Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41052
Docket No. MW-41158
11-3-NRAB-00003-090518

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 (Caylor and Gentz) to perform Maintenance of Way work (transport Maintenance of Way equipment) from Mile Post 78 to Mile Post 97 on July 23, 2008 and from Mile Post 150 to Mile 87 on July 25, 2008, all on the South Morrill Subdivision of the Nebraska Division (System File J-0852U-266/1508726).

(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 said work and when it 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 national December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant S. Gartner shall now be compensated for a total of twelve (12) 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.

The facts indicate that on January 10, 2008, the Carrier sent the Organization a 15-day notice of its intent to contract out certain work. The subject notice reads, in relevant part, as follows:

> ". . . Location: Various points across the Union Pacific system
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> Specific Work: operate trucks and lowboy trailers to assist in hauling and or moving misc. equipment, material and supplies on the Union Pacific system through 12/31/08. . . ."

By letter dated January 14, 2008, the Organization requested discussion of the notice. The notice was discussed in conference on January 18 without resolution. Thereafter, by letter dated January 22, 2008, the Carrier confirmed that it would proceed with the work being performed by contractors. The instant case record substantiates that the parties made the same respective arguments that they made in several other cases regarding the 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 Organization's position that the notice was vague and not consistent with the requirements of Rule 52 and the December 11, 1981 Letter of Understanding because of the blanket nature of the notice lacking specifics as to who, when and where the work would be done. It further argued that the nature of the work set forth in the Carrier's notice constituted scope-covered work customarily and historically performed by its members. It t specifically stated that the Denver & Rio Grande Western (D&RGW) "Transfer Territory" Agreement, which consolidated the UP and D&RGW properties, recognized that on UP property the work in dispute belonged to BMWE-represented employees. Additionally, it asserted that Public Law Board No. 7099, Award 14 is particularly pertinent, because it involved the same type of work and thoroughly rejected each of the same positions espoused by the Carrier. According to the Organization, Award 14 should be followed as being precedential. It further argued that Rule 52 contains exceptions which must be present before the Carrier can be allowed to contract out covered work and, in this instance, no exception existed. Lastly, it stated that the Claimant was fully qualified for the work, available and should have been used. It concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that there is a mixed practice of contracting out the type of work made basis for the claim and it properly served a 15-day notice after which a conference was held. It argued that the Organization's reliance upon the D&RGW "Transfer Territory" Agreement is misplaced and the Scope Rule is general in nature. It further argued that the Organization cannot prove system-wide exclusivity and disputed the Organization's assertion that it failed to establish any conditions listed in Rule 52(a) to justify contracting out the work in question. The Carrier believed that it did so, because 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." The Carrier further asserted that the same and/or similar work has consistently been performed by outside contractors as well as BMWE-represented employees. Therefore, unless the Organization can prove that the work has never been contracted out, or 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 case in this instance. It closed by asking that the claim remain denied.

After a thorough review of the record, the Board finds that the D&RGW "Transfer Territory" Agreement is helpful in the resolution of this dispute. The Agreement reads, in pertinent part, as follows:

> "On the former D&RGW, there is a well established practice of using commercial trucking firms to transport maintenance of way equipment to and from its engineering service repair shop at Denver, Colorado. Such firms are utilized to transport equipment to and from points on the territories of the former Southern Pacific Transportation Company. On the Union Pacific, work of this nature is performed by BMWE represented employees.
>
> It was agreed that the Carrier may continue the practice of utilizing trucking firms to transport maintenance of way equipment to and from points on the territories of the former D&RGW. It is not the intent of this understanding to expand this practice beyond its present usage. BMWE represented employees will continue to transport such equipment to and from territories coming within the jurisdiction of the collective bargaining agreement between the Union Pacific and BMWE prior to the consolidation of the former D&RGW. It is also understood that nothing contained herein will be construed to prohibit BMWE represented employees from transporting maintenance of way equipment to and from points on the territories of the former D&RGW." (Emphasis added)

The Carrier argued that the Organization is attempting to expand the meaning of the aforementioned language. It stated that the D&RGW "Transfer Territory" Agreement recognized that BMWE-represented employees performed the disputed work on the UP, but it does not state that it was performed to the exclusion of outside contractors. On the other hand, the Organization argued that the parties are experienced negotiators, and if the performance of such work was, as the Carrier stated, a "mixed practice," then the parties would have acknowledged such in the first paragraph of the Agreement, as opposed to stating that on the UP, the work is performed by BMWE-represented employees.

Both arguments are not without some appeal, however, the Organization's interpretation of the "Transfer Territory" Agreement, i.e., that the work in question has historically and customarily been performed by its members, is more persuasive and consistent with Public Law Board No. 7099, Award 14, which dealt with an almost identical notice on the same property, involving the same work and

the same parties. The Board notes that Award 14 was signed without Dissent. Therein PLB 7099 held, in relevant part, as follows:

> ". . . In the instant matter, there can be no dispute that the transporting work at issue is work customarily and historically performed by BMWE represented forces. Had this not been the case, presumably the Carrier would not have provided its blanket December 14, 2004 notice to the General Chairman."

In view of the fact that this is not a case of first impression and there has been no showing that Award 14 was an anomaly, the Board finds and holds that the Carrier did not meet its obligations under Rule 52 when it served a blanket notice on January 10, 2008, before it assigned the transporting work to the outside contractor (Caylor and Gentz) on July 23 and 25, 2008. As a result, the Claimant shall be compensated as requested in Part (3) of the claim because there was a showing of lost work opportunities.

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 23rd day of August 2011.