Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41060
Docket No. MW-41261
11-3-NRAB-00003-100109

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 and Collins Construction) to perform Maintenance of Way work (build/install switch panels and related work) on Belt Railway (BRC) property beginning on April 28, 2008 and continuing (System File B-0804B-102).

(2) The Agreement was further violated when the Carrier failed to make a good-faith effort to reach an understanding concerning the aforesaid contracting in accordance with Rule 4.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) 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 28, 2008 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.

According to the record of the claim handling on the property, the claim alleges violation of Rule 4 of the effective Agreement as well as a collateral Agreement signed March 2, 2008.

The instant claim is the latest in a series of contracting disputes between these parties. Third Division Award 41059 provides detailed background information about the parties' history and is not repeated here.

Although the Carrier alleged the claim to be procedurally defective in that it combined several work functions into this single claim, our review of the record does not reveal any such irregularity. All of the contracted work arises out of the same switch replacement project in 2008. It was not improper, therefore, to address all of the alleged violations in the same claim.

It is also clear from the on-property record that only two sources were cited in support of the alleged violations. Those sources were Rule 4 of the effective Agreement and the March 2, 2008 collateral Agreement. Therefore, the Organization's additional citations to Rule 1, Rule 3 and the Berge/Hopkins December 11, 1981 Letter of Understanding in its Ex-Parte Submission must be disregarded by the Board. Having not been part of the on-property record, they are not proper considerations to be raised for the first time before the Board.

Except for one narrow facet of the dispute to be discussed later, our review of the record requires us to deny most of the claim. It is clear that the Carrier served notice of its plans to contract out the disputed work by letter dated November 6, 2007. The notice listed plans to contract for the installation of up to 44,000 ties on approximately 65 miles of track. It also listed plans to contract for equipment and Operators to perform turnout replacement on approximately 30 switches and three other types of projects. The parties met as required by Rule 4. The record shows

the Carrier recognized the tie work to have been reserved for performance by its forces and, accordingly, the parties developed the March 3, 2008 Agreement to permit the Carrier to use contracted forces for the tie work. That Agreement did not address any of the other work listed in the Carrier's notice.

The March 3, 2008 Agreement does not contain any language that prohibits the Carrier from contracting other work. It does not contain the "penultimate paragraph" that was present in earlier Agreements between these parties for the years 2002 - 2005 as noted in Award 41059. Instead, the March 3, 2008 Agreement speaks only to the tie installation work. Accordingly, we must find that the March 3, 2008 Agreement does not provide the requisite support for the Organization's claim that the instant work of switch removal/replacement violated the Agreement as alleged. The Organization has not satisfied its burden of proof in this regard.

The main body of Rule 4 is the Agreement Rule that establishes the requirement for the Carrier to provide notice of its contracting plans and the duty to meet with the Organization to discuss its proposed contracting plans. The record is clear, as previously noted, that the Carrier did serve notice and did meet with the Organization. Indeed, the parties reached an understanding regarding the tie work. Accordingly, we must find that the notice and discussion meeting requirements imposed by Rule 4 have been satisfied by the Carrier. Therefore, those portions of the claim must be denied.

But Rule 4 includes some additional language not commonly seen in similar notice Rules that creates a narrow restriction on the Carrier's ability to sell scrap on an "as is-where is" basis. The additional language reads as follows:

> "Note: The following paragraph from the August 24, 1998 Agreement remains in effect.
>
> With respect to Track Department scrap, the Carrier agrees that scrap will be sold 'as is-where is.' However, stock piling will be reserved to Track Department employees. The Buyer will pick up scrap only from the 'stock piles.'"

On the property, the Organization asserted that this language was violated by the Carrier because of the manner in which the scrap sale of turnout materials was handled. It is undisputed that the contractor who purchased the turnout panels that

were being replaced did not take the materials from stock piles. Instead, the record establishes that the contractor's forces removed the old turnouts as an intact panel by lifting them out by crane.

The additional Rule 4 language is sufficiently explicit to reserve the work of disassembly of the panels and stock piling of scrap materials to the Carrier's forces. The Carrier's responses on the property effectively ignored the stock piling requirement.

Therefore, to the extent the contractor's forces disassembled the removed turnout panels and segregated the materials into piles, that constituted a loss of work opportunity for the Carrier's forces and violated the Agreement.

Given the state of the claim record before the Board, we find the claim must be denied in part and sustained in part. The dispute is remanded to the parties to determine whether and to what extent the contractor's forces performed disassembly and stock piling work. The Carrier must compensate its employees as noted in the Statement of Claim for the total of such work hours expended by the contractor in the disassembly of the removed turnouts and segregating the materials in preparation for the "as is-where is" sale from the stock piles.

AWARD

Claim sustained in accordance with the Findings.

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.