

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42514
Docket No. MW-42090
17-3-NRAB-00003-130006**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated on August 10, 11 and 12, 2011 when the Carrier assigned outside forces (W. T. Byler Construction Company) to perform Maintenance of Way Department work of building track panels in the vicinity of Baytown, Texas for installation at Mile Post 35.40 on the Baytown Subdivision (System File UP983PA11/1558558 MPR).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out said work or make a good-faith effort to reach an understanding and reduce the amount of contracting as required by Rule 9 and the December 11, 1981 National Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Williams, C. Martinez, A. Eason, B. Collins and K. Gipson shall now each be compensated for twenty-four hours (24) at their respective straight time rates of pay.”**

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 letter dated December 9, 2010, the Carrier gave notice to the General Chairmen of the Organization in five different states of the Carrier's intent "to contract work from time to time to outside contractors at the attached locations." There were 67 locations were listed with the beginning and ending mileposts for performance of the work, which was described in the notice as follows:

"Some of the work to be performed will be tie renewal, crossing renewal, and drainage work. Equipment to be used: asphalt laydown machine, on-track brushcutter, trackhoe with undercutter head, tamping head, tie inserter head, grapple trucks, rotary bed dumptruck, weed eater with operators, badger ditcher, Holland flash butt welder, multi-purpose ditcher, backhoe, dump truck, truckhoe, loader, bulldozer, brush-hog mower, crane and chainsaw with operators and traffic control support services in connection with construction work and track maintenance."

The notice also contained the following disclaimer:

"This is the type of work that has customarily and traditionally been performed by outside contractors' forces. Serving of this "notice" is not to be construed as an indication that the work described above necessarily falls within the scope of your agreement, or as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMWWE."

The General Chairmen were informed that if they desired a conference in connection with the notice, they should make contact with the Labor Relations Department.

By letter dated January 3, 2011, the Organization took exception to the notice on the grounds that it was "vague and improper" for various reasons. One of the reasons was that "instead of following with descriptions of 'types of work,' [the Carrier's] letter

simply lists 21 pieces of equipment that Union Pacific apparently believes it may need 'at attached locations'." The Organization further stated that the notice did not comply with the requirements of Article IV of the May 17, 1968, National Agreement or the national December 11, 1981, Letter of Agreement, explaining why, in its opinion, this was so.

The work in dispute in this proceeding – the building of track panels – was performed by the Contractor's employees on August 10, 11, and 12, 2011. By letter dated August 31, 2011, the Organization submitted a claim and grievance to the Carrier requesting 24 hours' pay at straight time each for five employees on the basis that the contractor had five men working in the vicinity of Baytown, Texas, MP 35.40 building the panels. The grievance claimed that building track panels is fundamental track maintenance work that has customarily and traditionally been performed by Maintenance of Way forces in the past. Therefore, the grievance claimed, the "the Carrier violated the Scope Rule and Rules 1, 2, and 9 when it contracted and assigned the building of these track panels to outside forces." In addition, the Organization asserted, "the Carrier compounded this violation of the Agreement when it failed to provide a proper advance notice of intent to contract this work and when it failed to make a good faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 9 (Article IV of the 1968 National Agreement) and the National December 11, 1981 letter of Agreement."

Rule 9 states in full as follows:

- “(a) In the event the Carrier plans to contract out work within the scope of this Collective Bargaining Agreement, Carrier will 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.
- (b) If the General Chairmen (sic), or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier will promptly meet with him for that purpose. A good faith effort will be made 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.
- (c) Nothing in this Rule will affect the existing rights of either party in connection with contracting out. Its purpose is to require the

Carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

(d)

- (1) The amount of subcontracting, measured by the ratio of adjusted Engineering Department purchased services (such services reduced by costs not related to contracting) to the total Engineering Department budget for the five-(5) year period 1992-1996, will not be increased without employee protective consequences. In the event that subcontracting increases beyond that level, any employee covered by this Agreement who is furloughed as a direct result of the increased subcontracting will be provided New York Dock level protection for a dismissed employee, subject to the responsibilities associated with such protection.
- (2) Existing rules concerning subcontracting which are applicable to employees covered by this Agreement will remain in full effect.”

Rule 9 (a) requires the Carrier to give the Organization not less than 15 days’ notice in writing of its plans to contract out “work” within the scope of the collective bargaining agreement. The Organization contends that the notice was defective in this case because it did not identify track panel construction work at the specific mile post location involved in this particular job. That is true, but the notice is similar to the notice found adequate in Third Division Awards 40861 and 40863 involving these same parties. The notice sent to the Organization by the Carrier in that case stated as follows:

“THIS IS TO ADVISE OF THE CARRIER’S INTENT TO CONTRACT THE FOLLOWING WORK:

PLACE: At various locations on the North Platte Service Unit.

SPECIFIC WORK: Providing any and all fully operated fueled and maintained and or non operated equipment necessary to assist with program work, emergency work, and routine maintenance commencing May 5, 2008 to December 31, 2008.”

The particular work contracted out in Award 40863 was operating a truck crane to lift a frog from a track and set in a new frog on the South Morrill Subdivision. The notice made no specific reference to removing or installing a frog or even mentioned the word frog. This Board found the notice sufficient for purposes of Rule 52 of the parties' agreement. The notice requirements of Rule 52 of that agreement were virtually identical to the notice requirements of Rule 9 of the present Agreement. The only difference is that Rule 52 contains an express exception for "emergency time requirements," a consideration not relevant in the present case.

There are Awards that go both ways on the question of whether a general or blanket-type notice is sufficient to fulfill the Carrier's notice obligations under Rules 9 and 52. A well-reasoned decision supporting the Organization's position on that issue is Award 14 of Public Law Board No. 7099. However, the great majority of more recent decisions on that issue go the other way and support the Carrier's position. In addition to Third Division Awards 40861 and 40863, see Third Division Awards 42076, 42116, 42156 and 42159 between these same parties. These cases involved decisions by Referees Benn, Newman, and Halter upholding the sufficiency of blanket or general notices. In light of the recent line of decisions on the issue, in this Board's opinion it would be destabilizing to the relationship of the parties for this Board to now hold that general notices of the kind found sufficient in Awards 40861, 40863 and other Third Division cases between the parties are, in fact, inadequate and a violation of Rule 9. The Board declines to take that path. It finds that the notice given in this case was consistent with general notices found sufficient by the Board in a number of other Awards involving these parties and the same or similar contract language and therefore did not violate Rule 9 of the Agreement.

One of the objections voiced by the Organization to the Carrier's notice was that "instead of following with descriptions of 'types of work,' [the Carrier's] letter simply lists twenty-one (21) pieces of equipment that Union Pacific apparently believes it may need 'at attached locations'." The Board agrees that merely listing equipment without describing the kind of work to be performed is not adequate notice under Rule 9. In the present case, however, the listing of equipment was followed by the following words: "with operators and traffic control support services in connection with construction work and track maintenance." The Carrier, therefore, was plainly stating that the equipment would be used in connection with construction work and track maintenance. In Awards 40861 and 40863 the notice described the specific work as "... equipment necessary to assist with program work, emergency work and routine maintenance commencing May 5, 2008 to December 31, 2008." The Board, as noted, found such notice sufficient. Similarly, in the present case the listing of the equipment is followed by a description of the kind of work to be done with the equipment.

Rule 9 permits the Carrier to contract out work where there is a mixed practice of contracting out such work. See Third Division Award 42251, pages 15-16. The Carrier presented evidence of at least 18 instances of installing or laying track panels that were let to contractors. This is work that is similar or identical to the work in issue in the present case and establishes a mixed practice with regard to the performance of such work. Based on the existence of a mixed practice of both bargaining unit employees and contractors performing such work, the Board finds that the Carrier did not violate the Agreement when it contracted out the work in issue. See Third Division Awards 33646, pages 3-4 and 42251, pages 15-16.

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 11th day of January 2017.