Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40553
Docket No. MW-39949
10-3-NRAB-00003-070083
(07-3-83)

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 (England Construction) to perform Maintenance of Way and Structures Department work (pouring concrete headwalls and related work) on the ends of culverts between Mile Posts 149 and 150, near Iowa Falls, Iowa beginning on November 22, 2005 and continuing through January 3, 2006 (System File 2RM-9713T/1440909 CNW)

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper 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 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 D. Murphy, S. Johnson, E. Lindloff, P. Asleson and D. Austin shall now each be compensated at their respective straight time rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning November 22, 2005 and continuing through January 3, 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.

This matter involves a contractor's performance of yard expansion work at the Carrier's Yard in Iowa Falls, Iowa, from November 22, 2005 through January 3, 2006.

On April 14, 2005, the Carrier served notice of its intent to subcontract at the location of "Iowa Falls, Iowa, Mason City Subdivision, Mile Post 149" identifying the work as Service Order No. 31465. The specific work was identified as "Providing labor, supervision, grading, sub ballast work, electrical work, equipment rental, asphalt work and other items associated with yard track expansion." The body of the notice stated 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 as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWE.**
>
> **In the event that you desire a conference with this notice, all follow-up contacts should be made with John Steiger in the Labor Relations Department. . . ."**

Although a conference on this and other subcontracting matters was held on April 25, 2005, the parties were unable to come to an understanding. The Organization stated in a letter dated April 25, 2005, in pertinent part:

"In conference the Brotherhood advised Carrier that the work described is basic railroad construction that has been performed for years by the Carrier's track forces. The ability to perform this work may require Carrier to provide the necessary tools for the jobs, but the Carrier track forces are experienced and capable of performing this work. The Brotherhood cited Rule 1 – Scope of the CNW CBA to support our position.

The Brotherhood advised Carrier that performance of electrical work as noted would not be BMWED work under the CBA.

In conference, Carrier failed to even allege that even one of the contracting out criteria listed in Scope Rule 1 of the Agreement exists in this instant case.

In conference the Brotherhood explained the Carrier's notice of 'other items associated with track construction' or 'yard expansion' does not meet the specific requirements set forth in Rule 1 – Scope of the Agreement for such notices of intent.

The Brotherhood cited that the Carrier does possess all of the necessary equipment to perform this work . . . this is Scope covered work to be performed by Carrier forces."

The Carrier's May 9, 2005 response from the Assistant Director of Labor Relations provided, in pertinent part:

"During our conference, you took the position that this 'notice' was improper inasmuch as your members had an exclusive right to perform this work on a daily basis.

It was explained to you that the Company is not adequately equipped to handle the work in that the time requirements are such that it is beyond the capabilities of Company forces to meet. Under the circumstances, Carrier's use of a contractor to perform the work described is not a violation of that agreement. . . ."

The Organization's July 19, 2005 reply listed conference letters regarding nearly two dozen Service Orders, including the instant matter. It provided, in relevant part: "The Brotherhood did state that the work contemplated by the Carrier in the cited notices is work covered under Rule 1 - Scope of our CBA and is reserved to be performed by Carrier BMWE forces."

The Organization filed its claim on January 16, 2006. The claim provided, in pertinent part:

> "Beginning on Tuesday November 22, 2005, the Carrier had a contractor perform scope covered work as defined in the November 1, 2001 Agreement. . . . The violative work consisted of pouring concrete headwalls.
>
> The Contractor forces [used] a backhoe, skid loader, generator and various hand tools, all of which are common tools and equipment in the immediate inventory of Claimant's crews."

The claim also included a discussion of Rule 1 – Scope, as well as Rules 2 through 7, Rules 23, 30, 31 and Appendix 15.

The Carrier responded in a February 1, 2006 letter from Manager of Labor Relations P. Allen that provides, in part:

> "As a result of my investigation into the merit of your claim, I have determined that the Carrier has not violated Rules 1 B, 2 A 1-5, . . . of the Agreement. The Carrier has served notice and held conference. . . . I direct the Organization's attention to Service Order 31465. . . . This Service Order was conferenced on April 25, 2005 . . . The notice for this Service Order was sent to the General Chairman . . . on April 14, 2005.
>
> In your claim, you reference that the alleged contracted work was done between Mileposts 149 and 150 near Iowa Falls . . . If you direct your attention to the Notice that I have supplied, the work in question covered by this Service Order is work associated with a yard track expansion project at milepost 149 near Iowa Falls. . . . This Service

Order clearly covers the work alleged in your claim. It is apparent that you are overtly ignoring this notice.

Notwithstanding, with the notice in mind, you are also aware that the contactor employees 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.

The Carrier resorted to contracting such work out because as discussed . . . the Carrier is not adequately equipped to handle the work in that the requirements are such that it is beyond the capabilities of Carrier forces to meet. . . . Thus, the Carrier is not adequately equipped to handle this work for this project.

Your claim for loss of work opportunity is completely unsubstantiated and irrelevant in this case. Contrary to your contentions, the Carrier has customarily and traditionally utilized outside forces to perform the type of work you describe in this case, and we understand that outside forces have historically performed such service. Rule 1 (b) gives the Carrier certain latitude when it comes to such situations. And one of these situations specified by Rule 1(b) is when 'time requirements must be met which are beyond the capabilities of Company forces to meet' then by agreement between the Carrier and the General Chairman the Carrier can contract out such work. Additionally, such work can be contracted out when the Carrier is not adequately equipped to accomplish such work by agreement between the Carrier and General Chairman. Even if such work were reserved to employees of your craft, the fact remains that the Claimants involved in this case weren't actually deprived of a work opportunity."

The Organization's appeal of the denial, dated March 15, 2006, indicated a contrary view of the claim and repeatedly cited Rule 1 as dispositive of the instant claim. Rule 1(b) 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." (Emphasis added)

The Carrier responded in a May 17, 2006 letter from the Director of Labor Relations asserting that the work was under the scope of the UP/BMWE Agreement of July 1, 2001 because the work was Consolidated System Gang work and further stated:

"The Carrier notifying you of such work, was merely for informational purposes only, and was not to be construed as an indication that the work described falls within the 'scope' of your agreement. Even though you were served notice of the intent to contract, it was at the request of the Organization that you be served notice of the UP Collective Bargaining Agreement work until such time as the current dispute is resolved.

Since the work . . .was in conjunction with new construction, the work was assigned to the Consolidated System Gang forces. The Consolidated System Gangs work under the scope of the Union Pacific BMWE Collective Bargaining Agreement, not the CNW BMWE Agreement."

The letter continues that the governing Rule is Rule 52 of the UP/BMWE CBA and that it has been found to be a general scope Rule in numerous Awards. Further, Rule 52 allows the use of contractors where notice is given and there is a mixed practice. According to the Carrier, the notice was proper and the subcontracting was allowable under UP/BMWE Rule 52.

The Organization replied on August 1, 2006 and asserted that the claim was filed under the CNW Agreement and not the UP Agreement. Further, Rule 1 reserves the work. Moreover, the work was not done by a System Gang; rather, it was performed by a contractor.

The Carrier responded in an August 1, 2006 letter from the Director of Labor Relations. That letter reiterated the earlier arguments that the UP Agreement governed the instant claim and that the contracting was permissible under that Agreement.

The Organization reiterated its position in a letter dated August 25, 2006. The Carrier similarly responded in a letter dated September 18, 2006.

The Organization maintains that the work at issue is scope-covered work pursuant to Rule 1(b) of the CNW Agreement. The Organization continues that the notice was defective because it did not mention the specific enumerated exceptions for subcontracting. There were no reasons for the contracting provided to the Organization and it maintains that it could not properly conference the matter absent the stated reason as required by the Rule.

The Organization continues that the Carrier's defenses are invalid. Specifically, because the Carrier failed to comply with paragraph three of Rule 1(b) by not specifying the reasons for contracting out the work, the Carrier cannot claim a valid pre-contracting conference with the Organization. Further, the affirmative defenses offered by the Carrier are based on nothing more than mere Carrier assertions and not evidence. The Organization continues that it refuted the Carrier's claimed affirmative defenses. Further, even if the notice was not defective, the cited exception of time requirements that was proffered by the Carrier during the handling were either refuted or nothing more than a mere statement without support in the record.

The Organization addressed the Carrier defenses as discussed below. The Carrier's contention that the work is not exclusively reserved to BMWE-represented

employees is not a valid defense in light of numerous Awards that address the issue and have found that exclusivity is not the test in contracting cases. The Carrier's contention that it was not equipped to perform the work within time constraints and that the Claimants did not possess the fitness and ability to perform the work should not be considered because it was not part of the notice and the conference on the claim. According to the Organization, failure to include these reasons in the notice precluded the Organization from requesting a conference to discuss the issues. Finally, the Organization asserts that the Carrier's assertion that the work was assigned to System Gang forces is simply untrue in light of the notice that was provided – a notice for contracting out the work. This claim was processed under the CNW Agreement and the Carrier responded under that Agreement. In conclusion, the Organization points out that the Claimants are entitled to the remedy requested. The Carrier performed the work six months after the notice. The Carrier had time to plan the work in order to use existing Carrier forces.

The Carrier sees the issue in the instant matter as:

"1. Does the [UP Systems Agreement] govern the pouring of headwall and other related work in conjunction with the new construction on the Mason Subdivision or does the CNW Agreement?

a. If the UP Agreement governs, did [the Organization] prove that the [Carrier] vioalted the contracting steps (notice) of the Agreement? Not argued on property.

b. If the CNW Agreement governs, did the Organization meet its heavy burden of exclusivity as required by jurisdictional disputes?"

The Carrier counters that the territory of the instant claim is governed by two separate Agreements – the CNW Agreement and the Consolidated System Gangs Agreement. The latter Agreement contains an Implementing Agreement that preempts the CNW Agreement when certain work is to be performed by System Gangs. One type of work is new construction of track. The System Gangs used a contractor to perform the headwall work on the project and that contracting was allowable under the Consolidated System Gangs Agreement. The UP Systems Agreement governs and, under that Agreement, the Carrier can clearly subcontract certain work, such as the work performed in the instant matter.

The Carrier continues that the Organization is trying to create a jurisdictional dispute among employees in the same craft. In a jurisdictional dispute, the burden is on the Organization to prove exclusivity and it cannot meet that burden in the instant matter.

Unlike other Awards dealing with this issue, the Carrier did not analyze the instant claim under the CNW Agreement in its Submission. (See e.g. Third Division Award 39953.)

The Board carefully reviewed the record and concludes that it supports a finding that the Carrier provided a subcontracting notice and conferenced the matter with the Organization. However, the answer to that inquiry does not end the analysis. Our review also indicates that the work at issue, as stated by the Carrier, is work associated with new track construction. 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 maintains that the work has been performed by BMWE-represented employees in the past and is reserved to them under Rule 1. Under the

plain meaning of Rule 1(b) this work is scope-covered because it is "work in connection with the construction, maintenance, and repair and dismantling of tracks, structures, and other facilities. . . ." Accordingly, we find that the work of constructing the headwalls 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 avail itself to 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 provides an appropriate analysis in the instant matter.

The Carrier did not list any of the exceptions in the notice of subcontracting. The Board nonetheless examined the Carrier's defense as discussed in its May 9, 2005 letter from the Assistant Director of Labor Relations. The Assistant Director of Labor Relations did not cite to the UP Consolidated Systems Gang Agreement or Rule 52 of that Agreement. Rather, he invoked the "time requirements" exception when he stated:

> "During our conference, you took the position that this 'notice' was improper inasmuch as your members had an exclusive right to perform this work on a daily basis.
>
> It was explained to you that the Company is not adequately equipped to handle the work in that the time requirements are such that it is beyond the capabilities of Company forces to meet."

The Board notes that the Organization stated that Rule 1 of the CNW Agreement was at issue beginning in the post-conference letter dated the same day as the conference on the instant matter, i.e., April 25, 2005. That letter provided, in part:

> "The Brotherhood cited Rule 1 – Scope of the CNW CBA to support our position.

The Brotherhood advised Carrier that performance of electrical work as noted would not be BMWED work under the CBA.

In conference, Carrier failed to even allege that even one of the contracting out criteria listed in Scope Rule 1 of the Agreement exists in this instant case."

The Carrier was put on notice by the Organization from the outset that the claim was being processed as a claim under the CNW Agreement. The Board also notes that Carrier correspondence prior to those of the Director of Labor Relations all responded and defended under the CNW Agreement.

In its handling of the claim, the Organization stated that the work has been performed by BMWE-represented employees in the past, they possess the necessary skills, and that the tools and equipment were common Carrier equipment. The Carrier asserted that time requirements required the use of contractors. However, a review of the record reveals that there was no written correspondence from the Carrier regarding what the necessary time requirements were for this project. It appears that the Carrier abandoned this defense when the Director of Labor Relations asserted that the UP Agreement governed the instant matter.

There is insufficient evidence to establish the affirmative defense. Simply, there is no evidence in the record that establishes what time requirements were necessary for the project. Accordingly, the affirmative defenses have not been shown under Rule 1.

The Board's finding that the Carrier violated Rule 1 is not the endpoint to the analysis of the claim. The Board must also consider the Carrier's argument that Rule 52 of the UP/BMWE Consolidated System Gangs Agreement is dispositive of the instant matter. The initial notice in the instant matter was a notice of subcontracting of "Providing labor, supervision, grading, subballast work, electrical work, equipment rental, asphalt work and other items associated with yard track expansion" on the Mason Subdivision. The Organization requested a conference and followed up with a letter to the Carrier which asserted that, among other things, the subcontracting violated Rule 1. The work was performed by the contractor and a claim was filed.

In its initial response of February 2006, the Carrier did not invoke the UP Systems Agreement, but instead appeared to defend the claim under Rule 1 of the CNW Agreement. The Carrier later asserted that the contracting notice was proper,

stating "It is apparent that you are overtly ignoring this notice." However, as discussed above, the Carrier's argument was misplaced under a Rule 1 analysis. Although the Carrier defended under Rule 52 in its response from the Director of Labor Relations, the Carrier conferenced and defended this matter under Rule 1 of the CNW Agreement. Indeed, Rule 1 is mentioned in the Carrier's initial responses as was the CNW Agreement. It is clear to the Board that the Carrier was defending under Rule 1 of the CNW Agreement.

The Board also notes the Carrier's citation to numerous Awards for the proposition that subcontracting is allowable under the UP/BMWE Consolidated System Gangs Agreement and Rule 52. However, the Board carefully examined the rationale in those Awards. In those cases, Rule 52 of the UP/BMWE Consolidated System Gangs Agreement was invoked by the Carrier from the onset of the claim. While there might have been a valid defense to the instant claim under a Rule 52 analysis, that analysis cannot be applied to this claim. The Carrier chose to defend this claim under Rule 1 of the CNW Agreement. The Carrier's change of position at the last stage of handling does not affect the outcome because the Carrier chose to conference and defend the claim under Rule 1 of the CNW Agreement and repeatedly cited to that Agreement during the handling.

A careful reading of the record indicates to the Board that the Carrier has not satisfied its burden to prove its asserted affirmative defenses. Having established that the work was reserved to BMWE-represented employees under Rule 1(b) the inquiry moves to remedy. The record contains no showing that the work could not have been scheduled in a manner so as to include the Claimants. The work was performed approximately six months after the subcontracting notice was given to the Organization. The Claimants were assigned to the territory at the time of the contracting of the track 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 29th day of June 2010.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARDS 40553 and 40554

DOCKETS MW-39949 and MW-39953

(Referee Brian Clauss)

These Awards are in direct conflict with other recent Awards which have found no Agreement violations in identical circumstances. There was no reason for the Majority here to reach a different conclusion than was reached in those Awards. Rather, the Majority should have followed the established precedent and denied the claims presented here for the same reasons. In light of the Majority's failure to follow that precedent, the undersigned must respectfully dissent.

The claims in these cases allege violations of the Chicago & NorthWestern (C&NW) Collective Bargaining Agreement, but they actually involve work covered by the Union Pacific (UP) Agreement. The Organization pursued similar arguments in two recent cases, and the Awards in both of those cases held that contracting of work which is covered by the UP Agreement cannot form the basis for a claim brought under the C&NW Agreement. There was no reason to reach a different conclusion here – as in those cases, the Organization again failed to meet its burden of proving any violation of the C&NW Agreement when the Carrier contracted work which was not reserved to the Claimants.

There is no dispute that the work in question was preparatory work for construction of new track in Proviso Yard and in the yard in Iowa Falls, Iowa, which is new construction work. There is also no dispute that the new track itself was installed by Carrier forces working under the Consolidated System Gang Agreement, which applies the UP Collective Bargaining Agreement covering new construction and other major production gangs to the territories of the former Southern Pacific Western Lines, the Denver & Rio Grande and the C&NW. Surfacing and lining of the new track was also accomplished by consolidated system gangs. Therefore, the Union Pacific System Agreement covering new construction, not the C&NW Agreement, governs the work involved.

These cases are not the first instances in which the Organization attempted to progress a claim under the C&NW Agreement when the work in question involved system gang work performed pursuant to the UP Consolidated System Gang Agreement. The same arguments presented by the Organization in these cases have been rejected in two recent Awards. In Award 131 of Public Law Board No. 6302, where grading, sub-ballast placement, fencing and other incidental work involved in new construction was contracted as permitted by the Union Pacific Agreement, the Board denied the claim stating:

> "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."

The same conclusion was reached in Award 8 of Public Law Board No. 7097, which held:

> "The record establishes that the disputed work was performed in connection with UP System Tie Gangs 9066 and/or 9067. Therefore, this Board finds that the UP-BMWE Agreement is applicable to the work, and the C&NW agreement, including Rules 1, 2, 4(d) 7 and 44, is inapplicable."

Although no claims were progressed challenging the Carrier's right to contract grading and other preparatory work under the UP Agreement, even if a claim had been progressed under the proper Agreement, the claim would still have been unavailing. As the Carrier noted on the property and in its Submissions, its right under the UP Agreement to have similar work performed by contractors has been upheld in many prior Awards. See, e.g., Third Division Awards 32310 and 32629.

In the current cases, the only reason the Majority posits for not following the aforementioned precedent is because, in response to the Organization's claim that the C&NW Agreement had been violated, the Carrier's initial claim denial stated that the C&NW Agreement had not been violated. There is no question, however, that in both cases the Carrier's highest designated officer for handling claims further observed that the

Organization's claim improperly alleged a violation of the C&NW Agreement because the work in question was governed by the UP Agreement. That observation was just as much a part of the on-property handling as any other matters in the record, and there was no reason for the Majority to dismiss it because it was not noted in the initial level response.

The Agreement in question contains provisions for initial claims and subsequent appeals. Materials set forth in the Carrier's response to an appeal are properly part of the on-property handling in these cases. Had the Carrier failed to raise such matters at all during the on-property handling, the Majority may have been justified in disregarding arguments raised only at the arbitration stage. There is no question here, however, that the Carrier's position regarding the applicability of the UP Agreement was properly included in the on-property handling and it should not have been cast aside. The Majority's analysis in essence removes any significance to anything after the initial claim and response, an action which has the effect of improperly altering the Agreement's claim handling provisions. Inasmuch as there was no basis for the Majority to take such action, these Awards should in no way be considered as precedent which diminishes the Carrier's rights as accurately established by Public Law Board Nos. 6302 and 7097. Therefore, we respectfully dissent.

Michael D. Phillips

Michael D. Phillips
Carrier Member

Michael C. Lesnik

Michael C. Lesnik
Carrier Member

November 1, 2010