Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40552
Docket No. MW-38952
10-3-NRAB-00003-050396
(05-3-396)

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 Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Nevada RR) to perform Maintenance of Way Department work (pre-plate ties for on-property installation) in the vicinity of the North Little Rock Panel Plant at North Little Rock, Arkansas beginning February 3, 2004 and continuing. (Carrier's File 1399497 MPR)

(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 said work or make a good-faith effort to reduce the amount of contracting as required by Rule 9 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Price, J. Sumler, K. Jacks, K. Copeland, R. Patterson, M. Porter, S. Rhodes, L. Mahan, P. Harton, R. Ball, D. L. Williams, R. Weeks, J. Gordon, D. Williams, L. Davis, D.Keels, R. Fenceroy, C. King, R. Bush and J. Henry shall now be compensated at their respective rates of pay for all straight time and overtime hours expended by the

outside forces in the performance of the aforesaid work beginning February 3, 2004 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 the North Little Rock Tie Plating Plant.

On April 1, 2004, the Organization filed a claim that alleged a violation of Rules 1, 9 and 20 of the Agreement. Its claim stated, in pertinent part:

> "On February 3, 2004 Union Pacific started delivering ties to Nevada RR at the North Little Rock yards near the North Little Rock Panel Plant, to be pre-plated for installation on Union Pacific Railroad property. Nevada RR is working twenty (20) employees twelve (12) hours per day seven days per week. Nevada RR has worked . . . (13,920) hours to date. This is work that has been performed at the Panel plant within a couple hundred yards of the contractor's facility on Union Pacific property. Work performed was of a non-emergency nature. The claimants possess the skills, experience and ability to have performed the work in a safe and efficient manner. . . ."

The Carrier responded in a letter dated May 26, 2004 that provided, in relevant part:

> "My investigation into your claim reveals that the Carrier has not contracted out the work as you allege. The ties that the Nevada RR is pre-plating are not ties that the Carrier has taken ownership of. The Organization was advised a couple of years ago the Carrier would be purchasing pre-plated ties from outside Vendors. Nevada RR is one such vendor. The Carrier has a right to purchase a finished product and you are reminded of the previous awards on this property concerning this issue.
>
> Since the Carrier is not contracting this work there is no violation of the Scope Rule or Rules 1, 9 and 20 or the 1981 Hopkins letter. Furthermore, since this is a general scope rule the work would not be reserved to your Claimants."

In a letter dated July 13, 2004 the Organization appealed the Carrier's declination. It disputed the Carrier's earlier assertions and re-asserted that the Carrier was violating the Agreement by using a contractor to perform work historically performed by Organization-represented employees. The Organization also stated:

> "As a result of the Carrier's decision to subcontract this scope covered work, we hereby request a copy of the contract between the Carrier and Nevada RR to supply pre-plated crossties. We also request documents or contracts related to tie specifications, delivery/shipping methods and all other pertinent documents/contracts relating to the issue of crosstie pre-plating.
>
> The Carrier has further compounded this violation by its failure to provide a notice of intent to subcontract as required by Rule 9."

The Carrier responded in a letter dated August 30, 2004 that the work was not being performed on railroad property and was not scope covered. The Carrier continued:

> "Without waiving from the foregoing, your claim is lacking factual information. The vendor is not performing any of this work on railroad property and it is not scope covered. Furthermore, the

vendor provides pre-plated ties for territories that are not subject to your collective bargaining agreement. The Carrier has used this product from various vendors for many years in the past without objection from the BMWE.

The property in which Nevada RR is performing the work is not Carrier property. The previous vendor . . . no longer are (sic) in business. Since the company dissolved, Nevada RR leased property from UP and has established a business of providing pre-plated ties to various railroads. . . . Nevada RR leased this property from UP so they will have rail service available to them to receive various products.

Your claim is also lacking any assertion that once the vendor completed their product that any of the ties were even installed on the territory covered by the CBA. . . . These territories are not subject to your Agreement and they are controlled by the separate and distinct BMWE collective bargaining agreements."

The claim was conferenced on March 22, 2005 and the parties were unable to come to an understanding. In a letter dated July 18, 2005 the Organization asserted that the Carrier retained ownership of the ties throughout the plating process and used the assembled product on Carrier property. The Organization continued:

"As you may recall, in my letter of July 13, 2004 I formally requested that the Carrier provide: '. . . a copy of the contract between the Carrier and Nevada RR to supply pre-plated crossties. We also request documents or contracts related to tie specification, delivery/shipping methods and all other pertinent documents/contracts relating to the issue of crosstie pre-plating.' However to date the Carrier has failed to provide any of the requested documentation. Please be advised that I once again reiterate our request in this respect. In your letter of August 30, 2004, you additionally state that Nevada RR leased Carrier-owned property in the North Little Rock area. Therefore, I also request that you provide a copy of the lease document with the sub-

contractor for examination by the Organization. Please provide the requested documentation prior to the expiration of the time limit governing this issue on August 1, 2005."

In its July 29, 2005 response the Carrier stated that it purchased the plated ties as a finished product and did not own the ties prior to delivery of the product. The Carrier continued that there is no contract between Nevada RR and the Carrier. Rather, the Carrier stated that work orders were provided with the correspondence for plated ties purchased by the Carrier. The Carrier also included a statement from the President of Nevada RR about the plating operation on leased property. The Carrier also restated prior positions and commented that the Organization waited more than ten months before requesting additional information.

The Organization responded in a letter dated August 8 asserting that the record had closed on August 1, and that the Carrier's response had not been received until August 3, 2005 and was barred from consideration. The Organization reiterated prior arguments and added that the lease agreements did not support the Carrier's position.

The Organization maintains that the work at issue is scope-covered work pursuant to Rules 1 and 9 of the Agreement. The Organization continues that there was no notice of intent to subcontract the work of pre-plating ties and that failure to provide notice was a violation of the Agreement. The Carrier's reference to notice "a couple years ago" is vague, at best, and not related to the instant claim. The Organization also maintains that the 1981 Berge/Hopkins Letter of Understanding addressed contracting on a national basis.

The Organization continues that the defense that the purchase of pre-plated ties was a purchase of finished products is not persuasive. There is no support in the Agreement for such a distinction. Even if there was such a distinction, and the Organization reminds the Board that there is no such distinction, these ties are not "off the shelf" as they are built in numerous combinations to Carrier specifications. The Carrier owns the bare ties, drops them at the Nevada RR plant using Carrier equipment, supervises the assembly, and then picks up the finished product.

The Organization further argues that the Carrier did not comply with the request for information in a timely manner. Rather, the Carrier waited until two

days before the Organization filed its Notice of Intent with the Board to respond. It was not received in a timely manner and the information should not be considered by the Board. Even if considered, it is insufficient to address the issues raised by the Organization because it shows that Nevada RR simply moved from Texarkana to North Little Rock, Arkansas.

Finally, the Organization contends that the April 30, 2003 Fishgold Special Board of Adjustment Award, albeit on another portion of Carrier property not covered by the instant Agreement, analyzes issues virtually identical to those of the instant claim.

The Carrier counters that there is no dispute that the Carrier is purchasing pre-plated ties. The Carrier does not purchase the components separately. Rather, the Carrier purchases a complete finished product from a third party vendor and that is an acceptable practice. The Carrier continues that the Organization improperly added new evidence when it cited published reference material regarding rail ties. Moreover, the Carrier supplied requested documentation and a complete record. Contrary to the Organization's argument that the Carrier responded at the last minute, the Carrier argues that the Organization made a last minute request for a lease.

The Carrier distinguishes the Fishgold Award, as well as the November 6, 2001 Wallin Special Board of Adjustment Award as being poorly reasoned and not following established precedent that finished products can be purchased by the Carrier. Moreover, the Fishgold Award relied on the Organization's lack of knowledge that pre-plated ties were being purchased. In the instant matter, the Organization was aware of the work being done by Nevada RR. Finally, the relief claimed is inappropriate.

The Board carefully reviewed the record, the Submissions, and the arguments of the parties at the Hearing. It is important for the Board to note what the instant claim is not. As the parties reminded the Board at the Hearing, the instant claim does not involve the propriety of moving pre-plated tie work to North Little Rock under the applicable UP/BMWE Agreement. That issue was to be presented to another Board in the week following the Hearing on the instant claim.

What the instant claim involves is whether the Carrier subcontracted tie plating in violation of the Agreement. The Organization asserts that the Carrier supplied raw ties to Nevada RR and Nevada RR, in turn, plated the ties and returned them to the Carrier. The Carrier denied that there was any subcontracting and countered that it purchased pre-plated ties from Nevada RR as a finished product. The Carrier also contended that Nevada RR was an independent third party that provided the pre-plated ties as a finished product.

Although the Organization requested documents in its letter of July 13, 2004, they were not forthcoming. The Organization requested that the Carrier provide: ". . . a copy of the contract between the Carrier and Nevada RR to supply pre-plated crossties. We also request documents or contracts related to tie specification, delivery/shipping methods and all other pertinent documents/contracts relating to the issue of crosstie pre-plating." The Carrier did not produce purchase orders until shortly before the Organization filed its Notice of Intent with the Board on August 1, 2005. The purchase orders were requested more than one year earlier, but were produced so late in the handling of the claim that the Organization was not afforded an opportunity to respond. Accordingly, the purchase orders are not considered. See Third Division Award 36018, cited by the Carrier at the Hearing, for the proposition that late requests for information are nothing more than a "gotcha." The corollary is also true – a late submission of requested information is also a form of "gotcha," albeit by a different party. However, this does not end the inquiry.

The Organization also was requesting additional information late in the handling of the claim. The Organization proffered a new request for information in its letter of July 18, 2005, wherein it stated:

> "In your letter of August 30, 2004, you additionally state that Nevada RR leased Carrier-owned property in the North Little Rock area. Therefore, I also request that you provide a copy of the lease document with the sub-contractor for examination by the Organization. Please provide the requested documentation prior to the expiration of the time limit governing this issue on August 1, 2005."

This request came nearly 11 months after the Carrier's disclosure that the property was leased to Nevada RR. Nonetheless, the Carrier complied with the request on July 29, 2005 and supplied a copy of the lease as well as a statement from the President of Nevada RR. The Board's review of the lease indicates that the property in North Little Rock, including industry trackage, was indeed leased to a third party – Nevada RR.

The Carrier readily acknowledges that pre-plated ties are used on some properties throughout the system and further argues that the Organization has been aware that Nevada RR produces pre-plated ties at North Little Rock. However, the Carrier also contends that the instant claim is devoid of any connection to the governing Agreement or the property governed by that Agreement.

The Board agrees. The lease indicates that the Carrier leased the land to a third party. Although that third party produces pre-plated ties, there is no allegation in the claim or during its handling that the third party-provided pre-plated ties were used anywhere on the property governed by the instant Agreement. There is no allegation that Organization-represented employees governed by the instant Agreement were affected by the pre-plated ties because there is no allegation that the ties were used, stockpiled, or planned for the instant property. The lease documents clearly show that Nevada RR leases the property. That lease does not establish that the Carrier somehow controls the third party.

The Carrier has a vast amount of trackage throughout the country and numerous Agreements on various properties. The mere allegation that the Nevada RR plant produces pre-plated ties for use by the Carrier, absent more, is insufficient to establish the Organization's burden of proof. Those pre-plated ties could presumably be used anywhere on the system where the applicable Agreement allows their use. Simply having the third party tie-plant located on property leased from the Carrier does not establish a connection to the instant Agreement.

The Organization failed to meet its burden of proof. Accordingly, the claim is 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 29th day of June 2010.