Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40409
Docket No. MW-39480
10-3-NRAB-00003-060225
(06-3-225)

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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 (Godberson-Smith) to perform Maintenance of Way and Structures Department work (construct concrete box culverts under existing bridges and removing the bridges) at Mile Post 277.30 on the Boone Subdivision near Denison, Iowa beginning on March 31, 2005 and continuing, instead of Seniority District B-4 employes L. Fisher, J. Miller, K. Brink, W. Kress, R. Schoon, B. Wickham, D. Broich and G. Mathies (System File 4RM-9656T/1425082 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a 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 L. Fisher, J. Miller, K. Brink, W. Kress, R. Schoon, B. Wickham, D. Broich and G. Mathies shall now each be compensated at their applicable rates of pay for an equal proportionate share of the total straight time and overtime man-

hours expended by the outside forces in the performance of the aforesaid work beginning March 31, 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.

This matter involves a contractor's construction of concrete box culverts under existing bridges and removal of a bridge at MP 277.30 that began on March 31, 2005 on the Boone Subdivision where the Claimants hold seniority on Seniority District B-4.

On November 10, 2004, the Carrier served a revised notice of an intent to subcontract at the location of "Bridge 277.30 on the Boone Subdivision near Dennison, IA" identifying the work as Service Order No. 30319. The specific work was identified as "furnishing all supplies, materials, equipment, labor and supervision to construct concrete box culverts and the necessary bridge prep and removal of the exiting two bridges that these culverts will replace." The notice continued that: "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 that the work is necessarily reserved, as a matter of practice, to those employees represented by the BMWE."

The Organization replied on the same day and requested an immediate conference. The Organization pointed out that the Carrier's notice of intent to subcontract is inadequate under Rule 1(b) because it fails to specify the five enumerated exceptions for subcontracting which are identified in Rule 1(b). A

conference was held on February 16, 2005 and the parties were unable to come to an understanding.

The Organization followed up with a letter dated February 18, 2005 that provided, in pertinent part:

> "In conference, the Organization cited Carrier forces are experienced and capable of performing the contemplated work. The work proposed is work that is covered under the Scope of the Agreement. Carrier possesses the required expertise and equipment needed to perform this work. No agreement was reached during this conference."

The Organization filed a claim on May 11, 2005 for the subcontracting that began on March 31, 2005. The Carrier responded as follows in a June 30, 2005 letter regarding the work:

> ". . . the contractor employees performing the work are fully qualified to perform the work. Further, the Carrier has customarily and traditionally utilized contractor's forces to perform the type of work disputed in this case. Your contention that such work is reserved exclusively to employees covered by the BMWE is simply without substance. Since the work in the instant case does not fall under the scope of your Agreement, your argument with regard to the lack of notice is obviously irrelevant in this case. 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 fitness and ability to safely and efficiently perform the duties or operate the equipment in question."

The Organization's July 13, 2005 response indicated that work had begun on March 31, 2005 and was continuing. The Organization listed the equipment and tools being used by the contractor, ". . . all of which are common tools and equipment in the immediate inventory of Claimants' crews. Claimants have historically performed this very same work as part of their regular bridge and culvert maintenance." The Organization further contended that during conference the "Carrier failed to even allege that one of the contracting out criteria listed in

Scope Rule 1 of the Agreement exists in this instant case." The Organization asserted that the Carrier failed to identify the tools, skills or equipment not owned by the Carrier that would be a valid defense under Rule 1(b). The Organization addressed the Carrier's statement that the "Claimants involved in this case do not possess sufficient fitness and ability to safely and efficiently perform the duties or operate the equipment in question" by requesting the underlying reasoning for the statement.

The Carrier responded in an August 5, 2005 letter asserting that the notice was proper, and further stating, in summary, that the work was not covered by the Scope Rule and had not been exclusively performed by BMWE-represented employees. The Carrier asserted that because there was no loss of work, there was no basis for payment as the employees were fully employed.

The Organization responded on November 18, following a November 9, 2005 conference. It asserted the following relevant points:

"(1) The Carrier did serve notice, but that notice lacked specifics.

(2) Rule 1 reserves maintenance work for employees covered by the Agreement. . . .

(3) The Carrier has failed to show any reasonable explanation of time requirements. . . .

(4) The Brotherhood has never said we have exclusively performed this work, we have stated that the work falls under Rule 1, Scope of the CNW CBA.

(5) The Carrier failed to show any evidence of specialized equipment needed for this project.

(6) The Brotherhood gave copies of pictures and statements that show we have done box culverts in the past."

The Organization provided a statement describing past performance of box culvert work at MP 282 in 2002, that included what available equipment was in

company inventory and what was rented. Included were photographs of box culvert work.

The Organization maintains that the work at issue is scope covered work pursuant to Rule 1(b) of the Agreement. The Organization continues that the notice was defective because it did not mention the specific enumerated exceptions for subcontracting. Further, even if the notice was not defective, the cited exceptions that were proffered by the Carrier during on-property handling were refuted as nothing more than a mere statement without support in the record.

The Carrier counters that a timely proper advance notice of the intent to contract out the subject work was provided to the Organization. The Carrier contends that the work at issue is not scope covered and that the full employment of the Claimants caused no loss of wages or work opportunity. In its Submission, the Carrier states that "[d]uring conference the Carrier informed the Organization that the bridge and culvert work in question involved the magnitude that the Carrier could not timely perform it with its crew."

The Board carefully reviewed the record and concludes that it supports the finding that the Carrier provided notice to the Organization and conferenced the matter. However, that does not end the inquiry. Our review also indicates that the work at issue is box culvert work, as well as the removal of a bridge on the Boone Subdivision. According to the Organization, such work is covered by Rule 1(b) which provides, in pertinent part:

> "Employees included with the scope of this Agreement in the Maintenance of Way and Structures 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. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.
>
> 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 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 Organization provided the above-referenced photographs and statements to underscore its position that the work has been performed by BMWE-represented employees in the past on this Subdivision. The evidence serves to underscore the plain meaning of Rule 1(b) that the work is scope covered. Accordingly, we find that the work of constructing box culverts and dismantling the related bridge structure clearly falls within the scope of Organization work as described in Rule 1(b). See e.g., Third Division Award 37647 and Awards cited therein.

With the finding that the work is scope covered under Rule 1(b) it is necessary to examine whether the Carrier can defend its actions based on one of the enumerated exceptions that were proffered during the handling of the claim. When the record supports a finding that the Organization has made a prima facie showing of a Rule 1(b) violation, Third Division Award 37376 informs that ". . . the burden then shifts to the Carrier to show that one of the five exceptions in Rule 1(b) applies." Third Division Award 37376 is appropriate in the instant matter.

The Carrier did not list any of the exceptions in its notice of intent to contract out. The exceptions were addressed at a later point during the handling of the claim. According to the Carrier's Submission, "[d]uring conference the Carrier informed the Organization that the bridge and culvert work in question involved the magnitude that the Carrier could not timely perform it with its crew." A thorough review of the record contains no evidence that this affirmative defense was ever conveyed to the Organization at the conference. Even if there was evidence of this statement in the record, it is nothing more than a mere assertion without support in the record. Assertion is not evidence; claim is not proof.

The conference and subsequent discussion between the parties that occurred after the actual work began being performed on March 31, 2005, indicated that the

Carrier contended that an affirmative defense applied because the work ". . . required specialized skills that the Carrier employees do not possess and equipment that the Carrier does not own and that Carrier forces do not have the skills to operate."

The Organization refuted this defense with the above-referenced photographs, statements, timelines and leases to underscore that the work has been performed by BMWE-represented employees in the past on this Subdivision and that the tools and equipment were common Carrier equipment. Despite requests by the Organization for an explanation of the "specialized skills" and equipment necessary, the responses were not forthcoming. There is no evidence in the record that establishes what skills and equipment were necessary for the project. Accordingly, the affirmative defense has not been shown. The statement that the work ". . . required specialized skills that the Carrier employees do not possess and equipment that the Carrier does not own and that Carrier forces do not have the skills to operate," absent more, would be insufficient to establish the defense.

A careful reading of the record indicates to the Board that the Carrier has not satisfied its burden of proof with regard to the asserted affirmative defenses. Having established that the work was reserved to BMWE-represented employees under Rule 1(b) the inquiry moves to remedy. There is nothing in the record to show why the Carrier chose to perform this work when it did. The record contains no showing that the work could not have been scheduled in a manner to include the Claimants. The Claimants were assigned to the Boone Subdivision at the time of the contracting of the box culvert and removal work and we conclude that the Organization established a loss of work opportunity.

The Organization claims that the Claimants should be compensated for all hours worked by the contractor. The Carrier counters that full employment of the Claimants precludes any entitlement to compensation. The Carrier's argument has been previously rejected. See Third Division Award 37647 and citations therein. Therefore, in light of the above findings, the Claimants shall be made whole for all monetary losses.

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 14th day of May 2010.