Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41771
Docket No. MW-41046
13-3-NRAB-00003-090406

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(
(Soo Line Railroad Company (former Chicago, Milwaukee, St. Paul & Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Loram) to perform Maintenance of Way work (rail pickup and distribution) beginning at Sparta, Mile Post 255.5, on May 29, 2007 and continuing through July 9, 2007 (System File C-08-07-C080-03/8-00228-140 CMP).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper notice of its intent to contract out said work as required by Rule 1 and failed to enter good-faith discussions to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as set forth in Appendix I.

(3) As a consequence of the Carrier violations in Parts (1) and/or (2) above, Claimants R. Beitlich, T. Brzowsky, K. Kruser, G. Ronnie and R. Smithson shall now be compensated '. . . for a proportionate share EACH for all lost time at the applicable straight time and/or time and one-half (1 ½) rate of pay, wages, benefits and future work opportunities beginning May 29, 2007 through July 9, 2007, for three thousand seven hundred (3700) hours . . . .'"

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 Carrier contracted out work that the Organization maintained was contractually reserved to Maintenance of Way employees and customarily, historically and traditionally performed by them. According to the Organization, the disputed work consisted of common, ordinary maintenance-of-way material handling work, specifically, loading continuous welded rail (CWR) along the right-of-way and the operation of machinery and equipment in the performance of that work. Further, according to the Organization, the disputed work occurred between May 29 and July 9, 2007 and was performed by ten employees of the outside contractor, Loram Maintenance of Way, Inc. The Organization maintained that on May 29, 2007 the work commenced at Sparta, Wisconsin, where Loram employees set up the equipment, held safety discussions and prepared the site for work. On May 30, 2007, Loram employees began picking up rail at Mile Post 255.5. The Carrier, on the other hand, described the disputed work as follows: It engaged Loram to move two trains of rail to the DMVW where the DMVW would unload the rail upon its arrival. Next, pickup of the rail would occur on the River and Watertown Subdivision. The rail would then be laid in Lacrosse, Wisconsin, LaCrescent, Minnesota, and Bensenville and Schiller Park, Illinois.

Contrary to the Organization's contention that the disputed work that was contracted out should have been performed by Maintenance of Way employees, the Carrier asserts that the work performed by Loram is a very unique and revolutionary approach to handling CWR in both the transportation and unloading, as well as, the loading and transportation of second hand and scrap rail. The Carrier describes Loram's "Raptor Rail Handling system" as a whole new way to move rail to and from the field. According to the Carrier, the "Raptor" system provides improved safety, reduced track

occupancy and reduced overall cost. Additionally, the Raptor gantry system improves safety by reducing manual handling of rail, eliminates pushing rail during loading, and doubles as a rail delivery system. The Carrier notes that operation of the Raptor gantry booms requires Loram trained and qualified personnel who remain with the equipment at all times, under the direction of Loram's Operations Department. The Carrier notes that Loram's new technology and specialized equipment has never been operated by its Maintenance of Way employees in the past nor, the Carrier submits, are they qualified to do so. The Carrier asserts that the Loram Rail Train technology is not available to it elsewhere and, therefore, can only be procured by lease from Loram under specified terms.

While the Carrier acknowledges that there exists no dispute that BMWE-represented forces have loaded and unloaded rail, at the same time, the Carrier asserts that BMWE-represented forces have never performed the work in question in the manner that Loram performs such work. Moreover, the Carrier argues that the Organization failed to provide Agreement language that reserves to its members the loading, unloading, and handling of track material and other work incidental thereto. The Carrier asserts that no contractual language has been presented by the Organization reserving to it members the construction and maintenance of rail, nor has the Organization provided language which states that BMWE-represented employees shall perform all work in connection with the construction, maintenance, repair, and dismantling of tracks, etc. This is the case, the Carrier submits, because no such language is present in the controlling Milwaukee Agreement. On the contrary, the Carrier submits that the Scope Rule, Rule 1 of the Milwaukee Agreement, allows it to contract scope-covered work. Rule 1 reads, in pertinent part, as follows:

> "The rules contained herein shall govern the hours of service, working conditions, and rates of pay of the employes in the Maintenance of Way & Structures Department represented by the Brotherhood of Maintenance of Way Employes . . . .
>
> NOTE: In the event the Carrier plans to contract out work within the scope of this agreement, the Carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
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> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the

> designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Carrier may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.
>
> Nothing in this Note shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advanced notice and, if requested, to meet with the General Chairman or his representative to discuss and, if possible, reach an understanding in connection therewith."

The Carrier argues, as noted in the aforequoted portion of the Scope Rule, that it has the right to contract out work that traditionally has been performed by BMWE-represented forces, providing it serves the required advance notice and has business rationale to do so, such as, for example, insufficient forces, lack of qualified supervision, necessary equipment is not readily available, and/or inability to complete the work within the required time, just to name a few (noting this is not an inclusive list of business reasons). While the Organization alleges that the Carrier failed to provide it with the required advance notice to contract out the disputed work, the Carrier, on the other hand, asserts that it provided the Organization with such required advance notice. The Carrier alleges that during the requested conference held at the behest of the Organization to discuss contracting out the disputed work, the Organization made no counter-proposal as to how BMWE-represented employees could perform the work in question as efficiently, expeditiously or as safely as Loram. While the Organization alleges that it was the Carrier's failure to provide information during conference as to the reason why BMWE-represented forces could not perform the disputed work, the Carrier rebuts this allegation asserting that, in fact, it did provide the Organization with such information but, in any event, the Carrier asserts the burden befell the Organization to convince it by substantive evidence that BMWE-represented forces possessed the ability to perform the disputed work in question, which it failed to do. In support of its position on this latter point, the Carrier cites Third Division Award 38860, which states the following:

> "This Board has reviewed the record in this case, and we find that the Organization has failed to meet its burden of proof that the Carrier violated the Agreement when it subcontracted with outside forces to

perform drilling and torch cutting work in December of 2003. Therefore, the claim must be denied.

The record reveals that contrary to the Organization's argument, the Carrier did provide notice to the Organization prior to subcontracting the work at issue. The Organization representatives met with the Carrier and although the Organization takes the position that the Carrier tried to 'strong arm' the Organization, the record makes it clear that the Carrier and the Organization discussed the planned subcontracting after the Organization received notice and the Carrier made its determination to subcontract the work. The Carrier has that right.

It is fundamental that the Organization bears the burden of proof in cases of this kind. In this case, although the Organization is unhappy about the subcontracting of the work at issue, this Board finds that the Carrier did not violate the contract when it took the action of assigning the work to outside forces. Therefore, the claim must be denied."

Contrary to the Organization's allegation that the Carrier failed to inform it in its May 4, 2007 notice of a valid reason to contract out the disputed work, the Carrier asserts that it had legitimate business reasons for contracting out the disputed work, specifically, the specialized equipment utilized by Loram to accomplish the work, the expertise of Loram employees to operate the specialized equipment, which expertise BMWE-represented forces did not possess, and the fact that the Loram specialized equipment was not available for lease, which the Organization failed to refute by any evidence, otherwise. Moreover, the Carrier asserts that it informed the Organization of its reasons for contracting out the work during the conference that was held at the behest of the Organization, which occurred in advance of commencement of the work in question. Additionally, the Carrier refutes the Organization's contention that in contracting out the work in question, it acted contrary to the obligation of reducing the incidence of contracted out work as opposed to asserting a good-faith effort to increase the use of maintenance-of-way forces pursuant to the commitments set forth in Appendix I, the December 11, 1981 Letter of Understanding, which reads, in pertinent part, as follows:

"The carriers assure you [O.M. Berge, President of the Brotherhood of Maintenance of Way Employes], that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the

procurement of rental equipment and operation thereof by carrier employes.

The parties jointly affirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

The Carrier asserts that, in fact, contracted out work has been decreased and continues on a downward trend. The Carrier asserts that no BMWE-represented employees were furloughed as a result of contracting out the disputed work, including the named Claimants who were employed throughout the season without being furloughed. Contrary to the Organization's allegation of lost work opportunity suffered by the Claimants, which the Carrier notes the Organization supported by unsubstantiated statement only, the Carrier contends that the Claimants did not suffer any lost work opportunity.

Upon the respective argument presented by the Parties, the Board finds the following: (1) the Carrier complied with all obligations of notice required of it by Rule 1, the Scope Rule set forth in the controlling Milwaukee Agreement; (2) the Organization failed to present substantive evidence that the Carrier failed to participate during conference in good-faith pertaining to discussion regarding its intent and the reasons therefor for subcontracting the disputed work in question; (3) the Carrier successfully convinced the Board that it had valid business reasons, the same reasons it presented to the Organization during conference and in argument before the Board, for contracting out the disputed work in question; (4) the Carrier successfully convinced the Board that specialized equipment was utilized by contractor forces to perform the work in question and that BMWE-represented forces did not possess the expertise to operate said specialized equipment; (5) the Carrier successfully convinced the Board that the specialized equipment was not available to it to lease and, therefore, it was necessary to contract with Loram to perform the disputed work in question; and (6) the Organization failed to present substantive evidence that by contracting out the disputed work, the Carrier in some way eroded work of the bargaining unit in that the Claimants or any other BMWE-represented employees were neither economically harmed nor suffered any

loss of work opportunity as a result of the Carrier having contracted out the disputed work in question.

For all the foregoing reasons, the Board finds that under all prevailing circumstances, the Carrier was within its contractual rights to contract out the disputed work in question and, therefore, rules to deny the subject claim in its entirety.

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 25th day of November 2013.