Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41048
Docket No. MW-41154
11-3-NRAB-00003-090485

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Northwest Roof Renovations) to perform Maintenance of Way work (remove/replace roof and related work) at Building 7253 at Nampa, Idaho beginning on June 12, 2008 and continuing through June 24, 2008 (System File D-0852U-208/1507491).

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

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Young, R. Lewis, R. Tilley, G. Chambers, J. Paz, R. Olsen, R. Payne and T. Newby shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning June 12, 2008 and continuing through June 24, 2008."

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 use of an outside contractor to perform various building construction functions, including roof replacement in conjunction with remodeling Building No. 7252 at Nampa, Idaho, beginning June 12 and continuing through June 24, 2008, and whether the performance of such work infringed upon work protected to the Maintenance of Way craft.

The facts indicate that on May 22, 2008, the Carrier sent the Organization Service Order No. 40576 advising of its intent to contract the work described in the Statement of Claim at Nampa, Idaho. Pursuant to the Organization's May 27 request thenotice was discussed in conference on May 28, 2008, with no mutual understanding between the parties. The Carrier subsequently confirmed that it would proceed with the work being performed by a contractor. The record further reveals that the parties made the same respective arguments that they made in several other cases regarding the vitality and applicability of the December 11, 1981 Letter of Understanding and whether the Organization was required to prove exclusive reservation of scope-covered work when the dispute involves the assignment of work to outside contractors. For the sake of brevity, the Board will not discuss those issues, but instead refers the parties to Third Division Awards 40922, 40923, 40929 and 40930 wherein the Board ruled in favor of the Organization on those questions.

It is the position of the Organization that the Agreement was violated when the outside contractor performed the disputed work during the timeperiod covered by the claim. Additionally, it asserted that the notice was vague and not consistent with the requirements of Rule 52 and the December 11, 1981 Letter of Understanding. It argued that the work involved no special equipment or special skills that were not already possessed by the experienced and fully qualified Claimants. It further argued that the work of removing the existing roof and replacing a roof and other associated building maintenance work has customarily, historically and traditionally been assigned to and performed by the Carrier's B&B Sub-department employees and is contractually reserved to those employees under the provisions of Rules 1, 2, 3, 4, 5 and 8. It concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that (1) it has a strong mixed practice of contracting out the disputed work (2) the Claimants did not have the necessary skills and equipment to install an ITO rubber and nylon roof and (3) it properly served a 15-day notice, after which a conference was held. It further argued that (1) the Scope Rule is general in nature (2) the Organization cannot prove system-wide exclusivity and (3) contrary to the Organization's argument that the Carrier failed to establish any conditions listed in Rule 52(a) to justify contracting the disputed work, the Carrier believed that it did so, because 52(a) states in part: ". . . However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not possessed by the Company . . ." Furthermore, Rule 52(b) specifically states: "Nothing contained in this rule will affect prior and existing rights and practices of either party in connection with contracting out." According to the Carrier, the same and/or similar work has consistently been performed by outsiders as well as BMWE-represented employees.; Therefore, unless the Organization can prove that the work has never been contracted out, or that it has historically and consistently taken exception to the Carrier contracting out such work, the Carrier is allowed to continue to contract for such services, which was the situation in the instant dispute. The Carrier closed by asking that the claim remain denied.

The Board is not persuaded that the May 27, 2008 notice was procedurally defective or inadequate in accordance with the provisions of Rule 52(a) or the

December 11, 1981 Letter of Understanding. (See Third Division Awards 29981, 30063, 30185, 32500, and 40930.)

The Carrier set forth two arguments in support of its actions. With regard to its first argument it introduced a statement from Carrier Officer R. Karsten which stated, in pertinent part, the following:

> "This claim should be denied on the following grounds:
>
> 1) The Bridge Dept. does not have the knowledge, training or experience to install this type ITO rubber and nylon roof.
> 2) The Bridge Dept. does have the equipment to install the roof.
> 3) The Bridge Dept. has not ever done any roof jobs like this that I have heard about or observed.
> 4) The leaking situation caused an emergency due to the telecommunications equipment be effected."

The Organization never directly responded to the statement that the ITO rubber and nylon roof was different and required equipment for installation that the Carrier did not possess, or that its members had not been trained for its installation. However, it did offer a statement from Claimant J. Paz attesting to having done roofing work in the past at different locations. That statement does not rebut the Carrier's assertion that covered employees and outside contractors have both done roofing work in the past.

Additionally, the Carrier offered historical evidentiary proof of a mixed practice of the disputed work being performed by covered employees and outside contractors, including Third Division Awards 30102 and 30690 which upheld the Carrier's right to contract roof and building repairs. Neither of the aforementioned Carrier arguments was effectively rebutted by the Organization. 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 23rd day of August 2011.