Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40554
Docket No. MW-39953
10-3-NRAB-00003-070104
(07-3-104)

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (Orange Crush/Palumbo) to perform Maintenance of Way and Structures Department work (grading for new track roadbed and drainage) at Proviso Yards, Chicago, Illinois beginning on October 31 and continuing through November 10, 2005. (System File 9SW-2144T/1442112 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. Alexander, D. Johnson, J. Herrick, M. Henley, M. Soto, R. Perez and C. Rapier shall now each be compensated for seventy-two (72) hours at their respective time and one-half rates of pay."

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 work at the Carrier's Proviso Yard from October 31 to November 10, 2005.

On April 28, 2005, the Carrier served notice of its intent to subcontract at "Proviso Yard, Chicago, Illinois" identifying the work as Service Order No. 31579. The specific work was identified as "Grading for Track Roadbed and Drainage." 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 was held on May 5, 2005 the parties were unable to come to an understanding. The Organization stated in a letter dated May 25 2005, in pertinent part:

"In conference the Brotherhood stated that the notice did not provide sufficient information to determine what specific work is contemplated.

With the limited information provided the Brotherhood does not agree with the Carrier's alleged need to have outside forces perform the contemplated work. Carrier forces are fully capable and experienced to perform the grading work described. Carrier does possess road graders, crawler loaders, dozers, rubber tired end loaders, dump trucks and other equipment capable of performing grading and drainage work.

The Brotherhood also cited that the work contemplated is clearly roadway maintenance and construction contemplated in Rule 1 – Scope of the CBA."

The Organization filed its claim on December 19, 2005. The claim provided, in pertinent part:

"The Contractor employees used dump trucks, a dozer with bucket and blade, a front end loader and a roller to make the grade for the new track. The same type of equipment [is] commonly and historically used by Maintenance of Way employees. Each of these machines or similar machines that accomplishes grading and compacting are classified into classes by Rule 7 of the November 1, 2001 CNW/CBA.

The use of a contractor by the Carrier violated the current CNW/CBA as Rule 1 Scope states in pertinent part:

Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform <u>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</u>.

The Carrier further violated another portion of the Scope Rule which states in part:

In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto except in 'emergency time requirements' cases.

The Claimants are employees headquartered at Proviso and hold various assigned positions that mirror the contractor employees and are qualified to perform roadbed preparation on the Carrier's property. There is no shortage of the same or similar equipment in the Carrier's inventory which prevented the Maintenance of Way employees from performing the work in the same manner as practiced in the past."

The Carrier responded in a February 1, 2006 letter:

"As a result of my investigation into the merit of your claim, I have determined that the Carrier has not violated Rule 1 of the Agreement. A review of the Carrier records shows that the Carrier has served notice. I direct the Organization's attention to Manager['s] . . . 15-day notice. . . . This notice discusses the Carrier's intent to contract grading for track roadbed and drainage at Proviso Yard, Chicago, Illinois.

In your claim, you reference that the contracted employees prepared roadbed for a new segment of track in the Proviso Yard. If you direct your attention to the Notice . . . the work in question covered by this Service Order the grading work performed to prepare the roadbed for the new segment of track discussed in the Organization's claim. 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. Moreover, even if such work 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.

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 response of March 29, 2006 indicated a contrary view of the claim:

"After reviewing the notice and our records it is apparent why the notice was not recognized as pertaining to the claim before us. The notice fails to fully describe the work to be performed, size of the project or the exact location. The lack of information contained in such notices has been pointed out . . . many times to the Carrier to

no avail. The conference . . . failed to uncover additional details or reasons for the Carrier to contract the maintenance of way work.

In reading [the Carrier's] denial it seems she thinks the Agreement is satisfied by merely serving a notice to the Brotherhood. As stated in my [previous] letter . . . the notice failed to identify any circumstances or reasons which legitimately fall within the five enumerated exceptions to Rule 1 Scope, which states in part:

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 Carrier has failed in its burden to show how this project met any or all the exceptions provided by Rule 1 Scope of the Agreement. The Claimants were fully capable and experienced to perform the grading work. In addition, the Dump trucks, Dozer with bucket and blade . . . is the same type of equipment commonly and historically operated by Maintenance of Way employees. Each of these machines or similar machines that accomplish grading and compacting are classified into classes by Rule 7 of the . . . CNW/CBA.

It is noted that no special equipment or special material was required for the grade work and time requirements were not a concern as the work commenced almost six months after the notice was sent to the Brotherhood.

> [Carrier's] statement that the contractor employees were fully qualified. . . whereas the Claimants. . . do not posses sufficient fitness and ability. . .is an insult to the Claimants and their Supervisors."

The Carrier responded in a May 23, 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 [Agreement].
>
> Since the work . . . was in conjunction with new construction, the work was assigned to the Consolidated System Gang forces. According to the information provided by [the] Director of Construction . . . the project was a capacity related project assigned to the North Central Construction groups, in which System Construction Gangs 9049 and 9052 were to perform all the required track work on this project. . . . thus . . . the work in question was 'system work' and as such should not be covered under the scope of your Agreement. The Consolidated System Gangs work under the scope of the [UP/BMWE Agreement] not the CNW BMWE Agreement."

The letter continues that the governing Rule is Rule 52 of the UP/BMWE Agreement 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. Included with the correspondence was a copy of an email from the Director of Construction that discussed the work on the project, that it was a North/Central Construction Group project, and that Construction Gangs 9049 and 9052, as well as Surfacing Gang 9045, worked on the project.

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. Specifically, the Carrier "provided no reason for for [the Carrier's] intent to contract out the subject work."

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 specifiying 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. Assertions are not evidence. Moreover, the Organization refuted the Carrier's claimed affirmative defenses. Further, even if the notice was not defective, the cited exceptions that were 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 claim 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 assertion that it was not equipped to perform the work and that the Claimants did not possess the fitness and ability to perform the work should not be considered when 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 subcontracting of 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 Agreement] govern the prepatory work and other related work in conjunction with the new construction in the Proviso Yard in Chicago or does the CNW Agreement?
>
> a. If the UP Agreement governs, did [the Organization] prove that the [Carrier] violated 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 prepatory work on the project and that contracting was allowable under the Consolidated System Gangs Agreement.

The Carrier continues that, even if Rule 1(b) of the CNW Agreement applies, which the Carrier obviously argues does not apply, the CNW Agreement was not violated because BMWE-represented employees did not have the specialized equipment, training or skills to complete the work.

In support of the position, the Carrier states in its Submission:

> "While the Carrier did not concede that the alleged contracted work was Scope covered work, the Carrier did provide advance written notice to the Organization as directed by Rule 1. This notice specifically stated that the Carrier did not have the specialized equipment to accomplish this work and that the Carrier's forces did not have the equipment and/or skill level required to perform the work in question in a timely manner. In the on property exchange the Carrier attached an email . . . which stated 'Union Pacific forces

are not equipped to perform the grading and drainage work associated with this project.'"

The Carrier contends that it was in compliance with Rule 1 because the Carrier provided a timely written notice. Finally, the Carrier argues that the remedy is inappropriate because the Claimants were fully employed and Claimant Soto was on vacation for two days during the period at issue.

The Board carefully reviewed the record and concludes 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 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." (Emphasis added)

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. Accordingly, we find that the work of constructing new track 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 is appropriate in the instant matter.

The Carrier did not list any of the exceptions in the notice of subcontracting. Contrary to the Carrier's statement in its Submission that ". . . notice specifically stated that the Carrier did not have the specialized equipment to accomplish this work and that the Carrier's forces did not have the equipment and/or skill level required to perform the work in question in a timely manner," a review of the record reveals this to be an incorrect assertion. The notice is set forth above and contains no such disclosure by the Carrier.

The Board nonetheless examined the Carrier's defenses that it did not have the specialized equipment to accomplish this work and that the Carrier's forces did not have the equipment and/or skill level required to perform the work in question in a timely manner.

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 the tools and equipment were common Carrier equipment. A review of the record shows that there was no written correspondence from the Carrier regarding what the necessary skills or specialized equipment were for this project. The only evidence submitted by the Carrier that even comes close to addressing the above criteria for the affirmative defense is the letter from the Director of Labor

Relations that included an email of how the project was handled by System Gangs. That evidence is not sufficient to establish the affirmative defense. Simply, there is no evidence in the record that establishes what skills and equipment 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 instant claim. The Board must also consider the Carrier's argument concerning Rule 52 of the UP/BMWE Consolidated System Gangs Agreement. The initial notice in the instant matter was a notice of subcontracting of "Grading for Track Roadbed and Drainage" at Proviso Yard. 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 subcontractor and a claim was filed on December 19, 2005.

In its initial response of February 2006, the Carrier defended the claim under Rule 1. The Carrier contended that the 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 the final 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 at least three times in the Carrier's response and the CNW Agreement is also mentioned in that response. It is clear to the Board that the Carrier was defending under Rule 1 of the CNW Agreement.

The Board also notes the Carrier 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 the 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 the burden of proof with regard to its asserted affirmative defenses. Having established that the work was reserved to BMWE-represented employees under Rule 1(b) the inquiry moves to remedy. This record contains no showing that the work could not have been scheduled in a manner so as to include the Claimants. 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