Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40207
Docket No. MW-38506
09-3-NRAB-00003-040478
(04-3-478)

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Chicago
(and North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Swanson Construction) to perform Maintenance of Way and Structures Department work (install crossties, switchties and related track repair work) on tracks in the yard at Clinton, Iowa on June 12, 13, 14, 15, 16, 17, 18, 21, 22, 23 and 24, 2003, instead of Messrs. J. Sawvell, K. Spooner, W. Ringen, M. Clevenger and W. Braden (System File 3SW-2053T/1374441 CNW).

(2) 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 above-referenced work as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, '. . . Claimants Sawvell, Spooner, Ringen, Clevenger and Braden must be compensated at the applicable rate of pay an (sic) equal and proportionate share of the 600 man hours expended by the Contractor Employees in the repair and maintenance of the tracks in Clinton, IA.'"

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.

Claimants J. Sawvell, K. Spooner, W. Ringen, M. Clevenger and W. Braden established and hold seniority in the Maintenance of Way and Structures Department and were regularly assigned on the dates involved in this dispute.

In March or April 2003, various tracks in the Yards at Clinton, Iowa, were removed from service due to numerous tie and track defects. On or about June 12, 2003, the Carrier assigned Swanson Construction of Alsip, Illinois, to install switch ties and track ties in the yard. From June 12 through 18, 2003, eight employees of the contractor allegedly used a tie extractor, tie crane, speed swing and an air compressor to install ties. In addition, six employees of the contractor returned to the site between June 21 and 24, 2003 to continue installing ties. In addition to the above named equipment, the contractor's employees also used a switch tamper to perform this work. Swanson Construction expended a total of approximately 600 hours installing approximately 110 track ties and 157 switch ties in addition to surfacing the track.

The Organization claims that the Carrier did not provide proper notice to the General Chairman regarding the outside contracting and thus did not act in good faith. It contends that the Carrier was required to provide appropriate notice pursuant to the Agreement. Second, it claims that it was improper for the Carrier to contract out the above-mentioned work. This is work that is properly reserved to

BMWE-represented employees. According to the Organization, the Carrier had customarily assigned work of this nature to its Maintenance of Way employees. The Organization further claims that this work is consistent with the Scope Rule. According to the Organization, its Maintenance of Way employees were fully qualified and capable of performing the designated work. The work done by Swanson Construction is within the jurisdiction of the Organization and, therefore, the Claimants should have performed said work. Because the Claimants were denied the right to perform the relevant work, the Organization argues that the Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier first contends that the claim incorrectly identified the work dates as April 5 and 6, and as such, the claim is procedurally defective. In addition, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that inasmuch as the work contracted out was performed on property that was leased to Archers Daniels Midland (ADM) the Carrier had no control over that property. Because the work was performed completely for the benefit of and at the request of ADM and not the Carrier, the Carrier was not obligated to provide notice to the Organization. Moreover, the Carrier had no obligation to utilize its BMWE workforce to perform said work. According to the Carrier, there is no question that the Organization had no right to the work in question.

After a review of the facts and circumstances in this matter, we find that the work in question was performed by a contractor on property that was leased to a third party. As such, the Organization failed to meet its burden to prove that the work was within its jurisdiction. See Third Division Award 30824. Because we have made this determination, we need not reach the issue of whether the work in question is within the scope of the Organization's jurisdiction. Because the Organization has not met its burden of proof, 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 21st day of December 2009.