Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41160
Docket No. MW-41518
11-3-NRAB-00003-110132

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Swanson Railroad Contractors) to perform Maintenance of Way Track Sub-Department work (build switch panels, remove and replace switch panels, tie installation, boutet welding, rail installation and related work) on the Chicago Mainline track, the Chicago Yards, Brighton Park Yard and on the Brighton Park Running track on May 26, 27, 28, 29, 30, June 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, July 6, 9, 11, 12, 15, 16, 18, 19, 20, 21, 22, 25, 26, August 17, 18, 19, 20, 21, 24, 25, 26, 27 and 28, 2009 instead of Track Department employes (Carrier's Files BMWE-553, BMWE-554 and BMWE-555 NRP).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its plans to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 24.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, P. Avolos, F. Flores, D. Wilkins, D. Barnum, V. Williams, C. Gonzalez, T. Goodrich, C. Merrill, R. Segura, G. Castillo, Sr., R. Schaeffer, R. Roan, D. Smith, J. Iribarren, J. Guillen, Q. Nguyen, R.

Covarrubias, J. Crespo, J. Mota, E. Augle and J. Pulido shall '. . . be paid an equal amount of the total manhours expended by the Contractor in performing this work.***'"

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 claim, dated July 22, 2009, involves the Carrier's decision to use outside forces to build switch panels, remove old switch panels and replace them with new switch panels, install track ties, make boutet welds, install new rail and perform all related work at the Chicago area locations on the various dates set forth in the claim.

According to the Organization, inasmuch as this work has been ordinarily and customarily performed by BMWE-represented employees, the Carrier breached the Scope Rule. The Organization notes that the Claimants were available to perform the work, which required no special tools, equipment or skills. A violation of Rule 24 occurred, the Organization argues, when proper advance notice was not provided.

In response the Carrier asserts that it did provide proper advance notice of its intent to contract out and met with the Organization in a good faith effort to reach an understanding. This work is not reserved exclusively to BMWE-represented employees, so contracting out for its performance did not violate the Agreement. The Organization failed to prove that Carrier forces have customarily and ordinarily performed work of this complexity and magnitude at any time on property.

The progression of this claim on the property reveals it was processed in the usual and customary manner, including placement before the highest officer of the Carrier designated to handle it. Following a conference discussion on March 30, 2010, the claim is now properly before the Board for adjudication.

Regarding Rule 24, by letter dated November 4, 2008 the Carrier notified the Organization of its intent to contract out the work of renewing seven switch panels and 8,125 feet of yard track with new continuous welded rail (CWR) including ties and ballast at the 14th Street Yard; replacement of 2,000 deteriorated wood ties with new wood ties, ballast and surfacing of track on the Chicago Union Station Main Line; and installation of two switch panels and renewal of 410 feet of yard track with new CWR, ballast and asphalt paving at Brighton Park Yard.

The Carrier contends that its forces were fully engaged in performing their regular duties. Although Carrier forces would be assigned inspection and protection of contractors as needed, they could not complete this project within a reasonable amount of time while performing their regular daily duties.

The Carrier asserts that it did not have the equipment available at the location to support these projects, such as a track tamper, ballast regulator, tie inserter, tie spiker, tie crane, front end loader, crawler dozer, speed swing, portable rail flash welder and hi-rail dump truck. Finally, no BMWE-represented forces would be furloughed as a result of contracting out this work.

On December 2, 2008 the Carrier met with the Organization in conference, but the parties were unable to reach an understanding. Following this conference, the Carrier notified the Organization that it would proceed with the project using outside forces.

Based on the letters and conference, the record contains substantial evidence that the Carrier complied with Rule 24.

The principle is well-established that responsibility resides with the Organization to prove that the disputed work is covered by the Scope Rule. The Carrier asserts that the Organization must prove that its members exclusively perform this work; the

Board disagrees. Rather, the "exclusivity" test properly applies only to class and craft disputes and not to contracting out disputes.

For this situation (contracting out) the Organization must establish that its members customarily and ordinarily perform this work. The Carrier acknowledges that it's Maintenance of Way forces perform maintenance, repair, and inspection work in this territory, but not work of this magnitude and complexity.

A review of Third Division Awards 38195, 40234 and 40235 reveals that the Carrier contracted out the same kind of work at this location in 2003, 2004 and 2005 and that contracting was upheld by the Third Division on those occasions. In the same vein, the Board finds that this limited-duration work was of such magnitude and complexity that even though it is scope-covered work, the Carrier can contract out. (See Third Division Awards 36234, 37152 and 38123.)

On point with this dispute is Award 40234, wherein the Board held:

> "There is no question that the employees performed and were capable of performing the work. We conclude that the Organization has proven that the work which was contracted was within the Rule 1 Scope of the Agreement.
>
> However, just because the work fell within the scope of the Agreement, does not mean that it may not be contracted out. The language of Rule 1 on which the Organization relies must be read in conjunction with Rule 24. As the Board stated in Award 38195:
>
> > 'Notwithstanding the provision of the Scope Rule, the Carrier has the right to contract out work. If the Carrier did not have that right, Rule 24 would have no meaning.'"

The Board finds precedent in the above-mentioned Third Division Awards for contracting out this work based on prior years established in the record where it occurred for the same reasons proffered now by the Carrier. That is, considering the magnitude of the work involved, the Carrier argued that there were insufficient forces

to perform the work within a reasonable timeframe and the equipment used in this type of work was not available at the location.

There is no dispute that the equipment was not at the location, but the Organization asserts that is an insufficient reason to deny the work in question to the Claimants because scope focuses on work and not equipment. Also, the assertion that the work had to be completed within a reasonable amount of time was without merit because the contracting out did not commence until six or seven months after the decision was made to use outside forces. However, there is no requirement in the Agreement that the Carrier must secure or obtain the equipment and commence the work within a set period of time. Delay of the project does not, in and of itself, constitute a Rule violation.

Given all these considerations, including the persuasive authority found in the Third Division Awards arising from this location addressing contracting out under the same or similar circumstances, the Board will deny the claim.

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 21st day of November 2011.