecemeal" defense is without merit because the Carrier did not show how this work and the larger project were interdependent and/or interrelated. The Organization points out that the Board regularly has disregarded this "piecemeal" defense where various phases of a project were not interrelated, and has required carriers to divide the work.

The Organization emphasizes that the Carrier never disputed the requested remedy, so the Claimants are entitled to that remedy.

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 NRAB Awards have held that the Board 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 collective bargaining 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 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 (2) 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 a major project in the South Jersey area. 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 Organization's allegation in Part (2) 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 NJT project 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 asserts 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 work in question was a small and integral part of the entire project, and the Organization never has seriously refuted the fact that the Carrier did not have sufficient forces to complete the entire project. The Carrier also did not have the necessary equipment to dedicate exclusively to this project. The Carrier emphasizes that its manpower and its roadway equipment inventory were dramatically reduced on transaction day to reflect its new function as a switching and terminal company.

Pointing to a prior Award, the Carrier argues that the NJT light rail project certainly fulfilled the criteria for a large-scale project in that it was a multi-million-dollar project that would take more than three years to complete. The Carrier asserts that its post-transaction maintenance force in South Jersey certainly would not have been remotely able to handle this project.

As for the Organization's position that the Claimants should have been used to perform the work subject to the instant claim, the Carrier emphasizes that the Organization totally ignores the unrefuted fact that this work was but a miniscule

part of the multi-million-dollar project that took more than three years 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 simply because the Claimants were on their rest days on these two particular days in a multi-year project. 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 then points out that the work performed in Pavonia Yard and the surrounding areas, as identified in the initial and subsequent notices, was performed only to allow NJT the ability to institute its River Line passenger service. The Carrier emphasizes that it had no need, insofar as its freight operations were concerned, to perform any of these reconfigurations and additions to its physical plant. None of this work would have been done absent NJT's light passenger rail project. The Carrier contends that the Board continually has held that the Carrier may contract out work that is not for its exclusive benefit.

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

The Board reviewed the procedural argument raised by the Organization with respect to timeliness, and finds that that matter was resolved in conference prior to July 27, 2004. The Agreement dated July 27, 2004, between the General Chairman and the Vice President of Employee Relations is contained in the record, and it states, in part:

> ". . . at the conference, it was agreed that this claim would be handled on its merits without reference to time limits by either party."

The Board reviewed the procedural argument raised by the Carrier relating to whether this contracting dispute falls under the Arbitrated Implementing Agreement. The Carrier contends that this Board lacks jurisdiction to consider the claim. The Carrier tendered Third Division Award 38988, which was adopted on

March 27, 2008. In that case, where the facts are very similar to the ones at issue here, the Board held, in relevant part, as follows:

> ". . . however, given the substantial jurisdictional question raised by the Carrier; 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."

In the above Award, the Board relied on First Division Award 25983, wherein the Board held:

> "The Board reviewed the claim. It arose out of claims involving implementation of an Implementing Agreement under New York Dock. The Board has traditionally refused to accept jurisdiction of disputes that involve New York Dock Implementing Agreements. The claim listed here is therefore, dismissed. The Board lacks jurisdiction to do otherwise."

The Board also relied on Third Division Awards 36276 and 24804 in coming to its conclusion in Award 38988.

For all of the above reasons, the claim must be dismissed.

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.