Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40216
Docket No. MW-38310
09-3-NRAB-00003-040240
(04-3-240)

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 Division
(
(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 (Turner Roofing and Sheet Metal Co.) to perform Maintenance of Way work (install new roof, insulation and guttering) on the Rip Track Building at Cherokee Yard on the Springfield Division beginning September 11 and continuing through October 19, 2000, instead of B & B employes R. Washburn, B. Wilson, R. Harris, J. Jarvis, M. Cole and R. Planchon [System File B-2707-3/12-01-0013(MW)SLF].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance 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, Claimants R. Washburn, B. Wilson, R. Harris, J. Jarvis, M. Cole and R. Planchon shall now each be

compensated for two hundred thirty-two (232) hours 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 maintains that the Carrier violated the Agreement when it used outside forces, specifically Turner Roofing and Sheet Metal Company, to perform work that should have been done by Organization-represented employees. The record indicates that on April 19, 2000, the Carrier notified the Organization of its intent to utilize a contractor for "repair and renovation of the roof on the RIP Track Building at Cherokee Yard in Tulsa OK."

The April 19, 2000 letter also provided:

> "The scope of the planned work involves specialty products as well as specialized skills and equipment. The Carrier does not own the necessary equipment, nor do Carrier forces have experience with the materials and techniques required. Extensive experience with these specialty products and techniques is required for product warranty purposes, as well as to maximize the life of the roof renovations. Additionally, the height and pitch of the Rip Track roof pose special safety concerns which the Carrier believes are best dealt with by persons experienced in this specific type of work."

In an April 26, 2000 letter, the Organization replied, in pertinent part:

> "We do not agree with the contracting out of this work. This type of work belongs to the employees who are covered under the August 1, 1975 working agreement. Therefore, we request a conference to discuss this matter."

The parties held a conference on May 5, 2000 and reaffirmed their respective positions. Later that day, the Carrier notified the Organization that it intended to proceed with the project.

In a letter dated November 2, 2000, the Organization notified the Carrier of its claim that the seniority of the five cited employees was not respected when the Carrier used contractors to do their work. The letter also provided:

> "The Contractors used a man lift, ladders and fall protection which is exactly what the B&B department employees used when they completely built the building over the locomotive service tracks in Cherokee Yard. This contracting out of our work was done at a time when we have the highest furlough rate in recent history on the Springfield Division with 7 B&B personnel, (Special Equipment Operators) and 89 trackmen furloughed from the 900 seniority district. Any of the furloughed employees would have been glad to do this work and it should have fallen to them and not to the contractors."

The Organization maintains that the Carrier violated the Agreement when it contracted out the sheet metal roofing project. The Organization further maintains that the notice was deficient. According to the Organization, the Carrier's special equipment and special skills defense was incorrect where the work at issue (installation of a sheet metal roof) was work that had been previously performed by Carrier forces. Essentially, there was nothing "special" about the work or the equipment and the matter could not be properly conferenced.

The Carrier argues that (1) the work is not scope covered work (2) the work was performed with specialized equipment not available for lease or rental by the Carrier and (3) proper notice of the contracting was provided and a conference was held. Moreover, because the issue regarding the notice was not raised on the property, it cannot be raised at this juncture.

The Board compared the presented claim before the Board and the claim presented on the property. The Board notes that the purpose of a claim is to apprise the Carrier of the nature of the matter with sufficient specificity so that the Carrier can reply.

Here, the claim presented on the property alleges a violation of seniority when a contractor was used for sheet metal roof construction. There is no mention of improper notice of subcontracting. The claim letter contained a number of Rule citations and Agreements. However, a general recitation of numerous Rule Nos. and Agreements, absent more, is insufficient to place the Carrier on notice that an allegation of improper notice of subcontracting was part of the claim.

There is a material difference in these two claims and the additional portions of the claim presented to the Board, and not presented in the original claim on the property, will be disregarded. Regardless, the notice clearly described the work to be subcontracted and provided the Organization with information that was specific enough to prepare a response to the notice and schedule a conference.

On the merits, the Organization maintains that the test in a subcontracting matter is not "exclusivity" as that inquiry is reserved for intra-craft disputes. The Carrier counters that the Organization must prove an exclusive past practice of work performance in order to prove that the work should not have been performed by contractors. The Organization cannot show that the work is reserved and there is no evidence to support the Organization's position.

The Organization points to no specific language in the Agreement reserving the work at issue. Further, there are numerous Awards in support of the proposition that Rule 1 is a general Scope Rule and does not provide an exclusive grant of work to the employees discussed therein. Accordingly, the burden is on the

Organization to prove that the disputed work has traditionally, customarily and historically been performed by the Claimants or craft. Prior Awards indicate that "traditionally, customarily and historically" means that the work has been performed on a system-wide basis to the exclusion of others including outside contractors. (See Third Division Award 37618 and Awards cited therein.)

The Board carefully reviewed the evidence. It is axiomatic that the burden of proof is on the Organization to establish a violation of the Agreement. The Carrier points out that not only were contractors used for similar work on four other buildings, but also that the roof was a custom installation, i.e., installing new roofing panels over an existing roof and fabrication was required. The Organization provided some evidence that the work has been previously performed by BMWE-represented employees, but that evidence is insufficient for the Organization to meet its burden of proof.

The evidence offered by the Organization is insufficient to establish a violation of the Agreement. The Organization has not met its burden.

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.