Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40377
Docket No. MW-38641
10-3-NRAB-00003-050019
(05-3-19)

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 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 (Krause Welding Repair) to perform Maintenance of Way and Structures Department work (operate end loader and dump truck) in connection with removing waste accumulated by a yard cleaner in the Clinton Yards on October 2 and 9, 2003 (System File 3SW-2071T/1385916 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an 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 J. Sawvell, W. Braden and E. Imel shall now each be compensated at their respective rates of pay for an equal proportionate share of the fifty-two and one-half (52.5) man-hours expended by the outside forces in the performance of the aforesaid work."

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. R. Sawvell, W. C. Braden and E. S. Imel established and hold seniority in the Track Subdepartment. On the dates involved in this dispute the Claimants were assigned to various positions in the vicinity of Clinton, Iowa, under the supervision of Manager of Track Maintenance Lubbs.

The Carrier operated a yard cleaner in the Clinton, Iowa, Yard. Accumulated waste was unloaded into the yard for later removal. On October 2 and 9, 2003, allegedly without notice to the General Chairman, the Carrier assigned outside forces (Krause Welding Repair) to load and haul off the waste. On October 2, 2003, five of the contractor's employees used an end loader and five dump trucks to load and haul yard waste from Clinton Yard. The five employees expended a total of 30 hours performing the work. On October 9, 2003, the contractor returned to Clinton Yard and, using an end loader along with two dump trucks, expended another 22.5 hours loading and hauling yard waste.

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 that is reserved to BMWE-represented employees.

According to the Organization, the Carrier had customarily assigned work of this nature to its Maintenance of Way forces. It further claims that this work is covered by the Scope Rule. According to the Organization, Carrier forces were fully qualified and capable of performing the designated work. The Organization argues

that because the Claimants were denied the opportunity to perform the relevant work, the Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. First, it contends that the claim was not filed in a timely manner. The Organization filed its initial claim on November 12, contending that the work had been performed on September 2 and 9, 2003. It was not until December 12 that the Organization attempted to correct its error. This was beyond the 60-day time period allotted in the Agreement. Thus, the claim is untimely. Further, the Carrier contends that the contracted work does not belong to BMWE-represented employees under either the express language of the Scope Rule or any binding past practice. Therefore, notice was not required. According to the Carrier, controlling precedent has upheld the Carrier's position.

We first find that the claim was timely filed. The Organization filed its claim in November, incorrectly alleging violation dates as having occurred in September instead of October. However, the following month, the Organization attempted to correct its error. The Carrier did not raise this alleged time limit violation until January 6, 2004. It is evident that the Organization clearly attempted to file the instant claim in a timely manner and the error and subsequent correction will not defeat this claim. See Third Division Award 11570.

Appendix D, Article IV of the May 1968 National Agreement states:

> "In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file . . . claims in connection therewith.

> Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding. . . ."

Having reviewed the instant case, the Board finds that the Carrier did not furnish the Organization an advance notice as required. The Board concludes that the work in question was arguably scope-covered and, at a minimum, the Carrier should have provided notice to the Organization before contracting out the work. Such a requirement must have been fulfilled by the Carrier in order to sustain its position. ". . . If the Organization has established that BMWE-represented employees have, at times, performed the disputed work, then advance notice is required even if Organization forces have not performed the work to the exclusion of other crafts or contractors." (Third Division Award 36516) See also Third Division Awards 36514 and 36292. Thus, the claim will be sustained.

As a remedy, due to lost work opportunities, the Claimants shall be made whole for the actual number of hours of contractor-performed work at the Claimants' respective rates of pay.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of March 2010.