Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39915
Docket No. MW-38559
09-3-NRAB-00003-040547
(04-3-547)

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former St. Louis –
(San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Georgetown Rail Equipment Company) to perform Maintenance of Way work (operate trackhoe to pickup material and general clearing of right of way) on the Springfield Division beginning March 5, 2001 and continuing instead of furloughed employe M. Taylor [System File B-2895-1/12-01-0147 (MW) SLF].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper notice of its intent to contract out said work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 99 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or(2) above, Claimant M. Taylor shall now be compensated at his applicable rate of pay for all hours, including overtime hours worked by the contract operator in the performance of the aforesaid work beginning March 5, 2001 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 maintains that the Carrier violated the Agreement when it failed to give notice to the Organization of contracted work. The Agreement was further violated when the Carrier used a contractor to perform material pickup and right-of-way cleanup. The Carrier responds that the notice was proper and that the contracting did not violate the Agreement.

On December 19, 2000, the Carrier notified the Organization that it planned to utilize a contractor to operate four Georgetown Slot Machines to load and unload materials throughout the Carrier's system. On January 3, 2001, the Organization sent the Carrier a letter requesting a conference about the contracting. In the letter, the Organization stated that the notice "is not in compliance with the obligations contained in the various agreements in effect." A conference was held on February 12, 2001. On February 13, the Carrier sent the Organization a letter that included a list of Divisions where the Georgetown Slot Machine and other contracted equipment would be used in 2001. The letter stated that "I am attaching the tentative 2001 schedules for the following contract work. Obviously, these schedules are subject to change as the work season progresses." The Springfield Subdivision was not on the list.

On May 1, 2001, the Organization notified the Carrier that the Georgetown Slot Machine was used on the Springfield Division beginning on March 5. The General Chairman stated that an improper notice was provided for the contractor work on the Springfield Division. The Claimant was on furlough from December 15, 2000 to April 2, 2001.

The Carrier contends that the Organization failed to allege that the work at issue is scope covered and the claim must therefore be denied. Further, even if the Organization had properly stated a claim, the Georgetown Slot Machine work is not scope covered work, it was performed with specialized equipment not available for lease or rental by the Carrier and proper notice of the system-wide contracting was provided and a conference was held. The Organization further maintains that the failure to provide notice that the Georgetown Slot Machine work would be performed on the Springfield Division indicates that the Carrier did not act with the necessary good faith. Improper notice renders the Organization unable to rely on the notice when requesting and holding a conference on the contracting issue.

The Board carefully reviewed the record evidence and the parties' arguments. Initially, we find that the claim as originally presented contains no defect warranting dismissal. The Organization identified the contracting issue with sufficient specificity that the Carrier was put on notice of the nature of the claim, and could investigate and respond to the claim.

The Organization contends that the lack of proper advance notice requires that the claim be sustained. The initial notice did not contain any locations for the work. The correspondence following the conference contained locations for the contracted work. Although the Springfield District was not included in the correspondence, the list was identified as tentative and the work locations subject to change. The Board finds that the notice provided by the Carrier in the instant case was sufficient to meet its obligations under the parties' Agreement. The December notice provided the Organization sufficient specificity to put it on notice that the work might be reserved to BMWE-represented employees and the Organization could request a conference. Indeed, the Organization requested a conference about the work and had that conference on February 12. Further, as discussed below, the Carrier did not violate the Agreement when it contracted the work done by the Georgetown Slot Machine.

The Board notes that a similar issue has been decided in Third Division Awards 36502 through 36507 and the Awards cited therein. Third Division Awards 36502 through 36507 addressed the Carrier's use of a contractor to have track materials loaded and unloaded with a patented "cartopper" material handler that the Carrier did not own. In those Awards, the Board found that:

"The work of loading ties and scrap material from the Carrier's right of way has been performed by both the M of W Department employees and by outside contractors using their own specialized equipment. The Board also finds that a "mixed practice" regarding the performance of this work exists on BNSF and holds that the Carrier properly served the Organization with a 15-day contracting notice, as prescribed by the Note to Rule 55 and the December 11, 1981 Letter of Understanding."

Here, the Carrier contracted patented specialized equipment, the Georgetown Slot Machine, to pick up scrap ties and other material and to clean the right-of-way. The burden of proof is on the Organization and that burden has not been met. Accordingly, the claim is 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 August 2009.