Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40441
Docket No. MW-40165
10-3-NRAB-00003-070404
(07-3-404)

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 (Morrison Blacktopping) to perform Maintenance of Way and Structures Department work (install french drains) at Mile Post 133 on the Geneva Subdivision on March 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, 2006 (System File 3SW-2166T/1453318 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, Sr., J. Perryman and J. Sawvell, Jr. shall now '. . . each be compensated ninety four (94) hours at the applicable overtime rate of pay for all hours of service rendered by the private contractor's employees on March 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, 2006.'"

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 assigned an outside contractor to perform certain Maintenance of Way work. The claim further alleges that the Carrier violated the Agreement by failing to provide the General Chairman with advance written notice of its intent to contract out this work.

The Organization initially contends that the Agreement Rules clearly encompass work of the character involved here, with Rule 1(b) stipulating that employees included within the scope of the Agreement shall perform all work in connection with construction, maintenance, and repair of tracks, structures, and other facilities. Pointing to a number of Awards, the Organization asserts that Rule 1(b) previously has been interpreted as being a reservation of work rule. The Organization therefore argues that Rule 1(b) clearly and unambiguously reserves work of the character involved here to Maintenance of Way forces. The Organization emphasizes that, as held in numerous Awards, 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 maintains that there is no dispute that the Claimants have established and hold seniority in accordance with Rule 4, while Rule 5 clearly identifies Seniority District T-4, in which the Claimants hold seniority and work

rights. Citing prior Awards, the Organization submits that where seniority is confined, work also is confined. The Organization points out that pursuant to Rule 7, the position of Machine Operator is one of the classes in which employees' seniority is limited. The Claimants all held the position of Machine Operator, and they were fully qualified to perform all 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 subject work, and the assignment of the work to outside forces undoubtedly violated the Agreement. Moreover, it is well established that work reserved to the various classes of employees covered by the scope of the Agreement is that which they traditionally and historically have performed. The Organization contends that there can be no question that the work involved here is encompassed within the scope of the Agreement, and it 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 case, and this failure to provide the required advance notice is no small or insignificant matter. The Organization submits that the Carrier's failure to provide notice serves as a basis to question the Carrier's good faith in handling this situation.

The Organization points out that the Carrier's failure to provide advance notice effectively precluded any possibility of making a good-faith attempt to reach an understanding concerning the intended contracting. Pointing to prior Awards, the Organization emphasizes that it is well established that a carrier's failure to comply with the Agreement's notice provisions requires a sustaining award.

The Organization contends that the essence of Rule 1(b) is the opportunity it affords the employees to attempt to persuade the Carrier to assign the work to them. Without such notice in this situation, the General Chairman had no opportunity to persuade the Carrier to assign this scope-covered work to its

employees, rather than to outsiders. This result is contrary to the spirit and intent of Rule 1(b) and the December 1981 Letter of Understanding.

The Organization emphasizes that the parties reaffirmed the intent of their notice provisions in the December 1981 Letter of Understanding. The December 1981 Letter of Understanding states that such advance notice requirements must be strictly adhered to, yet the Carrier failed to comply with either the letter or the spirit of these provisions. 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 renders the Agreement as worth little more than the paper upon which it is written, and it serves as evidence of the Carrier's lack of good faith.

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 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 these excuses were soundly refuted during the on-property handling of the dispute. As for the Carrier's assertion that notice was not necessary because the work was not reserved exclusively to BMWE-represented employees, the Organization contends that drainage work such as that claimed here clearly is encompassed within Rule 1. Citing prior Awards, the Organization asserts that advance notice therefore is required when the work is customarily performed by BMWE-represented employees, not only when exclusively performed by them. The Organization argues 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 contradicts the Carrier's assertion that an "emergency" existed in connection with this work. The Organization insists that there is no evidence of any emergency involving the claimed drainage work. The Organization argues that it is well established that the party alleging an emergency must submit proof thereof and mere assertion is not an acceptable substitute for such proof. The Organization points out that an emergency generally is understood to involve a sudden, unforeseeable, and uncontrollable event that interrupts operations and brings them to an immediate halt. The Organization maintains that although the Carrier related the drainage work at issue to a derailment that occurred somewhere in the general vicinity of Mile Post 133, there is no evidence that the lack of French drains in this area disrupted or impeded the Carrier's operations. The Organization submits that the Carrier's belated emergency defense is nothing more than a blatant attempt to explain away its failure to provide proper advance notice. Because the Carrier failed to support this defense with probative evidence, it bears no consideration by the Board.

The Organization goes on to address the Carrier's assertions relating to a lack of skilled employees and available equipment. The Organization characterizes these allegations as disingenuous and procedurally invalid. The Organization points out that the proper forum for discussing such points was during discussion with the General Chairman, which was not held because the Carrier failed to give proper advance notice. Citing prior Awards, the Organization maintains that this is not a defense to the instant claim.

The Organization further emphasizes that the contractor did not use any special equipment in performing the subject work. Instead, the contractor used an excavator, a loader and a one-ton truck, and there are no special skills required to operate this equipment. The Organization additionally contends that the Carrier has not identified any such skills that the Claimants might be lacking.

The Organization also asserts that if the Carrier could not make its excavators, loaders, and trucks available for the claimed work, it was obligated to try to lease such equipment without operators for its employees' use. The Organization insists that the Carrier has not presented any evidence that it made

any attempt whatsoever to do this, further compounding its violation of the Agreement.

Addressing the Carrier's position that the hours claimed are excessive, the Organization points to numerous Board Awards that instruct the parties to conduct a joint search of Carrier records to determine the correct days and hours to remedy a claim. Such a joint search would be appropriate in this matter.

As for the Carrier's position that the Claimants were not available to perform the subject work because they were fully employed and/or on vacation during the claim period, the Organization maintains that because there is no evidence of any urgency relating to this work, it could have been scheduled for a time when the Claimants were available. In the alternative, the work that the Claimants were performing could have been postponed or delayed to make time for them to do the subject work. The Organization argues 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.

The Organization further asserts that the remedy requested here is nothing more than what would make the Claimants whole for the loss of work opportunity due to the Carrier's violation of the Agreement. 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 during on-property handling, it pointed out, without dispute, that the subject work was the continuation of a derailment that caused the track and sub-structure to be replaced. The Carrier asserts that the Organization is aware that the Carrier is allowed additional latitude in assigning its forces when the Carrier's operation is suspended in whole or in part, and it is not practicable to serve a 15-day notice when the work must be completed immediately. The Carrier argues that it is not required to provide a notice of intent under emergency conditions such as a derailment. The Carrier emphasizes that the subject work constituted an emergency, and time was of the essence so that the Carrier could restore the track and install the proper drainage system in order to resume train traffic. The Carrier submits that because the Organization did not dispute the fact that an emergency existed, this remains a fact and clearly provides that the Carrier entirely complied with the Agreement.

The Carrier contends that it does not own the specialized equipment necessary to perform the subject work, and time requirements had to be met. The Carrier points out that the Organization never denied these facts, nor did the Organization provide any evidence that such equipment could be rented in a reasonable manner. Moreover, Rule 1(b) does not require the Carrier to rent or lease equipment. Citing prior Awards, the Carrier asserts that because the Organization failed to rebut the Carrier's evidence, the material facts set forth by the Carrier must be taken as true.

The Carrier goes on to argue that the Claimants were working on each of the days for which the Organization now is requesting compensation. The Carrier asserts that the Claimants did not suffer any form of harm on the claim dates, and they should not be entitled to monetary compensation for work not covered by the scope of their Agreement. The Carrier suggests that an award of compensation to the Claimants would do nothing but provide them with a windfall to which they are not entitled.

The Carrier emphasizes that the Organization was unable to refute the Carrier's record showing that the Claimants did not suffer any loss in compensation from the utilization of a contractor. The Carrier further asserts that numerous Board Awards have held that fully employed employees are not entitled to additional pay such as that requested by the Organization in this matter.

The Carrier insists that the Organization failed to provide any evidence to support its compensation claim. The Carrier submits that mere unsupported allegations, or a listing of Rules devoid of any pertinent language, do not constitute proof of a violation. The Carrier contends that Boards consistently have held that the moving party must provide evidence to verify that a violation of an Agreement Rule has occurred, but the Organization failed to point to any Rules that were, in fact, violated in this matter, nor did the Organization 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 evidence and concludes that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it assigned outside forces to install French drains at Milepost 133 on several days in March 2006. The Board also finds that the Organization failed to show that the Carrier violated the Agreement when it failed to furnish the General Chairman with advance written notice of its intent to contract out the work. Therefore, the claim must be denied.

This situation involved the subcontracting of work to install French drains after a derailment. Because it was a derailment, it was an emergency situation. Although Rule 1(b) requires that if the Carrier plans to contract out work, it must notify the General Chairman in advance, there is a specific exception for emergency situations. Because this was a derailment situation that constituted an emergency, the usual notice was not required by the Rule.

With respect to the work that was performed, the Board finds that the Carrier has shown that it did not have the necessary equipment to install the French

drains. The record reveals that the Carrier has historically contracted out the installation of French drains and that this work is not normally performed by the employees represented by the Organization.

Because the Organization bears the burden of proof in cases of this kind and it failed to meet that burden, the Board has no choice other than 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 14th day of May 2010.