Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40399
Docket No. MW-39956
10-3-NRAB-00003-070137
(07-3-137)

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 (Ed Kramer & Sons) to perform Maintenance of Way and Structures Department work (bridge construction/removal, culvert installation/removal and related work) between Mile Posts 81.3 and 82.8 at Mankato, Minnesota beginning November 9, 2005 and continuing (System File 7WJ-7478T/144012 CNW).

2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance 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. O'Neil, B. Elmberg, K. Sullivan, S. Rogers, S. Campbell and B. Rumler shall now each be compensated at their respective rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid bridge and culvert work beginning November 9, 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 Organization filed the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it used outside forces to perform certain Maintenance of Way work and when it failed to provide the General Chairman with proper advance notice of its intent to contract out this work.

The Organization initially contends that there is no real dispute that work of the character involved here is reserved to BMWE-represented forces by the clear and unambiguous language of the Scope Rule. The Organization asserts that Agreement Rules also establish the classes of employees within the B&B Sub-Department required to perform the work specifically stipulated within the Scope Rule.

Citing prior Awards, the Organization argues that it is fundamental that work of a class belongs to those for whose benefit the contract was made and delegation of such work to others not covered thereby is in violation of the Agreement. The Organization emphasizes that it cannot be validly disputed that the work at issue has been traditionally, customarily, and historically performed by the Claimants throughout the Carrier's property. The Organization maintains that the Board repeatedly has held that the assignment of scope-covered work to outside forces violates the Agreement.

The Organization goes on to contend that the Board also has consistently held that where, as here, seniority is confined, work is also confined. The Organization submits that pursuant to the Agreement, the Claimants held seniority and work rights within District B-7, and they were fully qualified to perform all of the work performed by the contractor's employees. The Organization insists that by virtue of their established seniority, the Claimants clearly were entitled to perform the work involved here. The Organization asserts that the assignment of this work to outside forces undoubtedly violated the Agreement. The Organization emphasizes that there can be no doubt that the work involved in this dispute is encompassed within the Scope of the Agreement and is reserved to B&B Sub-Department employees, such as the Claimants.

The Organization further argues that the Carrier was obligated to notify and confer with the General Chairman pursuant to Rule 1B. The Organization contends that the Carrier failed to fulfill its obligation in this matter. The Organization asserts that although the Carrier notified the General Chairman of its intent to contract work in the vicinity of Mankato, Minnesota, the Carrier's notice provided no reason for its intent to contract out the subject work. Moreover, the Organization maintains that the notice also specifies that it was a foregone conclusion that the work was to be contracted, and that the "notice" was simply pro forma.

The Organization submits that the parties, in their December 1981 Letter of Understanding, reached an Agreement under which the carriers reaffirmed the good-faith advance notice requirements of the National Agreement and other contracts, and the parties jointly reaffirmed that these provisions would be strictly adhered to. The Organization insists that it is impossible to enter into the required good-faith discussions without a good-faith advanced notice.

The Organization points out that the December 1981 Letter of Understanding constitutes the Carrier's promise to provide an advance notice that clearly identifies the work in question, is issued at least 15 days prior to the contracting, and provides good-faith reasons why the Carrier's Maintenance of Way forces cannot perform the work in question. The Organization contends that such notice simply is pro forma if it does not set forth a good-faith reason why Maintenance of Way forces cannot be used to the extent practicable.

The Organization asserts that the Carrier apparently believes that the December 1981 Letter of Understanding does not apply on its property, but the proper time to have challenged the LOU was prior to its inclusion in the Schedule Agreement. The Organization also points out that prior Awards repeatedly and consistently have upheld the applicability of the LOU.

The Organization contends that "notice" is not merely a 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 a number of prior Awards, the Organization submits that the Carrier's failure to provide the required proper notice in this instance is evidence of its dereliction to act with the requisite good faith, and this requires a sustaining award. The Organization insists that the fundamental and overriding concern is the Carrier's failure to operate and conduct its actions with the requisite degree of good faith. The Organization suggests that what occurred here was a unilateral assignment of scope-covered work to other than those employees who are contractually entitled to perform the work.

The Organization argues that the Carrier's failure to comply with its obligations under Rule 1B is a serious matter that cannot be treated lightly. The Organization insists that the sanctity of the Agreement is at stake. The Claimants must not be made to suffer the loss caused by the Carrier's failure to comply with its contractual obligations. The Organization initially asserts that the Carrier historically and repeatedly has failed to fulfill its contractual notice obligations.

The Organization then addresses the Carrier's position that the subject work was not reserved exclusively to BMWE-represented employees. The Organization submits that exclusivity does not come into consideration in circumstances involving outside contractors. The Organization emphasizes that the Third Division repeatedly has held that the exclusivity doctrine applies to disputes over the proper assignment of work between different classes and crafts of the Carrier's own employees, and not to disputes involving outside contractors.

As for the Carrier's position that it was not equipped to accomplish the subject work and that the Claimants did not possess the ability to perform the claimed work, the Organization suggests that the proper forum for the discussion of these issues was during conference with the General Chairman following proper advance notice, and not as a defense to a claim. The Organization points out that it

was precluded from requesting a conference on these issues because the Carrier did not raise them until the work had begun and the instant claim was progressed. The Organization maintains that the Carrier's failure to provide proper notice was tantamount to providing no notice because there was no opportunity to discuss the Carrier's belated reasons for assigning the work to outside forces.

The Organization goes on to contend that there is no truth to the Carrier's argument that the work was assigned to Consolidated System Gang forces. The Organization emphasizes that the work in dispute was performed on former C&NW property and is subject to the C&NW Agreement. The Organization insists that the Consolidated System Gang Agreement does not contain any provision for B&B Sub-Department work to be performed by System Gangs. The Organization asserts that the C&NW Agreement is the sole controlling Agreement in this claim.

With regard to the Carrier's position that the General Chairman was not the proper Organization official to handle/progress such a claim, the Organization insists that the Carrier is in serious error. The Organization contends that the instant claim has been properly progressed on the property in accordance with stipulated requirements, and the Carrier's attempts to convince the Board otherwise should be flatly rejected.

The Organization then argues that there was no apparent urgency to complete the work in question, so it could have been scheduled for a time when the Claimants were available to perform the work, or the work the Claimants were performing could have been postponed to make time for them to perform the claimed work. The Organization emphasizes that the NRAB 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 further asserts that the remedy requested here is nothing more than what the Claimants would have earned had they been assigned to the work on the dates and times that the contractor's forces worked. The Organization argues that there are numerous Awards fashioning make-whole remedies, recognizing that an employee should not be made to suffer any loss when the Agreement is violated. The Organization maintains that the Claimants are entitled to be made whole for their entire loss due to the violation of the Agreement that occurred when the Carrier assigned outside forces to perform the subject work.

Moreover, the Organization points to several Awards involving monetary damages to "fully employed" claimants for proven violations.

The Carrier initially contends that the work at issue was done in conjunction with work being performed by UP Consolidated System Gang employees who are not under the C&NW Agreement. The Carrier asserts that the C&NW Rules therefore have no authority and are irrelevant.

The Carrier argues that this matter involves the C&NW's General Chairman claiming work done under the UP Agreement. The Carrier points out that it has maintained a longstanding practice of utilizing contractor forces to perform preparatory work for UP System BMWE new construction projects both before and after the former C&NW territory came under the jurisdiction of the UP System on January 1, 1998.

The Carrier contends that the work in question had nothing to do with the C&NW Agreement, and all Claimants were assigned to positions under the UP Agreement. Moreover, the alleged contracting was done in conjunction with work being accomplished by employees covered by the UP Agreement, and the Organization did not dispute this during the on-property handling. The Carrier also points out that the Organization's claim states that this work was in conjunction with new track construction, so the C&NW Rules are not applicable, nor does the C&NW Agreement retain jurisdiction in this claim.

The Carrier then submits that the UP Agreement is a type of implementing agreement between the parties. The Carrier insists that the C&NW was a party to such Agreement and understood that the work was being moved to the UP Agreement. Citing a prior Third Division Award, the Carrier asserts that the provisions of the UP Agreement therefore preempt any previous practices or understandings that were in place on the former C&NW property.

The Carrier contends that the work performed within this project was assigned to the UP Consolidated System New Construction Gangs, so it was not subject to the C&NW Agreement. The Carrier argues that it has shown that the work at issue is not reserved to C&NW employees, and that the C&NW committee entered into an Agreement allowing UP BMWE Consolidated System employees to

perform work on their former property. The Carrier asserts that the Organization was unable to refute these facts.

The Carrier argues that because the work was performed by UP Consolidated System Gangs, there is no contractual requirement to piecemeal a small portion of the work and apply a separate Agreement to that specific work. The Carrier contends that because the work was contracted out under the provisions of the UP Agreement, it is apparent that the work in question is not exclusive to the Claimants or the C&NW Agreement.

The Carrier then asserts that Rule 52(b) of the UP Agreement applies to this matter, establishing that the Carrier has the right to contract out this work. Pointing to prior Third Division Awards, the Carrier argues that it is well-established that bridge and culvert work has been determined to be a type of work that the Carrier can subcontract. The Carrier contends that because the work can be subcontracted and notice was served, there is no violation of the Agreement.

The Carrier also emphasizes that the Scope Rule in the UP Agreement is general in nature and does not reserve work. The Carrier contends that the instant claim should be denied based on the principle of stare decisis.

The Carrier further asserts that the Organization is attempting to create a jurisdictional dispute between employees of the same craft, but of different classes within that craft. The Carrier asserts that in such a jurisdictional dispute, the Organization carries a heavier burden of proof in establishing exclusivity. The Carrier insists that the Organization must prove that the work exclusively belongs to one group or the other. If this is not proven, then the Carrier can assign to work to whichever group it deems fit.

The Carrier submits that in this matter, the Organization is attempting to get around the UP Agreement and a prior Third Division Award finding that work associated with new construction is system gang work. The Carrier contends that the Organization is attempting to carve out certain work, which consistently has been performed by new construction gangs which work under the UP Agreement. The Organization claims that the preparatory work somehow came under the C&NW Agreement, and that the C&NW has an exclusive right to the work even

though it is not C&NW scope-covered work. The Carrier argues that the Agreement does not substantiate the Organization's position in any way.

The Carrier argues that the Organization failed to prove exclusivity in this case, so the instant claim must be denied.

The Carrier asserts that even if the C&NW Agreement Scope Rule applied here, which it does not, there is nothing in the language of the Rule that mandates that the work performed by the outside contractor, who utilized special equipment not owned by or in the possession of the Carrier, was work covered by the Rule. The Carrier emphasizes that the Scope Rule provides that if the Carrier does not own or have the special equipment utilized to complete the project, the Carrier may contract out such work. In addition, the Carrier points to numerous prior Awards that affirm the Carrier's right to contract work.

The Carrier additionally argues that it provided the Organization with an advance written notice as required by the Scope Rule. The notice specifically stated that the Carrier did not have the specialized equipment to accomplish this work and that its forces did not have the equipment, training, and/or skill levels required to perform the work in a timely manner.

The Carrier submits that it was in compliance with the Scope Rule. The Carrier provided a more than timely advance written notice, the Organization requested a conference, and a conference was held. The Carrier argues that the Organization simply is wrong in asserting any failure by the Carrier to comply with the notice requirements. No violation of the Scope Rule occurred in this instance, and the Organization failed to fulfill its burden of proof by showing that its members had any Agreement rights to perform the work in question. The Carrier further contends that, contrary to the Organization's assertion of a breach of good faith by the Carrier, the Carrier insists that it properly served notice of its intent to contract the involved work and held a good-faith conference on the matter.

The Carrier goes on to contend that all Claimants were assigned and voluntarily working under a distinct and separate Agreement, and they were not available for work under the C&NW Agreement. The Carrier asserts that the Claimants did not lose any work opportunity; several Claimants were working and compensated for both straight time and overtime on the claim dates. The Carrier

points to several Awards that have held that employees who are fully employed are not entitled to additional pay such as that requested by the Organization.

The Carrier submits that the Claimants did not suffer any monetary loss in connection with this matter. Moreover, because the Claimants cannot be in two places at the same time, there is no basis for awarding monetary relief. The Carrier argues that it has no intention of enriching the Claimants for losses that never were incurred, and there is no authority to grant "penalty" payments.

The Carrier argues that granting the instant claim would be equivalent to writing something into the Agreement that simply is not there, which the Board has no authority to do. The Carrier insists that the Board must interpret the Agreement as written, and there is no room for deviation from the practice that the Carrier has followed for this work, which is consistent with the language of the Agreement.

The Board concludes that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it assigned outside forces to perform bridge construction and removal work, as well as culvert installation and removal work, beginning November 9, 2005. Therefore, the claim must be denied.

The work involved in this case was preparatory work for the construction of new track, and the new track was going to be installed by Carrier forces that worked under the Consolidated Construction Gang Agreement that was to be performed by System Gang forces which would be working under the Union Pacific System Agreement covering new construction and not the C&NW Agreement. Consequently, it was not appropriate to file this claim under the C&NW Agreement because the work in question involved System Gang work under the UP Consolidated System Gang Agreement.

The Carrier cited two recent Awards which denied similar claims. In Award 131 of Public Law Board No. 6302, that Board held:

> "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 C&NW Agreement. Whether the contracting 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 C&NW Federation Agreement, must be denied."

A similar conclusion was reached in Award 8 of Public Law Board No. 7097, where that Board ruled:

"The record establishes that the disputed work was performed in connection with the UP System Tie Gangs 9066 and/or 9067."

With respect to the Organization's claim that the Carrier failed to serve notice, the record reveals that not only was a notice sent to the Organization, it was discussed in conference. We find that the notice gave the Organization enough information to take a position as to why the involved work should not have been contracted out.

It is fundamental that the Organization bears the burden of proof in cases such as this. The Organization failed to meet that burden in this case and, therefore, 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 25th day of March 2010.