Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40965
Docket No. MW-40986
11-3-NRAB-00003-090283

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 (Caylor and Gentz Construction) to perform Maintenance of Way and Structures Department work (dismantle and remove a switch, grading, install track panels, distribute ballast and related work) at Mile Post 100 in Broadwater, Nebraska on the Nebraska Division on October 21, 22, 23, and 24, 2007 (System File D-0752U-227/1494465).

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

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Bauer, B. Nienhueser, D. Roelle, A. Schlitz, C. Stoll, T. Benda and L. Gette shall now each be compensated for forty (40) hours at their respective and applicable 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 January 10, 2007, the Carrier advised the General Chairman that it intended to contract out ". . . providing fully fueled, operated, and maintained track excavators (track hoes) to assist Railroad with removing, replacing, loading and unloading switches, and track panels, excavating ditches, drains and installing culverts commencing January 25, 2007 to December 31, 2007. . ." at various locations on the North Platte Service Unit. The Organization sent a letter dated January 16, 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 from January 22, 2007, onward, or at an alternative date the Carrier suggests. The General Chairman indicated that if the Carrier did not respond to this request for a conference, it would assume that it agreed with the Organization's position and was withdrawing its contracting notice. When no response from the Carrier was received, the Organization sent a letter dated January 31, 2007, documenting the fact that its request for a conference was never complied with and that it assumed that the contracting notice was withdrawn. The Carrier did not respond to this letter and no conference was held.

The instant claim was filed on December 18, 2007, asserting that five contractor employees expended 200 hours removing a retired switch cut into panels and dismantling it on October 21, 2007, and working from October 22-24, 2007, making grade, installing track panels, distributing ballast and associated clean up, work which has been customarily performed by BMWE-represented employees and is reserved to them by Agreement, using three crawler hoes, one grader, one loader

and two dump trucks, 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 January 10, 2007, notice and argued that the Organization did not show that work was performed on the claim dates or reserved to BMWE-represented employees. The Carrier asserted that there is a strong mixed practice of this type of work, that the work was not scope-covered, that the Claimants did not possess sufficient fitness and ability to safely and efficiently perform it, and that the December 11, 1981, Berge/Hopkins Letter of Understanding was no longer a living document. It also noted that there was no loss of work opportunity because the Claimants were fully employed, and that they were not entitled to compensation.

In its March 31, 2008, appeal, the Organization presented a statement from one of the Claimants confirming the work performed by contractor employees and the equipment used on the claim dates, and its reservation as track work under the Agreement. It argued that the Carrier violated its obligations under Rule 52 and the December 11, 1981 Letter of Understanding by the vagueness of the notice, the absence of any reason for the contracting, and the failure to hold a conference. The Organization also rejected the Carrier's full employment defense to the appropriateness of a monetary remedy for this lost work opportunity. The Carrier's May 9, 2008, denial reiterates that the Organization did not meet its burden of proving that any work reserved to employees was performed by the contractor, or that the Claimants had any loss of earnings which entitled them to monetary compensation.

The Organization relies upon on-property precedent established in Third Division Awards 29121, 29312, 30066, 32862, 36832 and 38349 in support of its argument that the Carrier violated Rule 52 by failing to given adequate notice or hold a conference prior to contracting the work at issue, which is reserved to BMWE-represented employees by Agreement, and that monetary relief is appropriate for such violation. The Carrier contends that the Organization failed to sustain its burden of proving that the work in dispute is reserved to employees, that the subcontracting actually took place, that the Claimants lost any earnings entitling them to compensation, and that its notice was defective in any way, citing Third Division Awards 30063, 30166, 31171, 31284, 31288, 31652, 37490 and 39273.

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 as set forth in Rule 52(a). The Carrier never asserted that the work in dispute was not arguably scope-covered. Rather, it asserted that there was a mixed practice of contracting this type of work on the property, it had the prior and existing right to contract, and that its notice was adequate to meet its Rule 52 obligations. However, Rule 52(a) provides not only for prior advance notice, but also for a prompt meeting to discuss the contracting, upon request, and to "make a good faith attempt to reach an understanding." The undisputed fact that the Carrier did not respond to the Organization's timely request for a conference - sent on two separate occasions - and that no conference on this notice was held, distinguishes this case from those relied upon by the Carrier, and forms the basis for finding a violation of Rule 52(a) without reaching the merits of the contracting dispute. See, e.g. Third Division Awards 29121, 29312, 29472, 30066, 30823, 32862, and 38349. The Carrier's failure to hold a conference effectively frustrated the intent of that provision and negated any argument that it acted in good faith.

With respect to the appropriate remedy, the Carrier's contention that the Organization did not prove that the contracting occurred was sufficiently rebutted by the first hand written statement of one of the Claimants setting forth specifically the dates, hours and the nature of the work, the number of contractor employees, and the equipment used. Thus, regardless of whether the Carrier could have legitimately contracted out this work had it met its notice and conferencing obligations, 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 first hand statement submitted or the specifics set forth in the claim as to the total number of hours worked by the contractor employees, 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.