PUBLIC LAW BOARD NO. 5564

Brotherhood of Maintenance of Way Employees	)	AWARD NO. 40
	)	CASE NO. 40
and	)	
	)	
Northeast Illinois Regional Commuter Railroad Corporation	)	

STATEMENT OF CLAIM:

"Claim of the System committee of the Brotherhood that:

1. The Carrier violated Rule 1 Scope and Rule 2 Subdepartments – Seniority Groups and Ranks of the Agreement beginning on August 9, 10, 11, 12, 13, 16, and 17, 2010 when it assigned outside forces instead of B&B Department employees to remove and replace the roof on the Matteson Station head house in Matteson, Illinois and the warming house shelter and to install station identification signs and bulletin boards on the station platforms.

2. As a consequence of the violation referred to in Part 1 above, B&B Employees M. DeVito, A. Chorak, D. Galligan, P. Rodriguez and R. Bowsky shall be compensated at their respective rates of pay for an equal and proportionate share of all hours worked by the contractor's employees."

OPINION OF BOARD:

Public Law Board No. 5564, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimants hold seniority within the Carrier's B&B Subdepartment, and when events giving rise to this dispute occurred, they were headquartered on the Metra Electric Division. The record establishes that a microburst weather event occurred on June 23, 2010, during which the roof and building supports of the Matteson Metra passenger station were severely damaged. While B&B forces were called to perform the initial cleanup, the Carrier ultimately determined that the work of permanently repairing the structure should be performed by an outside

contractor. Pursuant to Rule 1 of the parties' Collective Bargaining Agreement, the Carrier notified General Chairman Hayward Granier by letter dated June 29, 2010 in relevant part as follows:

> ***"As a result of a tornado that struck Matteson, Illinois on June 23, 2010, severe damage occurred to the passenger station roof. As a result, BMWE forces were called in to remove the damaged sections, clean away debris, and to effectuate temporary repairs including installation of plywood sheathing. Due to this emergency, the Carrier intents (sic) to hire a contractor to supplement the workforce to complete permanent repairs to the roof and associated appurtenances. This work is due to commence on or about July 1, (as soon as all arrangements are made) and expected to take a couple of days. The work is being done under an emergency purchase order and is not going out for bid.***
>
> ***Due to the emergency nature of the situation, the usual notice and conference is impossible. However, we are available to discuss the matter with you at any time..."***[1]

The "emergency" work referenced in the Carrier's letter to General Chairman Granier did not, however, commence until August 9, 2010. On September 8, 2010, bargaining unit member Marty DeVito submitted a claim on his own behalf, and also on behalf of four additional B&B subdepartment employees, which stated as follows:

> ***"...The work in dispute at this station, when started, are the work of the Metra Electric Division Bridge and Building Department workers... the above mentioned work has been performed by the Bridge and Building Department at Matteson Station within the past 4 years and many other main line stations, Blue Island branch and South Chicago line."***

In denying the claim on November 4, 2010, the Carrier argued, in part, that a proper "Notice of Intent" to subcontract had been sent to the Organization because of the "emergency" nature of the requisite repairs. Specifically, the Carrier relied on exception (c) #3 in Rule 1, which states: "time requirements exist which present undertakings not contemplated by the Agreement that are beyond the capacity of its Maintenance of Way Employees." Later, the Carrier simply argued that the B&B forces available were not sufficient to handle the existing work load and also complete the project at Matteson. Importantly, the Carrier also argued that the claim itself was procedurally invalid, because it had not been submitted by "a duly elected representative of the BMWE."

Throughout the subsequent handling of the claim on the property, the Carrier continued to maintain that it was "fatally and procedurally" defective according to Rule 33(e), which states, "This rule recognizes the right of

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[1] Carrier Exhibit B.

representatives of the Organization party hereto to file and prosecute claims and grievances for and on behalf of the employees it represents." Claimant, the Carrier argued, was not a "representative of the Organization," and thus had no contractual authority to file a claim on behalf of any employee other than himself. Indeed, as the Organization duly pointed out, Claimant did, at the very least, have that right. Relevant Rule 33(a) states, "All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based." (Emphasis added.)

The Board is in a difficult position here, because the portion of the claim on behalf of M. DeVito, who submitted it on his own behalf, is indeed valid according to Rule 33(a). However, the Carrier is correct in stating that, pursuant to Rule 33(e), DeVito had no authority under the contract to pursue a claim on behalf of any other employee. Only a "representative of the Organization" may do that. The problem for the Board, then, is this; a finding that the entire claim is procedurally defective and thus invalid, would completely negate DeVito's contractual right to pursue a complaint on his own behalf, which is expressly preserved under Rule 33(a). On the other hand, a finding that the entire claim is valid would completely negate certain authority that has been expressly reserved for "representatives of the Organization" under Rule 33(e).

After carefully considering these unusual circumstances, we will rule that the claim is, at least in part, procedurally viable. Claimant DeVito was, in fact, privileged under the contract to submit a claim on his own behalf, and that he did. As for his coworkers, their claims are not valid. There is simply no provision in the Collective Bargaining Agreement under which this Board may deem Chorak, Galligan, Rodriquez and Bowsky proper claimants in this case. Their interests were not properly represented by the Organization, and as such their claims to any remedy, should a remedy ultimately be awarded, must be dismissed.

The Carrier also argued before the Board that DeVito's initial claim was procedurally defective, in that it cited Rule 1 – Scope of the applicable BMWE agreement, but then quoted subcontracting language from an entirely different contract. However, in his initial denial letter to DeVito dated November 1, 2010, Chief Engineering Officer J. Lorenzini took no notice of the evident mistake, and instead defended the Carrier's actions under Rule 1(c) #3 (time requirements). Lorenzini explained further that, "In this instance, the B&B forces available were not sufficient to maintain the existing work and the project at Matteson." Lorenzini also noted that the Organization had been duly informed of the Carrier's intent to subcontract the roof repairs very early in the process, and as such, the Collective Bargaining Agreement had not been violated.

Because the Carrier made little of DeVito's obvious "rookie" mistake in referencing certain provisions not contained in applicable Rule 1, neither will this Board. DeVito did cite the correct rule number in his initial claim, and the Carrier

duly responded in its own defense according to what the appropriate language actually states. In fact, Lorenzini did not mention the error at all. It is clear, then, that the parties on both sides of this issue knew exactly what was at stake and why the claim had been presented. The proper Agreement rule was cited, and only its correct contents were referenced in the Carrier's subsequent arguments concerning the claim's essential merit.

As to merit, then, this was, again, a difficult call. The Carrier's only stated reason for subcontracting the work at issue had to do with time constraints relative to a stated "emergency." Had the disputed work commenced immediately after the precipitating weather event, as the Carrier informed the Organization that it would, the Board would have a much more difficult time crediting any of the Organization's contentions. Indeed, the Organization was duly notified of the Carrier's intent to subcontract the roof work at Matteson, and the record is clear that no exception was ever taken. However, the sole reason a Rule 1 exemption was invoked in the first place was that the Carrier faced an "emergency" situation. As the Organization argued before the Board, in light of the fact that the actual work was ultimately deferred for more than 5 weeks and the resulting claim was timely presented thereafter, the assertion of an "emergency" became an affirmative one with the associated burden shifting to the Carrier.

When all is said and done, the Carrier did nothing more here than state that it simply did not have enough people to do the work on the Matteson building and satisfy its other obligations as well. In the throes of a true and time-sensitive emergency, the Board absolutely understands that such a challenge could well occur. However, the Carrier did not substantively argue that the work itself could not have been performed by members of this bargaining unit, or in the alternative that the operational circumstances were so dire (some five weeks later) that securing outside help became necessary in order to protect the Carrier's business interests in a crisis. Either or both of these realities would have to have been present to overcome the obvious classification of work conflict, and here, the Carrier failed to satisfy its affirmative burden to demonstrate that contracting out recognized bargaining unit work under these particular circumstances was a necessity. The disputed work was not performed concurrently, by any stretch, with the actual weather event that prompted the initial notice of intent to subcontract. Clearly, the Carrier did not consider the Matteson station roof to present an "emergency" within the normal understanding of that word, since work on it was deferred for more than a month after the precipitating event.[2] The Carrier did not meet, to the satisfaction of this Board, its obligation show the "nature, extent and duration" of the stated emergency, and as such, the Board will rule that DeVito's claim indeed has merit.

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[2] "First, the Carrier's assertion that the work constituted an emergency is not supported by the record. The burden rests with the Carrier to demonstrate the existence of the emergency. See; Third Division Award 31835 ('It is... well settled that assertions of emergency circumstances are treated as an affirmative defense. As such, the burden of proving the nature, extent, and duration of the emergency must be satisfied by the party asserting its existence.')..." (Third Division Award No. 32862; Benn, 1998)

As to remedy, however, the Board cannot under the circumstances, and will not, award Claimant DeVito a windfall equivalent to what the total value of this claim would have been had all five claimants been valid participants in the complaint. Accordingly, the Carrier is directed to compensate Claimant DeVito, at the appropriate rate of pay, only his "proportionate share" of all hours worked by the contractor's employees. The following Award so states.

AWARD

Claim is sustained in part and denied in part, in accordance with the above Findings.

ANN S. KENIS, Neutral Member

Tim Martin Hort
Carrier Member

Ryan Hidalgo
Organization Member

Dated this 25 day of March, 2014.