Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40376
Docket No. MW-38629
10-3-NRAB-00003-050006
(05-3-6)

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 Division -
(IBT Rail Conference
(
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Kewit Construction Company) to perform Maintenance of Way work (build casts, place concrete, saw cut and related work) at existing bridge piers at Mile Post 81.39 at Stockton, California commencing on October 1, 2003 and continuing through November 14, 2003, instead of Bridge and Building Sub-department employes J. Mendoza, J. Ruiz, M. Simental, J. Garcia and M. Puppo (Carrier's File 1385357 SPW).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work referenced in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with Article IV of the May 17, 1968 National Agreement and the December 11. 1981 Letter of Understanding.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants J. Mendoza, J. Ruiz, M. Simental, J. Garcia and M. Puppo shall now each '. . . be paid his proportionate share, at the respective rate of his position, for the total amount of man hours worked by the Kewit Construction Company and its employees. Payment shall be in addition to any compensation they may have already received. We further request that each named Claimant be paid at the applicable time and one-half rate of his respective position for any and all overtime worked by the outside contractor and its employees. Note: At a minimum, the total amount of straight time hours worked by the outside contractor and its employees are two thousand six hundred and forty hours (2,640). With overtime hours at two thousand and forty hours (2040).'"

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. Mendoza, J. Ruiz, M. Simental, J. Garcia, and M. Puppo established and hold seniority in various classes in the Bridge and Building Subdepartment on the Western Seniority District, Sacramento Western Division. At the time the instant dispute arose, they were regularly assigned to B&B Gang 7517, a mobile gang working ten-hour workdays, Monday through Thursday, with Friday, Saturday, and Sunday designated as rest days.

Beginning on October 1 and continuing through November 14, 2003, the Carrier assigned an outside contractor (Kewit Construction Company) to perform repair work on the bridge located at Mile Post 81.39 near Stockton, California. The work consisted of building casts, placing concrete, cutting concrete, drilling holes, etc., on the existing concrete support piers on the bridge. Eleven employees of the outside contractor utilized equipment including a front end loader, chipping gun, drill guns, air compressor and track excavator to accomplish the work. Said forces worked 12 hours per day, six days per week repairing the bridge support piers. The contractor's employees worked 2,640 straight time hours and 2,040 overtime hours.

First, the Organization claims that the Carrier did not provide proper notice to the Organization as required by the Agreement. Second, the Organization claims that it was improper for the Carrier to contract out the above-mentioned work, which is reserved to BMWE-represented employees.

According to the Organization, the Carrier had customarily assigned work of this nature to BMWE-represented employees. The Organization further claims that this work is consistent with the Scope Rule and the Carrier's Maintenance of Way employees were fully qualified and capable of performing the designated work. Therefore the Claimants should have performed said work. The Organization argues that because the Claimants were denied the opportunity to perform the work, they should be compensated for the lost work opportunities.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. First, it contends that it provided proper notice to the Organization. Second, the Carrier contends that bridge repair work does not belong to BMWE-represented employees under either the express language of the Scope Rule or any binding past practice.

The Board concludes that the Carrier sent a proper notice to the Organization of the proposed contracting on September 5, 2003, and that the Carrier acted appropriately according to the relevant Rule.

With regard to the issue of whether the work in question has been traditionally and customarily performed by the Organization, we note that Special Board of Adjustment No. 1016, Award 150, framed the scope issue as follows:

> "In disputes of this kind, the threshold question for our analysis is that of scope coverage. There are generally two means of establishing scope coverage. The first is by citing language in the applicable scope rule that reserves the work in dispute to the Organization represented employees. The second method is required when the language of the scope rule is general. In that event, the Organization must shoulder the burden of proof to show that the employees it represents have customarily, traditionally, and historically performed the disputed work. It is well settled that exclusivity of past performance is not required in order to establish scope coverage vis-à-vis an outside contractor."

In the instant case, the Board carefully reviewed all record evidence regarding whether the Organization proved that the involved work belongs to BMWE-represented employees. First, we note that bridge repair work is not specifically identified in the Scope Rule.

We next turn to whether there is sufficient evidence for the Organization to have proven that it customarily, traditionally, and historically performed the disputed work. While the Organization presented some evidence to show that the work in question belonged to the Organization, that evidence is insufficient for the Organization to meet its burden of proof. See Public Law Board No. 6537, Award 1 below. See also Third Division Award 37365, as well as Public Law Board No. 4402, Awards 20 and 28.

In PLB 6537, Award 1, Referee Brent indicated as follows:

> "Claimants contend that they were improperly deprived of work opportunity to perform maintenance of way work operating various equipment during the construction of a siding extension at Palos, Alabama between Mile Posts 710.85 and 715.18. . . .

> This work was performed by outside contractor forces. . . . According to the Organization, 'The character of work involved here is that which has been historically, traditionally, and customarily performed by the Carrier's Maintenance of Way employees throughout the Carrier's property. . . .'
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> The Carrier defended the propriety of its assignment, contending that the disputed work was not within the exclusive jurisdiction of the bargaining unit represented by the Organization, and that similar projects had often been outsourced to contractors in the past.
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> . . . the Board's evaluation of the propriety of the assignment of many aspects of this project to non-bargaining unit forces employed by outside contractors rests on the Board's determination that similar work has historically been performed on the Carrier's property by outside contractors on many occasions, thus precluding a finding of exclusivity of jurisdiction for the bargaining unit over the disputed work in the instant case. The Third Division of the NRAB has held similarly in Cases No. 36280, 36282, and 36283, among others. The holdings in these cases, especially as they involve the same parties as the instant case, afford valuable precedent for the finding herein.
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> Grading of road bed and compaction of substrate have not been routinely assigned to bargaining unit employees in all cases. Moreover, the portion of the work involving laying and installation of track, work traditionally within the expertise of the bargaining unit, was assigned to bargaining unit employees."

Based on the record evidence and the above-cited precedent, we cannot find that the work of bridge repair is either definitively encompassed within the plain

language of the Scope Rule or that the Organization has been able to prove that such work has historically and traditionally been performed by members of the Organization.

Thus, having determined that the notice was proper and that the work was not within the scope of the Organization, we find that the Organization failed to meet its burden of proof and the claim is therefore 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 25th day of March 2010.