Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40861
Docket No. MW-41342
11-3-NRAB-00003-100086

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
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(Union 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 (Saginaw Construction Company) to perform routine Maintenance of Way roadway equipment operator work (operate Carrier owned CAT to load ballast) between Mile Posts 282.0 and 292.0 in the North Platte Yard on September 9 and 10, 2008 (System File C-0852U-177/1511652).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant D. Vega shall now be compensated for a total of twenty-four (24) hours at his respective Group 19 rate 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.

By letter dated April 21, 2008, the Carrier advised the Organization's General Chairman as follows:

> "THIS IS TO ADVISE OF THE CARRIER'S INTENT TO CONTRACT THE FOLLOWING WORK:
>
> PLACE: At various locations on the North Platte Service Unit.
>
> SPECIFIC WORK: Providing any and all fully operated, fueled and maintained and or non operated equipment necessary to assist with program work, emergency work, and routine maintenance commencing May 05, 2008 to December 31, 2008."

A Conference on the notice was held on May 13, 2008, without reaching an understanding.

On September 8 and 9, 2008, an outside contractor's employee performed services for the Carrier loading ballast onto a dump truck. The contractor's employee utilized a Carrier owned CAT to perform the work. This claim followed.

The Organization argues that the Carrier's notice was deficient under Rule 52. This argument was rejected in Third Division Award 40756 (where the notice given under Rule 52 provided "Location: Various points across the Union Pacific System" and describing the work to be contracted covering the period January 10, 2008 through December 31, 2008) and Awards cited therein quoting similar notices found to be sufficient. See also, Third Division Awards 40857 and 40858 upholding similar notices as sufficient under Rule 52.

For reasons set forth in Award 40857, supra and Awards cited therein and contrary to the Carrier's argument, ". . . in contracting disputes, the Organization does

not have to demonstrate performance of work by scope covered employees on an exclusive basis."

The Carrier is correct that in what it refers to as "mixed practice" cases, the Board has found that contracting of scope-covered work is permissible under Rule 52 where the Carrier has contracted that work in the past. See e.g., the Board's recent decisions in Third Division Awards 40755 (fence construction work) and 40756 (vegetation control). With respect to the type of work performed in this case, prior Awards have upheld the Carrier's ability to contract out similar work. See Third Division Awards 33645 and 37644.

If the question in this case only involved whether the Carrier could contract this work, based on the above-cited authority that notice was sufficient, conference was held and the Carrier has previously contracted this type of work, we would deny the claim. But that is not what this case is about.

The problem in this case is not that the contractor as opposed to the Carrier's forces performed the work. Based on the above authority, that was permissible under Rule 52. The real dispute here is the fact that that the contractor's employee utilized the Carrier's equipment to perform that work. The evidence shows that the contractor performed services for the Carrier loading ballast onto a dump truck and the contractor's employee utilized a Carrier-owned CAT to perform the work. The resolution of the dispute turns back to the April 21, 2008, notice given by the Carrier to the Organization under Rule 52. In that notice, the Carrier stated its intent as "SPECIFIC WORK: Providing any and all fully operated, fueled and maintained and or non operated equipment necessary to assist with program work, emergency work, and routine maintenance commencing May 05, 2008 to December 31, 2008." (Emphasis added) The notice contemplates the contractor would provide the operator and the equipment. Indeed, that is how the Carrier viewed the contracting arrangement. In its Submission the Carrier stated "[t]he substance of our notice is easily understood on its face - the Company intended to have the contractor provide equipment when necessary and the Carrier's equipment was not available." However, the contractor did not provide the employee and the equipment as specified in the notice. The contractor provided the employee and the Carrier provided the equipment. The work performed was, therefore, inconsistent with the notice. The claim must be sustained on those grounds.

In its November 25, 2008, letter the Carrier asserted that the Claimant was not qualified to perform the work on the particular piece of equipment utilized. That does

not change the result. In its January 21, 2009, response the Organization refuted that assertion, contending that the Claimant was not only fully qualified and trained by the Carrier to perform the work, but it also was the type of work that is normally assigned to him in the course of his duties. The Carrier failed to demonstrate that the Claimant was not qualified during handling on the property.

As a remedy, the Claimant shall be made whole for the lost work opportunities. See e.g., Third Division Award 40763 ("[a]s a remedy, the Claimants shall be made whole for the lost work opportunities") and Awards cited therein. The fact that the Claimant may have been working on the dates when the disputed work was performed does not change the result that he lost work opportunities as a result of the Carrier's violation of the Agreement. Third Division Award 32862 (". . . even employees who were working could be compensated. . . ."). The issue for remedial purposes is the loss of the work opportunities resulting from the Carrier's violation of the Agreement, which the Claimant suffered in this case.

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 7th day of February 2011.