Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41059
Docket No. MW-40078
11-3-NRAB-00003-070337

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(The Belt Railway Company of Chicago

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (R. J. Corman) to perform Maintenance of Way work (build switch panels/turnouts) on Belt Railway (BRC) property beginning on March 27, 2006 and continuing (System File BRC-6900T).

(2) The Agreement was violated when the Carrier assigned outside forces (R. J. Corman and Collins Contractor) to perform Maintenance of Way work (remove, grade, replace turnouts and related work) on Belt Railway (BRC) property beginning on April 10, 2006 and continuing (System File BRC-6901T).

(3) The Agreement was further violated when the Carrier failed to make a good-faith effort to reach an understanding in accordance with Rule 4 and the August 1, 2005 Agreement.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, 'It is the claim of the Brotherhood that each member of the Brotherhood of Maintenance of Way Employes employed on the BRC be compensated, an equal and proportionate share, of all hours worked by the contractors

from March 27, 2006 until Contractors cease performing work belonging to the Brotherhood of Maintenance of Way Employes Division.'

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, 'It is the claim of the Brotherhood that each member of the Brotherhood of Maintenance of Way Employes employed on the BRC be compensated, an equal and proportionate share, of all hours worked by the contractors from April 10, 2006 until Contractors cease performing work belonging to the Brotherhood of Maintenance of Way Employes Division.'"

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 two claims described in the foregoing Statement of Claim confront the Board with a threshold procedural issue. Although they were handled on the property as separate matters, the Organization, without the Carrier's concurrence, unilaterally combined them into one ex parte Submission before the Third Division. The Carrier objected to the combination.

When multiple claims involve significantly different facts and/or contentions, the Organization runs the risk that all will be dismissed by the Board if they have been impermissibly combined. That said, however, our review of the two claim

handling records reveals that the claims do not suffer from such differences. They represent two related facets of the same switch renewal/replacement project in 2006 and allege violations of the same Rule and Agreement language. Because the claims are so closely related, we do not find the Organization's combination of them to have been improper in this instance.

According to the records of claim handling on the property, both claims allege violation of Rule 4 of the effective Agreement as well as certain language in a collateral Agreement signed August 1, 2005. The background leading to the August 1, 2005 Agreement is illuminating.

The two claims arose from the same somewhat complex and convoluted history. The parties have apparently developed several past Agreements ("Contracting Agreements") to avoid disputes over the propriety of using contractor forces to assist the Carrier's forces in completing major projects. Based on the contents of the Contracting Agreements in the record, they provided the Carrier's employees with lump-sum compensation payments and protection from furlough for some time after the work was completed. While the instant claim records contain only three of these Agreements, which describe work done in 2002, 2003, 2004, and 2005, the record establishes that earlier Agreements went as far back as 1999. There was no similar Agreement to explicitly cover the disputed work in these claims that was performed in 2006.

The earliest of the Contracting Agreements in the record was effective January 1, 2002, and described various work projects to be performed in 2002, 2003, and 2004. It was not signed until November 15, 2002. All apparently went well in 2002 and 2003, but a dispute arose in 2004 over the proper interpretation of certain of the terms of the Agreement. It is quoted, in pertinent part, below. Where italics and underscored italics is used in the quoted language, it was not in the original, but has been supplied by the Board for emphasis. The italicized language is the source of the interpretive dispute.

* * *

> "This Agreement shall become effective January 1, 2002, supersedes the work identified in previous agreements covering the use of

contractors on The Belt Railway Company of Chicago (BRC), and is between BRC and it's {sic} employees represented by The Brotherhood of Maintenance of Way Employes (BMWE) signatory hereto. The provisions of the Agreement shall remain in force *as specified for its term*, unless changed or canceled in accordance with the provisions of the Railway Labor Act, as amended.

It is mutually agreed that BRC will be allowed to utilize contract rail, surfacing, tie, switch and bridge gangs to perform the following work at BRC during the years 2002, 2003, and 2004:

2002
* Lease 60-ton Crane with both an Operator and Groundman, and lease a Front-end Loader with an Operator to assist BRC's BMWE forces with turnout/crossovers installation
* Installation of up to 55,000 ties at Cragin, South Chicago, 59th Street Branch and Clearing Yard
* Repair structural steel and concrete on up to four (4) bridges
* Asphalt up to ten (10) road crossings and lease a Front-end loader with an Operator to assist BRC's BMWE forces with crossing installation.

2003
* Lease 60-ton Crane with both an Operator and Groundman, and lease a Front-end Loader with an Operator to assist BRC's BMWE forces with turnout/crossovers installation
* Repair structural steel and concrete on up to ten (10) bridges
* Asphalt up to ten (10) road crossings and lease a Front-end loader with an Operator to assist BRC's BMWE forces with crossing installation.

2004
* Lease 60-ton Crane with both an Operator and Groundman, and lease a Front-end Loader with an Operator to assist BRC's BMWE forces with turnout/crossovers installation
* Repair structural steel and concrete on up to 15 bridges

*** Asphalt up to ten (10) road crossings and lease a Front-end loader with Operator to assist in crossing installation.**

*** * ***

A. All employees in active service on the date of this Agreement or hired between the date of this agreement and December 31, 2004, *will receive job protection through April 1, 2008.*

*** * ***

C. With respect to each of the above-referenced years, BRC agrees to utilize the BMWE-provided list of BMWE-represented companies and mail bid packages to each. If BRC does not receive a bid from any of these companies, BRC may utilize contractors to perform the work set out for each of the three years. It is agreed that BRC may reject any and all bids which exceed the acceptable industry costs for such work.

*** * ***

It is further understood that before any additional contractor forces are to be utilized or any other work not identified or contemplated can be performed, an additional letter of understanding detailing the work will be required."

By Carrier letter dated June 15, 2004, the parties signed an amendment to the existing November 15, 2002 Agreement. The amendment is the second of the Contract Agreements in the record. It added some rail laying and stockpiling of scrap after clean up of the designated work locations in 2004. It also increased the Carrier's lump-sum payment for 2004 from $1,500 to $2,500. In addition, the Carrier committed to hire an additional five BMWE employees.

The dispute over the proper interpretation of the November 15, 2002 Agreement was in existence at the time of the 2004 amendment. Nonetheless, nothing in the amendment appears to deal with it.

By letter dated May 21, 2004, the Organization expressed its interpretation to the Carrier. The Organization noted that the November 15, 2002 Agreement provided for job protection through April 1, 2008. Accordingly, the Organization believed the Agreement ". . . *shall remain in force as specified for its term* . . ."[1] through that 2008 date despite the fact that the Agreement specifically listed work only through 2004. In addition, the Organization maintained that the penultimate paragraph of the 2002 Agreement, which was also italicized earlier, constituted a restriction on the Carrier's ability to contract for any work whatsoever through April 1, 2008 unless the Carrier agreed to an additional letter of understanding. Recall that the penultimate paragraph read as follows:

> "It is further understood that before any additional contractor forces are to be utilized or any other work not identified or contemplated can be performed, an additional letter of understanding detailing the work will be required."

Not surprisingly, the Carrier disputed the Organization's interpretation. The Carrier submitted that the penultimate paragraph restriction did not apply after 2004.

With that interpretive dispute still simmering, the parties discussed the third of the Contracting Agreements for work to be performed in 2005. The third Agreement was apparently patterned on the November 15, 2002 Agreement and still contained the same disputed language about its duration and the restriction on contracting. A tentative agreement was reached that listed three projects for 2005. One of the three projects was for switch replacement that provided again for leasing the 60-ton crane with Operator and Groundman plus a front-end loader with Operator as in the 2002 Agreement. This third Agreement again provided for lump-sum payments to the employees and job protection. Finally, it apparently contained the same penultimate paragraph language. It failed ratification and is not in the record.

The Organization responded to the failed ratification by submitting a counterproposal. The counterproposal increased the amount of the lump-sum

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[1] See the italicized language quoted earlier from the November 15, 2002 Agreement.

payments and made another change. It deleted the following words from the introductory paragraph:

> ". . . as specified for its term. . . ."

These words are those that were both italicized and underscored for emphasis when quoting the November 15, 2002 Agreement. The affected sentence now read as follows:

> "The provisions of the Agreement shall remain in force, unless changed or canceled in accordance with the provisions of the Railway Labor Act, as amended."

When submitting his counterproposal, the handling of the deletion is significant. Nothing in the record shows that the General Chairman identified the deletion or otherwise brought it to the Carrier's attention. It is also clear that the General Chairman did not provide any explanation whatsoever to inform the Carrier about the intended purpose of his deletion. In this regard, the General Chairman's letter dated April 28, 2006 reads, in pertinent part, as follows:

> "After the initial tentative agreement failed ratification in 2005, I submitted a counterproposal to you that not only increased the amount of liquidated damages the employees would receive for permitting additional contracting for 2005, but also provided that the proposed agreement would remain in effect until changed in accordance with the Railway Labor Act instead of simply remaining in effect "for its term". Given our earlier dispute over the November 15, 2002 and my May 1, 2004 {sic} letter, you should have understood the significance of this proposed change. Indeed, I would not have been surprised to receive a counterproposal. However, as you correctly stated there was no discussion concerning my proposal, much less a counterproposal from you. * * *"

The Carrier disagreed with the Organization's position about the operation of the 2005 Agreement.

It is well settled that when a dispute resolver is charged with determining the proper interpretation of contract language, the mission is to find the mutual intent of the parties. It is axiomatic that when one party has a privately held and unexpressed purpose in proposing contract language changes, which is not discovered by the other party, there has been no meeting of the minds on the intended meaning of the language. In contract negotiations, one cannot be held to have agreed with what one does not know. Therefore, on the record before the Board, there is no proper basis for concluding that the Carrier agreed with the privately held and unexpressed purpose of the Organization in making its counterproposal. Consequently, we are compelled to find that the Organization has not satisfied its burden of proof to establish its interpretation of the August 1, 2005 Agreement. Accordingly, the August 1, 2005 Agreement is not found to be a restriction on the Carrier's ability to contract out work for any year beyond 2005. This finding is important because the instant claims only deal with work performed in 2006.

Just to be clear, our finding means only that the August 1, 2005 Agreement does not restrict the Carrier from contracting for work to be performed in 2006, 2007 or 2008. Our finding does not mean, per se, that the Carrier's contracting action was proper. The propriety of the Carrier's action remains to be determined. Thus, we turn to the question of whether the disputed contracting of work violated the effective Agreement.

It is well settled that work that is reserved for exclusive performance by covered employees may not be performed by outside forces without the permission of the applicable organization. The Awards of this Board recognize three common means by which the reservation of work may be established. The first method examines the wording of the applicable Scope Rule. If the language of the Scope Rule explicitly states that specified work is reserved to the covered employees, the basis for the reservation of work is clear. Such a Rule is said to be a specific Scope Rule.

If the wording of the Scope Rule is general and lacks the requisite specificity, then the second means of establishing reservation is to examine evidence of past performance. Reservation of the work is established if the evidence shows that the

covered employees have traditionally, historically, and customarily performed the work.

The third method is less frequently seen. This method looks at interim Agreements between the parties for guidance. If a Letter of Agreement or Letter of Understanding or similar document provides the answer, then the applicable interim Agreement will control.

On the records before the Board, both claims list only Rule 4 of the effective Agreement and the August 1, 2005 Agreement as their supporting basis. The Organization's Submission to the Board lists these same two sources of support. In addition, the Submission cites the Berge/Hopkins December 11, 1981 Letter of Understanding. However, careful review of both claims and the subsequent appeal correspondence on the property shows that the Berge-Hopkins letter was never asserted for support. Therefore, it is not a proper consideration in our analysis.

Rule 4 of the parties' Agreement is the requirement for the Carrier to provide notice of its proposed plans to contract work and then engage in discussions, if requested by the Organization, to make good-faith efforts to reach an understanding concerning the contracting plans. It is undisputed that the Carrier did provide the requisite notice and engaged in the required conferences. No understanding was reached. At that point, according to Rule 4, each party is free to pursue whatever existing rights it may have on the subject. Thus, it is clear that Rule 4 was not violated.

Although both on-property records for the instant claims do contain references to Rule 1 being added to the basis of the claims, the involvement of Rule 1 was apparently abandoned. In Claim No. 1, it was not carried forward through the end of the record. In Claim No. 2, Rule 1 did not survive into the Organization's Submission.

We assume that the Rule 1 that was belatedly cited in both records was the Scope Rule of the effective Agreement. Because it was apparently abandoned, the Scope Rule is not before the Board as a consideration. As a result, there is no proper basis for concluding that it is a specific Scope Rule that provided for reservation of the disputed work. The Organization had the burden of proof on this

point. We must find, therefore, that the work was not reserved by a specific Scope Rule. Thus, the first means of establishing reservation of the work has not been perfected.

Neither of the two claim records contains evidence of past performance of the disputed work that occurred outside of the Contracting Agreements. The Organization had the burden of proof on this second means of establishing reservation of the disputed work as well. It failed to satisfy that burden. No reservation of work is established by the second means.

The only interim documents in the two claim records are the Contracting Agreements already noted. Careful reading of the three documents, however, does not show that they speak to the subject of work reservation. None explicitly provides scope coverage guidance, nor do they expressly address the reservation of the subject work at all. Thus, it is impossible to determine whether some, all, or none of the work described in them is reserved work. Thus, this third means of establishing reservation of the disputed work has also not been perfected.

Given the state of the claim records before the Board, we must find that the Organization has not sustained its burden of proving the alleged violations of the Agreement. Both claims, therefore, must be denied.

AWARD

Claims 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.