Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40236
Docket No. MW-40218
09-3-NRAB-00003-070443
(07-3-443)

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
(
(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 (Rail Workers Track Service) to perform Maintenance of Way and Structures Department work (track construction and related work) between Mile Posts 66.7 and 70.0 at Oak Creek, Wisconsin on the Kenosha Subdivision beginning on April 4, 2006 and continuing (System File 8WJ-7489T/1454877 CNW).

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 the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants C. Hawley, J. Paulson, D. Dietrich, D. Braaten, G. Winchester, R. Harrison, D Kaminski, G. Patten, D. Dewitt, M. Ninmann, B. Hendershot, S. Lehmann, R. Schuett, F. Brown, T. Kneebone, J. Rickert, and L. Dembiec shall now '. . . each be compensated at their respective rates of pay for an equal share of the total man-hours of work performed by Contractor

forces in the performance of the track construction identified herein.'"

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 certain maintenance-of-way work.

The Organization initially contends that the Carrier failed to live up to its primary responsibility to provide advance notice and discuss the planned contracting transaction, in accordance with Rule 1 and Appendix 15, thereby forever depriving the Claimants of the opportunity to perform the work to which they were entitled under the terms of the Agreement and of the monetary benefit flowing therefrom. The Organization asserts that none of the exceptions permitting the use of outside forces to perform scope-covered work are present in the instant dispute.

The Organization maintains that the work of the character involved here clearly is encompassed within the scope of the Agreement. The Organization points out that Rule 1B specifically provides that employees covered by the Agreement in the Maintenance of Way and Structures Department shall perform all work connected to the construction, maintenance, repair, and dismantling of track,

structures, and other facilities used in the performance of common carrier service on the operating property. The Agreement Rules also clearly establish the classes of employees within the Track Sub-department required to perform the work specifically stipulated within Rule 1B.

Pointing to prior Awards, the Organization submits that Rule 1(b) has been interpreted as a reservation of work Rule, and it clearly and unambiguously reserves work of the character involved here to Maintenance of Way forces. The Organization emphasizes that it is well-established 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 in violation of the Agreement.

The Organization further contends that there is no dispute that the Claimants established and hold seniority within Seniority District T-8, in accordance with Rule 4. The Organization cites a number of prior Awards in asserting that it is a well-established principle that where seniority is confined, work also is confined. The Claimants, who held the position of Machine Operator, all were fully qualified to perform all work performed by the contractor's employees. The Organization submits that by virtue of this undisputed seniority established in accordance with Agreement Rules and past practice, the Claimants clearly were entitled to perform the work involved in this dispute. The assignment of this work to outside forces undoubtedly violated the Agreement.

The Organization goes on to argue that the Carrier simply failed to fulfill its obligation to provide the General Chairman with advance notice of its plan to assign outside forces to perform the work at issue. The Organization suggests that this failure goes to the very heart of the instant dispute, and it serves as a basis for questioning the Carrier's good faith in handling this matter. The Organization points out that the Carrier's action effectively precluded any possibility of making a good-faith attempt to reach an understanding concerning the intended contracting, and it prevented the General Chairman from having the opportunity to persuade the Carrier to assign this scope-covered work to its own employees instead of to outsiders. This course of action constitutes a direct and serious violation of the Agreement. The Organization insists that the notice requirement is not a mere courtesy, but a threshold requirement that must be met in good faith before

maintenance-of-way work can be assigned to an outside contractor. Pointing to prior Awards and to the parties' December 11, 1981 Letter of Understanding, the Organization emphasizes that a carrier's failure to comply with the Agreement's notice provisions requires a sustaining award.

The Organization asserts that the fundamental and overriding concern here is the Carrier's failure to conduct its actions with the requisite degree of good faith. The Carrier failed to meet its contractual obligation, and it engaged in a unilateral assignment of scope-covered work to forces other than the employees who are contractually entitled to perform the work. The Organization argues that the entire sanctity of the Agreement is at stake, and the Claimants must not be made to suffer the loss caused by the Carrier's failure to comply with its obligations under the Agreement.

Addressing the Carrier's initial defense that the contractor was working for Wisconsin Electric Power Company, and not the Carrier, the Organization stresses that the work was performed on Carrier property and the Carrier had control over the work. Moreover, contrary to the Carrier's subsequent assertion, there is no evidence that the Carrier leased the area where the claimed work was performed. In addition, the Organization submits that any assertions that the Carrier had no control over the claimed work are directly contradicted by the assertion of the Carrier's highest designated officer that notice of the planned contracting was provided in a Service Order. The Organization argues that the Carrier would not have provided notice of its intent to contract such work if it was on leased property or not under its control.

The Organization then contends that the cited Service Order does not constitute proper notice under any circumstances because it does not provide any reason for contracting the claimed work, which violates the express terms of Appendix 15. The Organization further points out that the Service Order is dated May 11, 2006, while the work in question began on April 4, 2006, 37 days before the Service Order was written. The Scope Rule stipulates that such a notice must be issued no less than 15 days prior to the start of contracting. The Organization asserts that this course of action further demonstrates the Carrier's bad faith.

The Organization further disputes the Carrier's position that the claimed work is Consolidated System Gang work, although it argues that this constitutes a tacit admission that the claimed work is BMWE work and that advance notice was required. The Organization points out that none of the claimed work was assigned to Consolidated System Gang forces.

As for the Carrier's boilerplate defense, which it raises in virtually every contracting claim, that the Organization has "failed to allege a fact scenario that is verifiable," the Organization insists that it presented all of the particulars available to it during the on-property handling and clearly established a prima facie claim to the work. The Organization emphasizes that it provided photographic evidence of the contractor performing the claimed work, and the Carrier's own correspondence shows that it knew exactly where the work was performed.

Turning to the Carrier's argument that the work was not exclusively reserved to BMWE-represented employees, the Organization contends that, as the Third Division repeatedly has held, the Organization is not required to prove exclusive reservation of scope-covered work when the dispute involves the assignment of work to outsiders. The Third Division also has repeatedly held that the proper application of the exclusivity doctrine is to disputes over the proper assignment of work between different classes and crafts of the Carrier's own employees, not to disputes involving outside contractors.

The Organization then acknowledges that numerous Awards involving this Carrier have sustained monetary payments in claims of notice violations only for furloughed claimants. The Organization points out, however, that the abundance of these Awards makes it apparent that the Carrier has no intention of discontinuing its practice of not properly notifying the Organization of its intent to contract if its monetary liability is limited only to furloughed claimants. Despite the Board's repeated admonishments, the Carrier has continued to ignore notice provisions when required to pay remedy only to furloughed claimants.

With regard to the Carrier's argument that the Claimants were not available for the claimed work because they were fully employed and/or on vacation during the claim period, the Organization notes that there is no evidence of any urgency to

perform the claimed work. The work could have been scheduled for a time when the Claimants were available to perform the work, or the work that the Claimants were performing could have been delayed to allow them to perform the claimed work. The Organization contends that the Board consistently has held that a carrier's failure to assign employees to a particular project does not mean that the employees were unavailable to perform that work.

The Organization asserts that any time the Carrier violates the Agreement by assigning work that is customarily and historically performed by its employees to outside forces, there is a loss of a work opportunity. The Organization argues that the Board has repeatedly and overwhelmingly found in favor of the Organization on the question of whether a so-called "fully employed" claimant is entitled to receive compensation when a carrier violates the contracting out of work provisions of the Agreement.

The Organization submits that the requested remedy would simply make the Claimants whole for the loss of work opportunity due to the Carrier's violation of the Agreement. The Organization argues that the legion of Awards fashioning make-whole remedies all recognize that an employee should not be made to suffer any loss when the Agreement is violated. The Board also has held that an employee's vacation status is not detrimental to entitlement for monetary reparations in the event that an Agreement violation is found.

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

The Carrier initially contends that there were no violations of the Agreement in this matter because the work at issue was not initiated by or paid for by the Carrier. It asserts that the Board has held that work contracted by a third party that is not under Carrier control does not violate the Agreement. The Carrier argues that the Organization has not proven that the Carrier owns the property where the work was performed. It insists that it did not violate the Agreement because a third party contracted out work that was not for the benefit of the Carrier, was not under the Carrier's control, and was not performed on Carrier property.

The Carrier contends that because the work was not performed for common Carrier service at the request of the Carrier, or even on the Carrier's property, no notice was required. The Carrier points out that the Organization's reliance on the notice provision of Rule 1 is misplaced and without merit. The Carrier argues that it cannot be faulted if a contractor hired by a third party occasionally crossed over the property line onto the Carrier's right-of-way. The Carrier asserts that it served a notice to ensure the Organization was fully aware of the project and because a Foreman would be used for flag protection. The Carrier contends that because the work was not initiated by, controlled by, or paid for by the Carrier, there was no need to provide the Organization with any notice.

The Carrier then argues that the Agreement Rules contradict the Organization's arguments. The Carrier asserts that it has maintained a long-standing practice of utilizing contractor forces for UP System BMWE new construction projects. The Carrier contends that under the circumstances, the cited Rules are not applicable, and the Agreement does not retain jurisdiction in this claim.

The Carrier points out that the claimed work also was done in conjunction with work being accomplished by employees covered by the UP Agreement. The Carrier contends that the UP Agreement is a type of Implementing Agreement between the parties; the CNW was a party to the UP Agreement, and it negotiated and understood the work was being moved to the UP Agreement. The Carrier emphasizes that the Organization's statement of claim indicates that the work was new track construction. The Carrier contends that because the work performed within this project was assigned to UP Consolidated System New Construction Gangs, it therefore is not subject to the CNW Agreement. The Carrier emphasizes that it is unrefuted that the work contracted out is not reserved to CNW employees, and the CNW entered into an Agreement allowing UP BMWE Consolidated System employees to perform work on their former property.

The Carrier then submits that because the work was performed under the UP Agreement, Rule 52(b) of that Agreement is applicable. This Rule provides that where the Carrier has a practice of contracting, then it is within its right to subcontract the work.

The Carrier further contends that it is apparent that the Organization is attempting to create a jurisdictional dispute between employees of the same craft, but of different classes within that craft. In such a jurisdictional dispute, the Organization carries a heavier burden in that it must prove exclusivity. The Carrier contends that the Organization therefore must prove that the claimed work exclusively belongs to one group or the other. If this is not proven, then the Carrier may assign the work to whichever group it deems fit. The Carrier insists that the Organization is trying to "back door" its way around the UP Agreement and a recent Third Division Award. The Organization is attempting to carve out certain work that has been performed consistently by new construction gangs that work under the UP Agreement.

The Carrier asserts that the Organization is claiming that the alleged contracting of the preparatory work somehow becomes theirs under the CNW Agreement. The Carrier points out that the Organization is taking the position that if the Carrier contracts the work out, even though it is not CNW scope-covered work, the CNW has an exclusive right to such work. The Carrier insists that nowhere in this Agreement is the Organization's position substantiated or supported, nor does it have any relevance to the instant claim. The Carrier contends that in a jurisdictional dispute between employees of the same craft, but of different classes within that craft, the Organization must prove exclusivity. The Carrier argues that the Organization failed to make this showing, so the instant claim must be denied.

The Carrier then emphasizes that all Claimants were assigned and voluntarily working under a distinct and separate Collective Bargaining Agreement, and they were not even available for work under the CNW Agreement. Moreover, an employee cannot suffer a loss of work opportunity when the employee has chosen to take a vacation. The Carrier also asserts that several of the Claimants were working and compensated for both straight time and overtime on the claim dates, so the Claimants obviously did not lose any work opportunity and did not suffer any monetary loss. The Carrier points out that numerous Awards have held that employees who are fully employed are not entitled to additional pay such as that requested by the Organization.

The Carrier notes that the Claimants could not have been in two places at the same time, and there is no basis for any monetary relief. The Carrier argues that it has no intention of enriching the Claimants for losses that never were incurred, and there is no contractual basis for any "penalty" payments, which is what the Organization is seeking here. The Carrier asserts that the Organization failed to substantiate any loss of wages.

The Carrier insists that the Organization failed to prove who owned the track, who paid for the contractors, and who actually benefited. If the Organization's position is sustained, then this would be writing new Agreement language and initiating a new practice and rule in the industry. The Carrier asserts that the Board is not empowered to initiate such Agreement language.

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 had outside forces perform track construction work at Oak Creek, Wisconsin, in April 2006.

The record reveals that the work in question was being performed at the direction of Wisconsin Electric, which is a local public power company. The work was being done for the benefit of Wisconsin Electric and Wisconsin Electric was paying for it. The Board has ruled in the past that work performed pursuant to such agreements is not reserved to the Carrier's BMWE-represented employees. In addition, there is no requirement of advance notice. See Third Division Awards 37143 and 37144.

Moreover, in Third Division Award 31234, the Board ruled:

> "This Board has consistently held that where work is not performed at Carrier's instigation, nor under its control, is not performed at its expense or exclusively for its benefit, the contracting is not a violation of the Scope Rule of the Agreement."

For all of the above reasons, 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 21st day of December 2009.