Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40922
Docket No. MW-41071
11-3-NRAB-00003-090090

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago &
(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 (Herzog) to perform Maintenance of Way and Structures Department work (ditching right of way) between Mile Posts 199.00 and 18.00 on the Wyeville and Altoona Subdivisions on June 18, 19, 20, 21, 22, 25, 26, 27, 28, 29 and July 2, 2007 (System File B-0701C-107/1486067 CNW).

(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 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, Claimant J. Lilly shall now be compensated for eighty-eight (88) hours at his respective straight time 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.

This claim concerns the utilization of an outside contractor (Herzog) to perform work at various locations on the Carrier's right-of-way involving grading, sloping, and ditching. The facts indicate that the Carrier served the Organization a notice on March 2, 2007, in Service Order No. 36327 advising of its intent to contract out the work of ". . . providing all supervision, labor and equipment necessary for the operation of a ditch cleaner to perform grading and sloping of drainage area near track structures on an 'as needed' basis." On March 6, 2007, the Organization requested a meeting to conference the notice. It asserted that the notice was inadequate because it failed to offer enough specific information to form the basis for a meaningful conference. According to the Carrier, a good faith conference was held on March 14, 2007, with neither side conceding to the other, after which the Carrier confirmed in a letter of the same date that it would contract out the disputed work.

It is the position of the Organization that the Carrier improperly used outside forces to perform scope-covered work. It asserted that Rule 7(H) of the Agreement lists various Carrier owned and/or leased machines under the Common Machine Classification many of which could have been used to do the disputed ditching work assigned to Herzog, all of which could have been operated by the Claimant. It further argued that Carrier forces have regularly performed similar projects as part of their normal duties on many occasions and the work is protected by its

specific Scope Rule. It concluded by requesting that the claim be sustained either procedurally or on the merits as presented.

It is the Carrier's position that after serving and conferencing a proper notice it contracted with Herzog to provide specialized equipment to perform ditching work. According to the Carrier, the equipment is a specially designed digging machine that has open well cars and moves along the outer rails of those cars and the machine is not similar to equipment the Carrier owns and, given its specialized nature, Herzog requires its employees who possess knowledge of the machine to operate it. The Carrier also stated that its forces could not complete the work within the required time period. It further argued there is a mixed practice on the property of contractors and covered employees performing the disputed work and the Scope Rule is general in nature. Lastly, it asserted the Claimant was fully compensated and worked all assigned hours operating a Little Giant Crane on the dates listed in the claim; thus he was not available to perform the disputed work. It closed by stating that the Organization did not present anything to show that it did not properly contract for the use of specialized equipment that it did not own or have readily available and because of that it requested that the claim remain denied.

The parties mutually relied upon Rule 1(B) of the Agreement as supporting their respective positions. It reads, in relevant part, as follows:

> "B. Employees included within 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 forces. However, such work may only be contracted provided that special skills 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.
>
> 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. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith."

The Carrier argued that the Organization cannot prove "exclusivity" to the work in dispute, however, that argument is not applicable in this instance because the Organization is not required to prove exclusive reservation of scope-covered work when the dispute involves the assignment of work to outside contractors. The proper application of the exclusivity test is to those internal disputes over the assignment of work between different classes and crafts of the Carrier's own workforce and not to disputes involving outside forces. In Public Law Board No. 7096, Award 1 involving the same parties to this dispute it was ruled without dissent as follows:

> "The Carrier initially argues that the disputed work is not exclusively reserved to the Maintenance of Way craft. For the sake of discussion, in this case we will assume the Carrier is correct. However, '. . . exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims.' *Third*

Division Award 32862 and awards cited therein. See also *Third Division Award 30944. . . .*"

As stated above the question at issue is not one of "exclusivity," but whether or not the Carrier demonstrated its ability to meet one or more of the exceptions contained in Rule 1(B). The Carrier suggested it met several of those exceptions. For instance, it argued that it could not meet the time requirements using its own employees and that specialized equipment and special skills to operate the machine were needed. It is undisputed that the Carrier did not own a specialized digger that has open well cars and moves along the outer rails of those cars. It was not rebutted that Carrier employees did not have the necessary special skills to operate the machine nor was there any evidence offered that such a machine; could be leased or had ever been leased and/or operated by Carrier forces. Rule 1(B) recognizes the use of specialized equipment coupled with special skills as one of the exceptions for contracting out work with the proviso that the equipment was required and/or time requirements had to be met which could not be met by the Carrier's employees. The Organization did not effectively rebut the Carrier's argument that the special equipment used hastened completion of the projects or that it could have been accomplished as expeditiously with other equipment. Therefore, the Board finds and holds that the claim must be 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 24th day of March 2011.