

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42157
Docket No. MW-42229
15-3-NRAB-00003-130199**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
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(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 (Herzog) to perform Maintenance of Way work (dismantle, remove/replace track and related work) on Tracks 201, 202, 203 and 204 in the West Colton Receiving Yard at Colton, California beginning on January 3, 2012 and continuing (System File RC-1252U-451/1565316).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out the aforesaid work and when it failed to make a good-faith attempt to reach an understanding and 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 December 11, 1981 National Letter of Agreement.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants E. Shorty and C. Vaca shall now each be compensated for twelve (12) hours at their respective and applicable rates of pay for each date the outside forces performed the aforesaid work beginning on January 3, 2012 and continuing.”

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.

By notice dated December 27, 2011, the Carrier advised the General Chairman that it intended to contract out the provision of operated and non-operated equipment necessary to assist its forces with programmed work from January 11 through December 31, 2012 at various locations on the Los Angeles Service Unit. The Organization sent a letter dated January 3, 2012 objecting to the contracting, and requesting specific information to be furnished at a conference to be held prior to any work being assigned to a contractor. The conference was scheduled by the Carrier and held on January 10, 2012. The contractor commenced work replacing track in the Colton Yard using the Herzog Multi-Purpose Machine (MPM) on January 3, 2012.

The instant claim was filed on January 26, 2012. In it, as well as in its April 4 and October 4, 2012 appeals, the Organization asserted that the work of replacing tracks has been historically and customarily performed by BMW-represented employees, and is reserved to them pursuant to Rule 9. It argued that (1) the notice of contracting was untimely served, (2) the Carrier failed to comply with its good-faith conference obligation, because the work commenced seven days after the notice and prior to the conference, and (3) none of the exceptions listed in Rule 52 applied. The Organization contended that the notice violation in and of itself is a sufficient basis upon which to sustain the claim and award a monetary remedy to the Claimants, who suffered a loss of work opportunity, regardless of whether the Carrier could have justified the contracting pursuant to Rule 52(a) if it had properly met its good-faith conferencing obligations, relying on Third Division Award 40964 and Public Law Board No. 6205, Award 12 and precedent cited therein.

In its denials of March 13 and May 20, 2012, the Carrier argued that the Organization failed to meet its burden to prove that the work in question was reserved to BMW-represented employees, noting that this type of work has customarily and historically been contracted, and that the Board has recognized its past practice of contracting this type of work and the use of the Herzog MPM, which is specialized equipment that can only be contracted with an operator, citing Third Division Award

42079. The Carrier also noted that it met its notice and conferencing obligations pursuant to Rule 52, and that the Claimants were fully employed and were not entitled to compensation, relying on Third Division Awards 31284, 31288 and 31652.

A careful review of the record convinces the Board that this case must be decided on the issue of whether the Carrier met its notice and conferencing obligations set forth in Rule 52(a). The Carrier never claimed that the work in question is not arguably scope-covered, or that no notice was required – only that (1) it was not reserved to BMW-represented employees under the Parties' Agreement, (2) it had a practice of contracting this type of specialized equipment work, and (3) it timely notified the Organization of its intent to contract out the work. Thus, we find that the Rule 52(a) provision requiring the Carrier to notify the General Chairman "as far in advance of the date of the contracting transaction as practicable and in any event not less than fifteen (15) days prior thereto," and to promptly meet to discuss the contracting upon request and "make a good faith attempt to reach an understanding" applies in this case.

The record exchanged on the property establishes that the contracting in question commenced on January 3, 2012, the same date that the Organization requested a conference, seven days after the notice was sent, and seven days prior to the holding of a conference, which was scheduled by the Carrier. Other than addressing the sufficiency of the notice and contending that it was timely served, the Carrier did not respond to the Organization's argument that the notice was not served at least 15 days prior to the commencement of the work and did not comply with the requirements of Rule 52(a). None of the cases relied upon by the Carrier in support of its position that the Board has recognized its right to contract work involving specialized equipment presented a situation where the notice and conferencing requirements of Rule 52 were not met. See, e.g. Third Division Awards, 29306, 32433, 37354, 40438; Public Law Board No. 5546, Case 15; Public Law Board No. 6205, Awards 1 and 2; Public Law Board No. 7098, Awards 9 and 10.

Thus, without reaching the merits of the contracting dispute, we conclude that the Carrier violated Rule 52(a) by failing to timely notify the Organization of its intent to contract out the work in question and by failing to meet with the Organization before the contracting transaction commenced; see, e.g. Third Division Awards 29472, 30823, 32861, 32862, 36015, 37572, 38349 and 40964; Public Law Board No. 6205, Award 12; Public Law Board No. 7096, Award 1. With respect to the appropriate remedy, regardless of whether the Carrier could have legitimately contracted out this work or proven the need for specialized equipment for which the Claimants were not trained

had it met its notice and conferencing obligations, and absent evidence of an “emergency” or situation that had to be completed by a certain time, we are in accord with Board precedent that this case represents a lost work opportunity for the Claimants, regardless of whether they were fully employed, and that they should be compensated for that loss. See, e.g. Third Division Awards 29472, 30823, 32861, 32862, 36015 and 37572. Thus, we sustain the claim, and direct the Parties to conduct a joint record check to determine the number of hours worked by the contractor performing the disputed work in this case.

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 26th day of August 2015.