Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40293
Docket No. MW-39697
10-3-NRAB-00003-060483
(06-3-483)

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 (Horizontal Bore) to perform Maintenance of Way and Structures Department work (bore and install culverts) at Mile Posts 149.08, 149.28 and 149.95 on the Mason City Subdivision on July 26, 27, 28, 29, August 1, 10, 15, 16 and 17, 2005, instead of System Pipe Jacking and Boring Gang employes R. Knipfel, J. Peterson and A. Scavo (System File 2RM-9683T/1432262 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper 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 R. Knipfel, J. Peterson and A. Scavo shall now each be compensated for an appropriate share of two hundred sixteen (216) hours at their respective straight

time rates and an appropriate share of one hundred seventy-three and one-half (173.5) hours at their respective time and one-half 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 Carrier sent a letter to General Chairman Bushman dated April 14, 2005, which provided:

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

Location: Iowa Falls, Iowa, Mason City Subdivision MP 149.

Specific work: providing labor, supervision, grading, subballast work, electrical work, asphalt work, and other items associated with yard track expansion.

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 on the notice of intent to subcontract. General Chairman Bushman 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 Organization sent a letter to the Carrier 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' or 'yard expansion' 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 claims if outside forces perform the described work."

The Carrier sent a letter to the Organization dated May 9, 2005, confirming the conferences:

> ". . . 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 yard expansion at Iowa Falls, Mason City Subdivision, MP 149.
>
> During our conference, you took 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 the Company is not adequately equipped to handle the work in that 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."

The Organization sent a claim in the instant matter to the Carrier dated August 30, 2005. In the claim, he stated that the "Claimants are assigned to the Pipe Jacking and Boring Machine Gang 9094." The claim cited Rule 1, 2, 3, 4, 7, 9, 23, 30, 31, and Appendix 15 in support of the Agreement right for the Claimants to perform the cited work. He continued:

> "Claimants are maintenance employees working in the area and they were not instructed to work on the project. None of the work performed installing was emergency work. Claimants typically perform this very same work and have historically done so in the past. The Carrier simply had a Contractor perform this work as a matter of convenience. Convenience is not a valid reason or exception as listed in Rule 1B to use a contractor to perform Scope covered work."

The Carrier replied in a letter dated September 8, 2005 and 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. 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 time requirements are such that it is beyond the capabilities of company forces to meet. . . . Thus, the Carrier is not adequately equipped to handle the work for this project.
>
> Rule 1 (B) gives the Carrier certain latitude when it comes to such situations. And one . . . is when 'time requirements must be met which are beyond the capabilities of company forces to meet' then by agreement between the Carrier and the General Chairman, the Carrier can contract 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."

The Organization appealed in a letter to the Carrier dated November 10, 2005, which 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. 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 Carrier replied in a letter dated December 7, 2005 in which it adopted the earlier Carrier responses. It also included the following:

"In looking at your claim, and the Claimants referenced within who are UP System BMWE forces, you should be aware that such employees are covered under the UP Agreement. Your 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 UP System January 1, 1998 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 nothing within the Scope Rule of the Agreement, past practice or custom that reserves this type of work exclusively to the Claimants or BMWE. The burden to show this is on the Organization and you have failed to do this. The work of boring and constructing culverts is not work reserved to the BMWE under the UP Agreement."

The Organization sent a letter to the Carrier dated January 31, 2006 following the January 19 conference on the instant matter. It stated in part:

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

(1) The CNW/CBA states 'all work' to be performed by BMWE members.

(2) The Carrier and Brotherhood held a conference on work to be contracted out, no understanding was reached however the Carrier fails to admit that just serving a notice does not give them the right to contract the work.

(3) Claimants are not UP System Gang BMWE forces, they are CNW Pipe Jacking and Boring Machine Crew, which is a specialized crew and machine for installing culverts."

The Carrier replied in a letter dated February 8, 2006, in part:

"The Organizations 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 boring and installing culverts at MP 149.08, 149.28 and 149.25 . . . was associated with the yard expansion project, which is work that was appropriately assigned to the Consolidated System Gang forces. The Consolidated System Gangs 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.

* * *

Further, the Carrier explained in its December 7, 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-represented forces under the Agreement. According to the Organization, the instant claim is simple – the work is reserved to BMWE-represented forces by the Agreement, the pipe jacking and boring crew has historically performed the work, and none of the exceptions of Rule 1(B) were shown by the Carrier. Even if the Systems 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.

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 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 intent to contract out certain construction work and notified the CNW 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 CNW 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 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 PLB 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 Consolidated System Gang. Under the UP BMWE Agreement, which governed the Consolidated System Gang project, 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, contracting on System Gang projects must be done pursuant to the CNW Federation Agreement. Because it was not done by the System Gang, the yard expansion work in this matter should have been done by the Claimants.

The Board carefully reviewed the evidence and finds the analysis of the above Awards to be persuasive. As discussed in PLB 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 yard expansion project was a Consolidated System Gang new construction project. The yard expansion was being built by the System Gang and the instant work was part of that project. PLB 6302, Award 131 and PLB 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 project.

In the instant matter, the Organization cannot show how contracting out 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.