Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40400
Docket No. MW-39957
10-3-NRAB-00003-070138
(07-3-138)

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 (SMC) to perform Maintenance of Way and Structures Department work (cutting brush and grading work) between Mile Posts 81.3 and 82.7 at Mankato, Minnesota beginning October 26, 2005 and continuing (System File 7WJ-7480T/1443611 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, the Claimants (all section forces and common machine operators headquartered at Mankato, Minnesota during the claim period) shall now each be compensated at their applicable rates of pay for an equal proportionate share of the total man-hours expended by all outside forces in the performance of the aforesaid work beginning October 26, 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 the Agreement Rules clearly encompass Maintenance of Way and Structures Department work of the character involved here. Rule 1B specifically provides that employees included within the scope of the Agreement shall perform all such work. The Organization asserts that Agreement Rules also establish the classes of employees within the Track 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 T-7, and they were fully qualified to perform all of the work performed by the contractor's employees. The Claimants would have performed this work had they been so assigned. The Organization emphasizes that there can be no doubt that the work involved in this dispute is encompassed within the scope of the Agreement. Moreover, it is well established that the character of the work reserved to various classes of employees covered by the scope of the Agreement is that which they have traditionally and historically performed.

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. Because of this failure, the Organization maintains that the "notice" was simply pro forma and tantamount to notice at all.

The Organization asserts that the Carrier's failure to provide proper advance notice precluded any good-faith discussions between the parties regarding the aspects of the work, thereby invalidating all of the Carrier's assertions. The Organization argues that the Carrier failed to support its affirmative "defenses" with any evidence. The Organization submits that in this case, the Carrier found a way to assign what surely was previously planned District T-7 Maintenance of Way and Structures Department work to strangers to the Agreement. As for the Carrier's position that the Claimants were "fully employed," the Organization notes that the record is devoid of any evidence regarding the nature of the work to which the Claimants were assigned during the claim period.

The Organization insists that the Carrier's failure to provide a proper advance notice is no small matter. The Organization argues that this failure serves as a basis to question the Carrier's good faith in handling this situation. The Organization emphasizes that the Carrier's actions effectively precluded any possibility of a good-faith effort to reach an understanding concerning the intended contracting. The Carrier simply assigned the subject work to outside forces without

first giving proper advance notice and discussing the matter in good faith as required by Rule 1B. The Organization maintains that these actions precluded a good-faith attempt to reach an understanding concerning the intended contracting. The Carrier's actions constituted a direct and serious violation of the Agreement. Citing a number of prior Awards, the Organization argues that the Carrier's failure to provide proper notice and engage in good-faith discussions require a sustaining Award.

The Organization emphasizes that because carriers had shown an inclination to disregard such notice provisions, the parties reaffirmed the intent of their notice provisions in the December 1981 Letter of Understanding (LOU). This LOU states that such advance notice requirements are to be strictly adhered to, yet the Carrier simply failed to comply with either the letter or spirit of Rule 1B. The Organization submits that what occurred here was nothing less than a unilateral assignment of scope-covered work to other than those employees who are contractually entitled to perform the work. Citing prior Awards, the Organization maintains 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, requiring a sustaining award.

The Organization contends 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 entire sanctity of the Agreement is at stake, and the Carrier historically has been a repeat violator of these obligations. The Claimants must not be made to suffer the loss caused by the Carrier's failure to comply with its obligations under the Agreement.

As for the Carrier's excuses for contracting out the work, the Organization submits that not only must these be deemed waived and belated because of the Carrier's defective notice, but these excuses were soundly refuted during the on-property handling of the dispute. With regard to the Carrier's position that the work was not reserved exclusively to BMWE-represented employees, the Organization asserts that exclusivity does not come into consideration in circumstances involving outside contractors. The Organization maintains that the Third Division repeatedly has held that the proper application of the exclusivity doctrine was to disputes over the proper assignment of work between different classes and crafts of the Carrier's own employees, 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 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 further contends that there is no dispute that Carrier forces have been assigned in the past to perform work of the nature involved here. The Organization argues 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 that permits the contracting out of that work.

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 Agreement was complied with and there is no basis for a finding otherwise. The Carrier asserts that the Agreement must be interpreted as written, and there is no room for deviation from the language of the Agreement.

The Carrier argues that the contracting of the preparatory work at issue was done in conjunction with the work being accomplished by UP Consolidated System Gang employees, and not under the C&NW Agreement. Accordingly, the C&NW Rules have no authority and are irrelevant.

The Carrier submits that this matter involves the C&NW's General Chairman claiming work done under the UP Agreement. The Carrier contends that the work in question had nothing to do with the C&NW Agreement, and the Claimants all 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 C&NW Rules therefore 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. 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 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 points out, in addition, that the Organization is attempting to have it both ways in that it does not dispute that the subject work was under the purview of the UP Consolidated System Agreement, yet it claims that the alleged contracting of the preparatory work associated with that work somehow became the Organization's under the C&NW Agreement. The Carrier maintains that the Organization must either claim that all of the work was theirs or not. The Organization cannot "split the pie" between two BMWE Agreements, whichever is more convenient for the Organization at the time. The Carrier argues that because it contracted this work under the provisions of the UP Agreement, it is readily apparent that the work is not exclusive to the Claimants or to the C&NW Agreement.

The Carrier goes on to contend that there are no provisions in the C&NW Agreement granting the exclusive right for preparatory work involved in new construction to the employees working under the C&NW Agreement. The Organization's reliance on the Scope Rule is misplaced because the Scope Rule does not grant specific job duties or activities. Citing a number of prior Awards, the Carrier submits that it is well established that where, as here, a Scope Rule is general and non-specific, the Organization bears the burden of substantiating its claim by establishing its right to the work by "custom, tradition and practice on a system-wide basis."

The Carrier contends that the work at issue was not confined to a specific sub-department or craft, and the Carrier has a historical practice of subcontracting this type of work. Accordingly, the work is not reserved to the Claimants to the exclusion of all others.

The Carrier argues that its history of a mixed practice of assigning this work to either contractors or its employees, along with the general nature of the Scope Rule, demonstrates that the Carrier's right to contract out this type of work is preserved. The Organization's continued attempt to claim otherwise does not change this. The Carrier points out that even if this work was governed by the C&NW Agreement, more than 200 Awards have been rendered that reaffirm the Carrier's right to subcontract, illustrating a very significant past practice of

subcontracting. Moreover, because this work was performed as part of a UP System Rail Gang project, and therefore was not under the purview of the C&NW Agreement, the Carrier had the right to proceed with the subcontracting.

The Carrier then emphasizes that the Organization bears the burden of proving a definite violation of the Agreement, but the Organization failed to prove how the Agreement has been violated. Citing a number of prior Awards, the Carrier argues that the instant claim must be denied because the nothing in the Agreement supports the Organization's position. The Organization has made unsupported allegations in a blatant attempt to pad its constituents' wallets with additional, undeserved pay to which they were not entitled.

The Carrier additionally maintains that the Organization failed to present any evidence to verify how many contractors were on the property and how long each worked per day. The Carrier suggests that the Organization is requesting a remedy without providing one iota of proof that any of its facts are correct.

The Carrier also points out that the Claimants were working in October 2005, and they did not suffer any loss of work opportunity. The record also documents that many of the Claimants were absent from work on the dates of the alleged violation, raising the question of how an employee can suffer a loss of work opportunity when they chose to absent themselves from work. The Carrier insists that the Organization was unable to show that any of the Claimants suffered any loss of compensation from the utilization of a contractor, and numerous Awards have held that employees who are fully employed are not entitled to additional pay such as that requested here.

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 asserts that even if the instant claim had merit, which it does not, the Claimants would be entitled only to the actual wage loss sustained, less any and all compensation earned during the claim period.

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 the work of cutting brush and grading between Mile Posts 81.3 and 82.7 at Mankato, Minnesota, beginning October 26, 2005. Therefore, the claim must be denied.

Although the Organization argues that the Carrier failed to give notice to the Organization prior to subcontracting the work, the record reveals that the Carrier did serve a detailed notice on the Organization and discussed the matter in conference with the Organization prior to the work being performed. Consequently, the Board must find that the notice requirements were met.

The Carrier presented evidence to show that the work involved was preparatory work for the construction of new track, siding, and yard expansion, all of which was new construction work. The record reveals that the new track was installed by Carrier forces working under the Consolidated System Gang Agreement, which applies the UP Agreement covering new construction to this type of work. The Carrier made it clear that the Union Pacific System Agreement covers this type of work and the C&NW Agreement does not.

The record reveals that this matter has come before several Boards in the past, and all have rejected the Organization's arguments. In Award 131 of Public Law Board No. 6302, that Board denied the claim and stated the following:

> "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."

See also Award 8 of Public Law Board No. 7097.

Because the Organization is required to come forward with sufficient evidence to meet its burden of proof in cases such as this and it failed to do so, the Board has no choice but to deny the claim.

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.