Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40291
Docket No. MW-39692
10-3-NRAB-00003-060450
(06-3-450)

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (Rittmier Construction) to perform Maintenance of Way and Structures Department work (grade, sub-ballast, culvert, asphalt and other work associated with construction of universal crossovers) between Mile Posts 40.99 and 41.76 near Lowden, Iowa and between Mile Posts 31.64 and 32.4 near Calamus, Iowa on the Clinton Subdivision beginning on June 6, 2005 and continuing (System File 4RM-9668T/1430073 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 L. Walton, S. Koeppen, W. Harrington, D. Perdue, D. Bartachek, K. Rosel, M. Davis, R. Jacobi, G. Neuroth, J. Safely, M. Lindsey, J. Koeppen, G. Hart

and D. Bolen shall now each be compensated at their respective and applicable rates of pay for an equal proportionate share of the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning June 6, 2005 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 Carrier sent a letter dated April 5, 2005 to General Chairman K. Bushman via email, which provided:

"This is a 15-day notice of our intent to contract the following work:

Location: Calamus, IA Clinton Sub MP 31.64 MP 32.4

Specific work: providing labor, supervision, grading, subballast work, culvert work, asphalt work, equipment rental and other items associated with construction of a universal crossover.

Serving of this 'notice' is not to be construed as an indication that the work described above necessarily falls within the 'scope' of your agreement, nor as an indication that such work is necessarily

reserved, as a matter of practice, to those employees represented by the BMWE.

In the event that you desire a conference in connection with this notice, all follow-up contacts should be made with John Steiger in the Labor Relations Department at phone [number omitted]."

General Chairman Bushman sent a letter to the Carrier on the same date requesting a conference regarding the notice of intent to subcontract. He notified the Carrier that Rule 1(b) Scope provided that the work "may only be contracted provided that special skills not possessed by the Company's employees . . . special equipment, . . . special materials . . . or, time requirements must be met which are beyond the capabilities of Company forces to meet."

The Carrier's April 6, 2005 response sent via email provided:

"This is a 15-day notice of our intent to contract the following work:

Location: Lowden, IA Clinton Sub MP 40.99 to MP 41.76

Specific work: providing labor, supervision, grading, subballast work, asphalt work, culvert work, equipment rental and other items associated with construction of a universal crossover.

Serving of this 'notice' is not to be construed as an indication that the work described above necessarily falls within the 'scope' of your agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWE.

In the event that you desire a conference in connection with this notice, all follow-up contacts should be made with John Steiger in the Labor Relations Department at phone [number omitted]."

Secretary Treasurer and Assistant General Chairman W. C. Jorde sent a letter to Assistant Director Labor Relations J. Steiger dated April 25, 2005, following the conference of the instant matter and two other subcontracting notices. He stated, in pertinent part:

> "In conference the Brotherhood cited the Carrier's notice of 'other items associated with construction' does not meet the specific requirements set forth in Rule 1 – Scope of Agreement for such notices of intent.
>
> The Brotherhood cited that the Carrier does possess all of the necessary equipment to perform this work. . . . If additional equipment is needed, such equipment would be readily available for Carrier to rent or lease. Carrier forces are experienced and available to perform this work. This is Scope covered work to be performed by Carrier forces. . .
>
> No understanding was reached . . . we will progress the claims if outside forces perform the described work."

The Assistant Director Labor Relations' May 9, 2005 response confirmed the conference:

> ". . . of the Carrier's notice of its intent to use contract forces to provide labor, supervision, grading, subballast work, electric work, and other items associated with construction of a universal crossover at Calamus, Iowa, Clinton Subdivision, MP 31.64 to MP 32.4.
>
> During our conference, you had the position that this 'notice' was improper, inasmuch as your members had an exclusive right to perform this work on a daily basis.
>
> It was explained to you that work you described is 'system' work and the Company is not adequately equipped to handle the work in the time requirements are such that it is beyond the capabilities of

> Company forces to meet. Under the circumstances, Carrier's use of a contractor to perform the work is not a violation of that Agreement, and you were advised that the Carrier would proceed with the contracting of this work."

In its July 19, 2005 claim, the Organization stated that the "Claimants have seniority in the classifications for this work while the contractor's employees do not." The claim cited Rules 1, 2, 3, 4, 5 7, 9, 23, 31 as well as Appendix 8 and Appendix 15 in support of the Agreement right for the Claimants to perform the cited work.

The Manager Labor Relations' September 7, 2005 response stated, in pertinent part:

> "As a result of my investigation into the merit of your claim I have determined that the Carrier has not violated Rules 1-B, 2-A . . . of the Agreement. The Carrier has served notice. . . .
>
> Notwithstanding, with the notice in mind, you are also aware the contractor employees working are fully qualified to perform the work. The contractor merely assisted our local forces on this universal crossover work through providing equipment support. Further, the Carrier has customarily and traditionally utilized contractor forces to perform the type of work disputed in this case. Your contention that such work is reserved exclusively to the employees covered by the BMWE is simply without substance. The Carrier has resorted to contracting such work out because the Carrier simply does not own the specialized equipment to accomplish such work. Thus, the Carrier is not adequately equipped to handle the culvert work for this project. Rule 1 (B) gives the Carrier certain latitude when it comes to such situations. This Rule clearly states that if the Carrier does not own the specialized equipment or [is not] adequately equipped to handle the work then by agreement between the Carrier and the General Chairman the Carrier can contact out such work. Moreover, even if

such were reserved to employees of your craft, the fact remains that the Claimants involved in this case do not possess sufficient ability to safely and efficiently perform the duties or operate the equipment in question.

. . . Contrary to your contentions, the Carrier has customarily and traditionally utilized outside forces to perform the type of work you describe in this case, and we understand that outside forces have historically performed such service. Additionally, such work can be contracted out when the Carrier is not adequately equipped to accomplish such work by agreement of the Carrier and General Chairman."

The Organization's October 6, 2005 response addressed to the Director Labor Relations discussed Rule 1 B, and provided, in relevant part:

"Just by the Carrier serving notice and holding a conference to contract this work does not give the Carrier the unilateral authority to contract the work. The Carrier failed to even identify one of the contracting out criteria listed in Scope Rule 1 of the Agreement. An agreement must be reached with the General Chairman, which no such agreement was reached. Therefore, the Organization retains the right to file claims as deemed appropriate."

The Director Labor Relations' December 6, 2005 response reaffirmed the earlier Carrier responses, as follows:

"In looking at your claim, and the Claimants referenced within who are UP System BMWE forces, you should be aware that such contentions that UP System BMWE forces may perform such work, yet contractor forces on the same project is somehow reserved to CNW BMWE forces is baseless. The Carrier has maintained a longstanding practice of utilizing contractor forces to perform preparatory work for UP System BMWE new construction projects prior to and subsequent to the former CNW territory coming under

the jurisdiction of the January 1, 1998 UP System Gang Agreement under Appendix 'T.' Under your novel theory, this longstanding past practice would somehow be applied differently on the former CNW territory, than on the former UP territory, or the former WPRR territory, or the former SP Western Lines territory, or the former D&RGW territory, for that matter. There is no dispute that the complained of new crossover on the Clinton subdivision . . . was installed by UP System BMWE forces under the provisions of Appendix 'T.' Therefore, there can be no other conclusion that any contracting involved in this project would necessarily fall under the same provisions that would otherwise apply to the collective bargaining agreement under which the BMWE forces performed the construction of the new crossover – the UP BMWE Agreement.

* * *

There is nothing within the Scope Rule of the Agreement, past practice or custom that reserves this type of work exclusively to the Claimants or the BMWE. The burden to show this is on the Organization and you have failed to do this. The preparation and construction of a universal crossover is not work reserved to the BMWE under the UP Agreement."

The General Chairman's to January 31, 2005 response to the Director Labor Relations following conference on the instant matter reads, in pertinent part, as follows:

"During the conference, the Organization re-iterated its positions of this claim as follows:

* * *

3) The work and property involved fall under the guidelines of the CNW November 1, 2001 Agreement.

4) The Consolidated Systems Gang Agreement does not give work to outside contractors."

Director Labor Relations Dominic Ring replied in a letter dated February 8, 2006, in part:

> "The Organization's contention that the instant matter is governed by the CNW/BMWE Agreement is incorrect and misleading. As expressed on the property, the work in question was covered under the provisions of the UP/BMWE CBA.
>
> * * *
>
> Initially, the work of providing labor, supervision, grading, sub-ballast work, culvert work, asphalt work, equipment rental and other items associated with construction of 2 new universal crossovers on the Clinton Subdivision, is work that was assigned to the Consolidated System Gang forces. The Consolidated System Gang work under the scope of the Union Pacific BWWE Collective Bargaining Agreement, not the CNW/BMWE Agreement. Since the work is controlled by the UP/BMWE Agreement, Rule 52 is the governing rule and rights and practices flowing from that rule and agreement are applicable to this claim.
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> * * *
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> Further, the Carrier explained in its December 6, 2005 correspondence, that the work in question falls under the provisions of the UP Agreement. Nevertheless, the Carrier submitted proper notice to your Organization and held conference to re-iterate its position that the work in question is considered "system" work and does not fall under the provisions of the CNW/BMWE Agreement. Even though you were served notice of the intent to contract, it was at the request of the Organization that you be served notice of the

UP Collective Bargaining Agreement work until such time as the current dispute is resolved."

The Organization maintains that the claim must be granted because the character of the work is reserved to BMWE-represented forces by the clear language of the Scope Rule of the C&NW Agreement. For example, Third Division Award 39942 recognizes that the instant work is typical work of BMWE forces under the Agreement. According to the Organization, the instant claim is simple – the work is reserved to BMWE forces by the Agreement, the Carrier's Maintenance of Way track forces have historically performed the work, and none of the exceptions of Rule 1(B) were shown by the Carrier. Even if the System Gang Agreement governed, the work was not done by the System Gang, it was done by a contractor. Further, the notice of contracting was insufficient because the Carrier was not involved in any good faith discussions of the subcontracting. To the Organization, the Carrier is inappropriately trying to bring a right that it has on the System Gangs down to the Districts.

Under that Agreement, Scope Rule 1(B) provides:

"Employees included within the scope of this Agreement in the Maintenance of Way and Structure Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property. . . .

By Agreement between the Company and the General Chairman work as described in the preceding paragraph, which is customarily performed by employees described herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through a supplier are required or unless work is such that the Company is not adequately equipped to handle the work; or

time requirements must be met which are beyond the capabilities of Company forces to meet."

The Carrier counters that the instant work (installation of two new crossovers) is work of a System Gang and that the UP Agreement should govern. System BMWE forces are not governed by the C&NW Agreement for this work and the claim must fail. Under the System Agreement, the instant work is customarily done by contractors. According to the Carrier, the UP BMWE Agreement governs the use of system gangs. Under that Agreement, the Organization cannot show that the work was reserved exclusively to BMWE-represented forces.

Similar issues were addressed in Public Law Board No. 7097, Award 8 and Public Law Board No. 6302, Award 131. In PLB 6302 Award 131, the Carrier notified the Organization of its intent to contract out certain construction work and notified the C&NW General Chairman. The Carrier subsequently rescinded the notice after determining that the project was consolidated system gang new construction work subject to the UP Agreement. The UP General Chairman was notified. The claim progressed under the C&NW Agreement. That Board stated:

> "During the handling on the property, the Organization conceded that the work could be performed under the UP Agreement by system gangs. However, it maintained that when [the] Carrier chose not to assign work to system gang employees but instead to contract the work out, the work became exclusive to employees under the C&NW Federation Agreement.
>
> We do not find the Organization's position persuasive. Either the work was subject to the CNW Federation Agreement or the UP Agreement. If the work was subject to the UP Agreement, we fail to see how contracting out the work would somehow render it subject to the CNW Agreement. Whether the contracting out violated the UP Agreement is not before us as no claim filed under that Agreement is before us, However, the claim that is before us, which was filed under the CNW Federation Agreement must be denied."

In Public Law Board No. 7097, Award 8, the Carrier used outside contractors to perform crossing watchman duties on CNW Federation Agreement property without notifying General Chairman Bushman. The Organization argued that the Carrier violated CNW Federation Agreement Rule 1(b) by not giving proper notice of the contracting at least 15 days in advance. The Carrier defended that the crossing protection was part of a new track construction project being performed by a UP BMWE Consolidated System Gang. Under the UP BMWE Agreement, which governed the Consolidated System Gang project, the subcontracting of the work was allowable. The Board found that the work was part of a Consolidated System Gang project, that the UP BMWE Agreement was applicable, and that the CNW BMWE Agreement was inapplicable. Because the Organization could not show that the crossing work was BMWE work under the UP BMWE Agreement, the claim was denied. The Board also held that because the Organization could not show any claim to the disputed work under Rule 1(B) of the CNW BMWE Agreement, there was no obligation to provide General Chairman Bushman with advance notice.

The Organization reminds the Board that the UP System Gang Agreement governs employees assigned to the System Gang - and contractors are not employees. Because the work was done on a property where the CNW Federation Agreement controls, the contracting on System Gang projects must be done pursuant to the CNW Federation Agreement.

The Board carefully reviewed the evidence and finds the analysis of the above Awards to be persuasive. As discussed in Public Law Board No. 7097, Award 8, under Rule 1(B) the Organization could show a claim to the disputed work and notice to General Chairman Bushman was appropriate here. However, that does not end the inquiry.

It is undisputed in the record that the crossover projects were a Consolidated System Gang new construction project. The instant work was part of that project. Public Law Board No. 6302, Award 131 and Public Law Board No. 7097, Award 8 both stand for the proposition that Consolidated System Gang projects are governed by the UP BMWE Consolidated System Gang Agreement. The Board agrees that the UP BMWE Agreement governs the instant crossover projects.

In the instant matter, the Organization cannot show how the contracting out of the cited work as part of that System Gang new construction project violated the UP BMWE Agreement. 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 1st day of March 2010.