Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40964
Docket No. MW-40983
11-3-NRAB-00003-090277

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (Hurk Underground Technologies, Inc.) to perform Maintenance of Way and Structures Department work (boring under tracks for drainage) at tracks within the Council Bluffs Yards beginning on October 23, 2007 and continuing through November 15, 2007 (System File J-0752U-280/1493824).

(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 aforesaid work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces 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, Claimants J. Mumm, B. Sock, K. Gute, M. Koricic, F. Ortez and B. Lippert shall now '***be allowed an equal proportionate share of the total work hours worked by the outside contracting force as described in this claim, at their respective Group 15, 19 and 17 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.

By letter dated October 11, 2007, the Carrier advised the General Chairman that it intended to contract out the ". . . furnishing all labor, supervision, tools, equipment, and materials necessary to design and implement drainage improvements. . . " in the Council Bluffs Yard. The Organization received the notice on October 15 and sent a letter dated October 17, 2007, objecting to the contracting, the vagueness of the notice, and requesting specific information to be furnished at a conference to be held prior to any work being assigned to a contractor, indicating its availability for a phone conference during the period of October 22–26, 2007. The conference was held on November 1, 2007; the contractor commenced work on October 23 and continued working until November 15, 2007.

The instant claim was filed on December 11, 2007, asserting that five contractor employees performed work cleaning and boring under tracks which has been customarily performed by BMWE-represented employees, is reserved to Seniority Groups 15, 19 & 17 under Rules 9 & 10 and that contractor employees used two bobcats and one dump truck, which is recognized maintenance-of-way equipment. It asserted that no prior notice was given and none of the exceptions listed in Rule 52 applied.

In its initial denial, the Carrier attached its October 11 notice and made reference to the November 1, 2007, conference, arguing that the Organization did not show that work was performed on the claim dates or reserved to BMWE-represented employees. The Carrier asserted that this type of work has customarily and historically been contracted, that the Claimants did not possess sufficient fitness

and ability to safely and efficiently perform the duties or operate the equipment, and that it was not equipped to design and implement drainage improvement projects like this. It also noted that the Claimants were fully employed, could not perform this type of work, and were not entitled to compensation.

In its March 13, 2008 appeal, the Organization argued that the notice was untimely, inasmuch as it was sent 12 days before the contracting commenced, and that the conference was held nine days after contracting, violating Rule 52 and the Carrier's obligation to engage in good faith discussion and to comply with its commitment to reduce the incidents of subcontracting set forth in the December 11, 1981 Letter of Understanding, which is still valid. It also maintained that none of the Rule 52 conditions existed, because no specialized equipment was used by the contractor, noting that the Carrier has a boring machine and the Claimants were qualified to operate the equipment used, and that the Carrier could have leased any specialized equipment it deemed necessary. Finally, the Organization rejected the Carrier's full employment defense to the appropriateness of a monetary remedy for this lost work opportunity.

The Carrier's May 6, 2008, denial reiterates the validity of the notice, the fact that the work was of the nature that was typically contracted because it involved the evaluation, design and implementation of a drainage system to specific criteria, and that more than 200 prior Awards concerning a "mixed practice" give it the right to contract out this work, specifically noting Third Division Awards 28850, 30287, 31035 and 31039 as addressing the subcontracting of drainage control. The Carrier also averred that the December 11, 1981 Berge/Hopkins Letter of Understanding did not create any separate rights or supersede the Rule 52 past practice exception, and was not valid because the Organization never lived up to its reciprocal commitments that were conditions precedent to such understanding. Finally, the Carrier asserted that the Claimants had no loss of earnings associated with this contracting and were not entitled to monetary compensation.

As noted above, the parties' positions were detailed in their correspondence on the property. Suffice it to say that the Organization relies upon the following facts in support of its claim: (1) the Carrier's vague and untimely notice, citing numerous Third Division Awards including 25677, 27011, 28443, 29472, 30823, 36966 and 38349, as well as Public Law Board No. 7096, Award 15 (2) the work reservation language of Rule 9 encompasses this type of work, relying on Third Division Awards 14061, 28817 and 30528, as well as Special Board of Adjustment

(Loram rail handling case) and Special Board of Adjustment (pre-plated pie dispute) (3) the Carrier's failure to meet its burden of proving the existence of one of the stated exceptions in Rule 52 or that specialized equipment was, in fact, necessary or used or could not have been leased, citing Third Division Award 26770, as well as Public Law Board No. 6204, Award 33 (4) the absence of proof of any past practice on the record and (5) that a monetary remedy is appropriate to preserve the integrity of the Agreement and make the Claimants whole for the loss of this work opportunity, citing Third Division Awards 14061, 28817, 30528 and 39139, as well as Public Law Board No. 7096, Awards 14 & 15. The Organization urges the Board not to consider "new evidence" or arguments concerning specialized equipment submitted by the Carrier to the Board but not exchanged on the property.

The Carrier contends that it timely notified the Organization of its intent to contract out work involving the provision of specialized equipment which it does not own, that it does not have the expertise to design and install drainage systems, and that the Organization did not dispute that this was specialized work using equipment the Carrier did not possess, which must stand as fact on the record, relying on Third Division Awards 28459, 29859 and 30460, as well as Public Law Board No. 7098, Awards 9 and 10. The Carrier argues that it has historically contracted for the installation of drains and culverts which involve specialized boring equipment and the Board has upheld its right to contract such work, citing Third Division Awards 40438 and 40441. It submits that the general Scope Rule does not specifically reserve this work to BMWE-represented employees, as was the situation in the precedent relied upon by the Organization, and asserts that the Organization failed to meet its burden of proving the reservation of directional boring of drainage installation work or its historical performance by employees, citing Third Division Awards 37480, 37998 and 38014. Finally, the Carrier argues that because the Claimants were fully employed, the Agreement does not permit the award of damages or monetary compensation in the absence of a proven loss of earnings, citing Third Division Awards 30166, 31171, 31284, 31288 and 31652.

A careful review of the record convinces the Board that this case must be decided on the issue of whether the Carrier met its notice and conferencing obligations set forth in Rule 52(a). The Carrier never asserted that the work in dispute is not arguably scope-covered, or that no notice was required, only that it was not reserved to BMWE-represented employees under the Agreement, that it had a practice of contracting this type of drainage work, and that it timely notified

the Organization of its intent to contract. Thus, we find that the Rule 52(a) provision requiring the Carrier to notify the General Chairman "as far in advance of the date of the contracting transaction as practicable and in any event not less than fifteen (15) days prior thereto," and to promptly meet to discuss the contracting upon request and "make a good faith attempt to reach an understanding" applies in this case. Unlike the situation in Third Division Award 40441, there was no assertion of an "emergency" in this case.

The record exchanged on the property establishes that the contracting at issue occurred on October 23, 2007, i.e., 12 days after the notice was sent, eight days after it was received, six days after the Organization requested a conference (noting its availability from October 22–26) and nine days prior to the holding of a conference. There is nothing in the record challenging the Organization's assertion that the delay in conferencing this case was caused by the Carrier. Other than addressing the sufficiency of the notice and asserting that it was timely, the Carrier did not respond to the Organization's argument that the notice was not served at least 15 days prior to the contracting and did not comply with the requirements of Rule 52(a). None of the cases relied upon by the Carrier in support of its position that the Board has recognized its right to contract drainage work or work involving specialized equipment presented a situation where the notice and conferencing requirements of Rule 52 were not met. See, e.g. Third Division Awards 29306, 32433, 37354 and 40438, as well as Public Law Board No. 6205, Awards 1 and 2; Public Law Board No. 5546, Case 15 and Public Law Board No. 7098, Awards 9 and 10.

Thus, without reaching the merits of the contracting dispute, we conclude that the Carrier violated Rule 52(a) by failing to timely notify the Organization of its intent to contract. See Third Division Awards 32861, 32862, 36015, 37572 and 38349, as well as Public Law Board No. 7096, Awards 1, 14 and 15; and by failing to respond promptly and meet with the Organization before the contracting transaction commenced. See Third Division Awards 29472 and 30823. With respect to the appropriate remedy, regardless of whether the Carrier could have legitimately contracted out this work or proven the need for specialized equipment for which the Claimants were not trained had they met their notice and conferencing obligations, and absent evidence of an emergency or situation that had to be completed by a certain time, we are in accord with Board precedent that this represents a lost work opportunity for the Claimants, regardless if they were fully employed, and that they should be compensated for that loss. See Third Division

Awards 29472, 30823, 32861, 32862, 36015 and 37572. Because the Carrier never disputed the number of contractor employees and hours worked set forth in the claim (five employees working ten hours/day and every other Saturday and Sunday) and only asserted that the Organization failed to prove any work occurred on the claim dates, and the record contains a statement from an employee attesting to the fact that contractor employees worked during the claim period, we will sustain the claim.

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 14th day of April 2011.