Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39882
Docket No. MW-38709
09-3-NRAB-00003-050116
(05-3-116)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
(
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and 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 (Zien Service, Inc.) to perform Bridge and Building Subdepartment work (install HVAC unit and related work) beginning on July 21, 2003, instead of Messrs. T. Rueda and S. Kitzman (System File C-31-03-C080-07/8-00229-092/0-0011-333 CMP).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out said work as required by Rule 1 and failed to enter good-faith discussion to reduce the use of contractors and increase the use of Maintenance of Way forces as set forth in Appendix I.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Rueda and S. Kitzman shall now be compensated for thirty-two (32) hours' pay at their respective straight time 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 Claimant, to perform B&B work.

The Organization initially contends that the uncomplicated work of installing a relatively small HVAC rooftop air conditioner is scope-covered B&B work by clear Rule and customary past practice. The Organization asserts that the Carrier failed to give notice to or hold discussions with the General Chairman until the work at issue was completed and/or nearly completed by the outside contractor. The Organization argues that because the Carrier is an established flagrant and repeated violator of the notice provisions of the Agreement, there are a number of Awards that serve as well-reasoned precedent for sustaining the instant claim in full.

The Organization maintains that even if the Carrier's alleged "reasons" for contracting out the ordinary B&B work at issue were valid, these reasons all were procedurally defective because they were not the topics of discussion at pre-contracting conference discussions pursuant to proper notice. Moreover, during the on-property handling, the General Chairman refuted all Carrier contentions as

contradictory, specious, tired, and/or misplaced. None of the Carrier's assertions may be construed to defeat the instant claim.

The Organization insists that the work at issue plainly is encompassed within the Scope Rule as typical building maintenance reserved to B&B employees. The Organization points out that payroll records demonstrate that B&B employees customarily have performed such work as a matter of past practice. The Organization emphasizes that the Carrier's decision to remove the work from those for whom the Agreement was negotiated, and to assign it to outside forces, violated the Agreement, as several Awards have held in similar circumstances.

The Organization contends that because the instant work unquestionably falls within the purview of the Scope Rule, the Carrier was obligated to assign it to the Claimants, absent any express restrictions listed within the contracting portion of the Rule. The Organization argues that under the Scope Rule, the Carrier is obligated to provide the General Chairman with written notice of its intent to contract out scope-covered work, and it must provide this notice as far in advance as practicable, and not less than 15 days prior to the contracting transaction. Based on prior Awards and the facts of this case, the Organization asserts that it is abundantly clear that the Carrier's "notice" was not issued as far in advance of the date of the contracting transaction as is practicable and was in violation of the Agreement.

The Organization goes on to point out that the Rule further requires that, upon the General Chairman's request, the parties shall meet to discuss the proposed contracting transaction and make a good-faith effort to reach an understanding about the proposed contracting. The Organization emphasizes that the Carrier has flagrantly and repeatedly failed to comply with the advance notice and meeting requirements of Rule 1 and the December 11, 1981 Letter of Understanding. The Organization suggests that this dispute merely represents another attempt by the Carrier to give the illusion of complying with the contracting Rule.

The Organization emphasizes the Carrier's blatant failure to exercise good faith. It maintains that the Carrier's July 24, 2003 faxed notice to the General Chairman of its intent to contract out the subject work was not in good faith because the Carrier's contract with the outside contractor already was a fait

accompli at that point. In fact, the work in question was completed and/or nearly completed as of July 24, 2003. The Organization insists that the Board need look no further for justification to sustain the instant claim in full.

Turning its attention to the Carrier's defenses, the Organization asserts that these various excuses were unsubstantiated, specious, and invalid. It insists that the General Chairman refuted all of the Carrier's contentions during the on-property handling of this matter. As for the particular assertion that Claimant Rueda acted independently, and not as the Carrier's agent, the Organization maintains that this is not true. The Organization argues that Claimant Rueda merely followed the orders of Carrier officials when he lined up the contractor in this case. The Organization points out that as a prior Third Division Award documents, this is not the first time that the Carrier has tried this tactic.

The Organization insists that all Carrier contentions, from "emergency" to "exclusivity" to "special license" to "full employment" to Claimant Rueda's alleged personal responsibility for hiring the outside contractor, lack any credibility and are procedurally flawed and specious.

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

The Carrier initially contends that the Agreement does not require the utilization of BMWE-represented employees where State and Federal law require the use of licensed employees. The Carrier asserts that the Organization has not met its burden of proof in this matter. It argues that notice was provided as soon as possible, and the laws requiring the use of licensed contractors takes control for such work out of the Carrier's hands.

The Carrier asserts that its notice to the Organization clearly stated that the contractor was to furnish, deliver, and mount the HVAC unit, so this was not a contract entered into to subcontract work. Instead, the contract involved the purchase of an HVAC unit that the contractor was to furnish, deliver, and mount. The Carrier emphasizes that this was a purchase agreement, not a subcontracting arrangement. The Carrier points out that the Scope Rule does not include the right

to furnish, deliver, and then mount purchased equipment as work reserved to Organization members. The Carrier asserts that this was merely a reasonable business decision to leave the coordination of all aspects of the new on-site system to the expert judgment of the supplier.

The Carrier argues that although the Organization failed to specify precisely what work is at issue, the Organization does not purchase, furnish, or deliver equipment. Moreover, the installation required the use of licensed contractors, which none of the Claimants are. The Carrier insists that the work is not reserved to BMWE-represented employees by tradition, custom, practice, or Agreement language, so the Organization has been unable to provide evidence of same. The Carrier contends that under these circumstances, notification under the Agreement was and is not required.

The Carrier nevertheless asserts that it complied with the provisions of Rule 1 by serving notice on and meeting with the Organization. The Carrier points out that because the Organization's members could not have performed the work, would not have performed the work, and are not qualified to perform the work, the 15-day advance notice requirement has no application here. The Carrier further argues that Rule 1 specifies no penalty for failure to provide notice 15 days in advance when providing such notice is not possible.

The Carrier then contends that on July 22 and 24, 2003, in compliance with OSHA standards and to avoid a potential business interruption, a high-efficiency HVAC unit was to be installed as soon as possible. The Carrier points out that because the Organization does not inventory such units, does not deliver them, and does not mount them, there is no evidence of how the Organization could have accomplished the work. Moreover, there is no dispute between the parties that City and State regulations governing the installation of HVAC units require the use of properly licensed mechanical technicians.

The Carrier points out that in the reply to its notice, the General Chairman confirmed that notice of intent to subcontract had been provided, but he objected to the timeliness of the notice. As for the General Chairman's objection that the notice lacked both location and work, the Carrier insists that the General Chairman

certainly was aware of these details because he then alleged that the work already was in progress. The Carrier asserts that the parties conducted a conference to reach an understanding on the contracting out of this work. The Carrier emphasizes that the record contains no evidence of past practice or that any Claimant possessed the necessary license to perform the work. The Carrier asserts that the record therefore shows that the notice requirement of Rule 1 was met, and this Rule places no other restrictions on the Carrier.

The Carrier submits that the Claimants are, in fact, improper Claimants, because the Carrier could not have awarded the work to its own forces due to the statutory license requirements. The Carrier additionally asserts that it is long-established that the Carrier need not portion out the work involved herein, but the Carrier asserts that in good faith it initially intended to do so. The Carrier points out that an IBEW-represented employee was to perform the electrical hook-ups. The Carrier insists, however, that the work in question could not be performed by the Claimants, and the Carrier was not obligated to fragment any portion that the Organization believes its members were entitled to perform. The Carrier argues that there was no attempt to abrogate the Agreement.

The Carrier then contends that there is no evidence of any type of traditional, historical, or customary practice of Organization members performing such work, and there is no evidence of these Claimants performing such work in the past. The Carrier emphasizes that the Claimants were not qualified to perform the work. The Carrier asserts that there is no dispute that the instant installation work required a licensed contractor, and the Claimants are not licensed to perform this work.

The Carrier goes on to argue that it is improper that one of the Organization's members, and a Claimant herein, is the employee who contracts for the work to be performed and then the Organization files a claim on his behalf. The Carrier asserts that it is obvious that Claimant Rueda acknowledged that BMWE-represented employees could not perform this work, nor have its members ever performed this type of work. The Carrier emphasizes that because Claimant Rueda recognized that this was not his work, he did not request that a claim be submitted on his behalf.

The Carrier asserts that because the Claimants did not have the skill, ability, or necessary licenses to perform the work in question, they are unqualified to do so and suffered no lost work opportunity. The Carrier further contends that because Claimant Rueda gave the okay to the contract, signed the contracting agreement, and advised that he had no problem with the work being contracted, any claim filed on Rueda's behalf clearly is a conflict of interest.

The Carrier then argues that the Organization failed to submit any evidence to support a past practice of its members performing this work. Instead, it is evident that Claimant Rueda and R. Davis discussed this work and Rueda did not have an issue with a contractor performing this work. The Carrier insists that Claimant Rueda was not ordered to secure a contractor as the Organization suggests. Instead, Claimant Rueda does not deny that he had no issue with a contractor performing this work or that his crew could not perform it. Moreover, because Claimant Rueda had a copy of a July 18, 2003 letter from the contractor, Rueda and the Organization could have brought this matter to the Carrier's attention if they had a problem with it. Instead, the Organization sat back, went through the notice and conference requirements, and then filed the instant claim. The Carrier contends that the General Chairman was aware the work was to be contracted prior to commencement of same, made no objection, and knew all along that one of the Claimants had given approval for the contracting.

The Carrier additionally contends that the Organization has not established any type of historical, traditional, or customary practice, let alone an exclusive practice. The Carrier asserts that if the Organization argues that exclusivity is not relevant, the Organization still must establish some type of practice of performing this work that would obligate the Carrier to serve notice under Rule 1, but the Organization has not done so.

The Carrier submits that the Organization is not attempting to protect its jurisdiction, but rather is once again attempting to restrict the Carrier in a manner not contemplated by the Agreement. The Organization's members never have performed this work, but they are attempting to secure the right to do so by filing the instant claim and raising a technical argument.

The Carrier insists that there is no question of the pressing necessity to perform the work, which is confirmed by the quick scheduling of the parties' conference. The Carrier points out Train and Engine service employees were threatening to walk off the job due to the unbearable conditions. The Carrier emphasizes that Claimant Rueda, who has been signing contracts for years, gave the order for the contractor to proceed, knowing full well that notification under the Agreement had not yet been provided. The Carrier points out that an Organization employee therefore entered into the contract for this work, which the Organization now alleges was a violation created by one of its own members. The Carrier contends that Claimant Rueda cannot bind the Carrier in this manner, then inform the Organization, who in turn files a claim on his behalf.

As for the documents that the Organization provided at the conference, these were not legible, and they in no way established a practice of performing this work. The Carrier argues that the Organization also has not provided any evidence to support the number of hours claimed or what work specifically was performed by the contractor. Moreover, although the Organization argued numerous Rule violations, the Carrier asserts that the Organization failed to indicate how each cited Rule was violated and how each cited Rule supports its position in this dispute.

The Carrier goes on to submit that the instant claim improperly seeks a penalty payment on behalf of employees who are unqualified and improper Claimants. The Carrier points out that the Claimants were fully employed on the claim dates and suffered no loss. The Carrier additionally argues that it should have the right to offset any claim by the amount earned by the Claimants during the dates in dispute.

The Carrier contends that the Engineering Daily Reports and timesheets submitted by the Organization do not support its position. Many of these documents are not legible, and the Daily Reports relate to such work as installing a window air conditioner or cleaning the filter of such a unit. The Carrier contends that the Daily Reports are for incidental work, not the type of work involved here. In addition, the Daily Reports are from the St. Paul service area, not the Chicago service area.

The Carrier asserts that the Organization bears the burden of showing a traditional, historical, and customary practice of performing such work throughout the system. The Organization has not provided even one example of its members installing an air conditioning unit such as the one in question. The Carrier therefore argues that the Organization failed to meet its burden of proof in this matter, and any award of monies would be outside the provisions of the parties' Agreement. The Carrier insists that it has not violated the Agreement, and the Organization has not shown that the Carrier has done so.

The Carrier insists that the contracting of the work in dispute was completely proper in light of the historical and established practice on the property, and the fact that the Claimants were not qualified to perform the work.

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

The Board reviewed the 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 install an HVAC rooftop air conditioner. Therefore, the claim must be denied.

The record reveals that although the Carrier belatedly issued the required notice to the Organization, the work involved did not really consist of work that was normally performed by Organization-represented employees. The fact remains that the Carrier purchased an HVAC rooftop air conditioner and it was being installed and set up by the very company from which the purchase had been made. The Carrier was attempting to avoid a potential business interruption and had a high-efficiency HVAC unit installed as soon as possible by the company from which it was purchased. The Organization has not made a record that this is normally work that its members perform.

It is fundamental that the Organization bears the burden of proof in cases of this kind. In this case, the Organization failed to meet that burden and, 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 31st day of July 2009.