Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40438
Docket No. MW-40128
10-3-NRAB-00003-070365
(07-3-365)

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 (ConStruct) to perform Maintenance of Way and Structures Department work (digging in French drains) along the right of way near Mile Post 74.25 on the Clinton Subdivision beginning on April 24, 2006 and continuing (System File 4RM-9736T/1453316 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 J. Blanchett, S. Koeppen, J. Brewer and B. Moody shall now each be compensated at their respective and applicable rates of pay for a proportionate share of the total straight time and overtime man-hours expended by the outside

forces in the performance of the aforesaid work beginning April 24, 2006 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 the 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. The Organization argues that Rule 1B clearly and unambiguously reserves work of the character involved here to Maintenance of Way forces.

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 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 as Machine Operators, and they were fully qualified to perform all work performed by the contractor's employees. In addition, Carrier forces have customarily and historically performed such work.

The Organization emphasizes that by virtue of their undisputed seniority established in accordance with the Agreement Rules and past practice, the Claimants clearly were entitled to perform work of the character involved here. The assignment of such work to outside forces undoubtedly is in violation of the Agreement. The Organization points out that 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 traditionally and historically have performed. The Organization insists that there can be no dispute that the work at issue is encompassed within the Scope of the Agreement and is reserved to Track Subdepartment employees such as the Claimants.

The Organization further argues that pursuant to Rule 1B, the Carrier was obligated to notify and confer with the General Chairman about its intent to contract out the subject work. 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 solicit bids to cover the furnishing of labor and equipment for drainage work somewhere on the Clinton Subdivision, 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 was issued to portray compliance with the Agreement.

The Organization emphasizes that the parties reaffirmed the intent of their notice provisions in the December 1981 Letter of Understanding. The Organization insists that without a good-faith advance notice that sets forth good-faith reasons why Maintenance of Way forces cannot be used to the extent practicable, the parties cannot enter into good-faith discussions. The December 1981 Letter of Understanding states that such advance notice requirements must be strictly adhered to, yet the Carrier apparently believes that the December 1981 Letter of

Understanding no longer applies on its property. The Organization then points to a number of Awards, including decisions on this Carrier's property, that have found this Letter of Understanding to be in effect and that have relied on it in sustaining contracting out claims.

The Organization characterizes the notice provisions as a threshold requirement, and not merely a courtesy, that must be met in good faith before Maintenance of Way work can be assigned to an outside contractor. 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 1(b) 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 it does not own the required equipment to perform the work, the Organization maintains that there is no evidence that any special equipment was required to perform the subject work, or that the contractor used any special equipment in this instance. The Organization insists that the equipment used in this instance was common, ordinary equipment that is used in a wide variety of construction, excavation, and demolition work. Moreover, Rule 7 of the Agreement lists similar equipment as equipment to be used by BMWE-represented forces in the performance of their duties. The Organization asserts that the listed equipment, if not the same type as that used by the contractor, performs the same functions as the equipment used by the contractor in this instance. The Organization additionally argues that because there is no evidence that the Carrier complied with its contractual obligation to rent

or lease the necessary equipment, the Carrier is precluded from relying on the equipment defense.

The Organization then contradicts the Carrier's assertions relating to time constraints. The Organization submits that there is absolutely no evidence of an emergent need to complete the drainage work involved in this dispute. The Organization points out that the Carrier's notice is dated March 22, but the subject work did not begin until April 24, 2006. The Organization therefore emphasizes that the Carrier had more than a month to make whatever arrangement was necessary to assign the work to its own employees, but the Carrier made no attempt to do so.

The Organization suggests that even if there were time constraints associated with this routine drainage work, it would have been a simple matter for the Carrier to arrange for BMWE-represented forces to do the work. The Carrier has total control over the work performed on its tracks, and any time constraints were a product of the Carrier's own creation. The Organization submits that the Carrier's defense in this regard does not demonstrate why the disputed work could not have been assigned to the Claimants or other available BMWE-represented forces on the Clinton Subdivision. The Carrier's attempt to justify its Agreement violation with alleged self-imposed time constraints is worthy of no serious consideration.

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 has repeatedly 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.

The Organization then addresses the Carrier's position that the Claimants were not available for the claimed work because they were fully employed and/or on vacation during the claim period. The Organization 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 Board has consistently 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 insists that there is a loss of work opportunity every time the Carrier violates the Agreement by assigning to outside forces work customarily and historically performed by its employees. The Organization submits that in a number of Awards, the Board overwhelmingly has found that so-called "fully employed" claimants are entitled to receive compensation when a carrier violates the contracting out of work provisions of an Agreement. The Organization cites a number of cases in which the Board plainly rejected carrier contentions regarding compensation for "fully employed" claimants. Similarly, the Board has found that an employee's vacation status is not detrimental to the employee's entitlement to monetary reparations in the event of an Agreement violation.

The Organization further emphasizes that the Carrier never disputed a log compiled by one of the Claimants, showing the days and hours improperly worked by the contractor's employees. Accordingly, the Organization submits that there can be no doubt as to the proper remedy. The Organization further asserts that the remedy requested here is nothing more than what the Claimants would have earned had they been assigned to perform 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.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that Rule 1 unambiguously states that the Carrier may contract out work when it does not own the specialized equipment necessary to do the work, or if the Carrier is not adequately equipped to handle the

work, or if time requirements must be met. The Carrier asserts that Rule 1(b) supports its affirmative defense that it is allowed to contract out work of the type at issue here.

The Carrier argues that the Organization never refuted the fact that the Carrier did not have in its possession the three pieces of equipment used to perform the subject work. The Organization also failed to provide any evidence that this equipment could even be rented in a reasonable manner, nor that Rule 1(b) even requires the Carrier to rent or lease equipment.

The Carrier contends that at no time did the Organization dispute the fact that the Carrier provided proper advance written notice of its intent to contract out the subject work. In this case, the Carrier provided the Organization with such notice more than one month before commencing the work.

The Carrier additionally asserts that the Organization did not dispute that the Carrier made a good-faith attempt to reach an understanding on the contracting, as required by Rule 1 and the December 1981 Letter of Understanding. The Carrier points out that the only portion of this project that the Carrier wished to contract out was for the specialized equipment and operator. The Carrier's contracting notice specifically advised the Organization that the contractor will assist Carrier forces in grading and establishing drainage.

The Carrier insists that the Organization has not submitted any evidence to refute even one of the elements of the Carrier's position that it did not own the equipment, that the Claimants were fully employed or working on other projects, and that the Claimants were not able to perform the subject work. The Carrier submits that because the Organization failed to rebut the evidence presented by the Carrier, the material facts set forth by the Carrier must be taken as true.

The Carrier then asserts that the remedy requested by the Organization is not substantiated by the facts. It argues that the Claimants were working on each of the days for which the Organization seeks compensation. The Claimants therefore did not suffer any harm on the dates in question, and they should not be entitled to monetary compensation for work not covered by the scope of the Agreement. The

Carrier asserts that awarding compensation to the Claimants would do nothing more than provide a windfall to which they are not entitled. The Carrier contends that numerous Awards have held that fully employed claimants are not entitled to additional pay such as that requested by the Organization in this matter.

The Carrier insists that the Organization has not presented any evidence to support its claim for compensation. The Carrier emphasizes that Boards have consistently held that the moving party must provide evidence to verify that a violation of an agreement rule occurred. The Organization failed to meet its burden of proving that any Rules were violated or to provide any documentation to substantiate its allegations.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Carrier issued the appropriate advance notice to the Organization of its intent to contract the work in question. The record reveals that the parties discussed the matter in conference before the work began and the issues were addressed. The Board reviewed the adequacy of the notice, and finds that it meets the requirements of the Agreement.

With respect to the work that was performed by the contractor, the record reveals that the Carrier does not own the type of equipment that was necessary to install the French drains. Moreover, there is evidence that the Carrier had historically contracted out the work of installing French drains, because it does not have the type of equipment that is necessary to perform that work. The record reveals that the Organization raised similar arguments in previous cases, and those arguments were rejected. See Public Law Board No. 7098, Awards 9 and 10.

Finally, in Third Division Award 37354 the Board rejected the Organization's position that the Carrier should have contracted for the use of specialized equipment if it did not own the necessary machinery.

For all of the above reasons, 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 14th day of May 2010.