AWARD NO. 11
CASE NO. 11

PUBLIC LAW BOARD NO. 7096

PARTIES TO DISPUTE	)	BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
	)	
	)	UNION PACIFIC RAILROAD COMPANY (FORMER CHICAGO NORTHWESTERN TRANSPORTATION COMPANY)

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (ConStruct and M&K Dust Control) to perform Maintenance of Way and Structures Department work (cutting trees, grading, ditching and install culverts) on the right of way between Mile Posts 13 and 64 on the Clinton Subdivision beginning March 22, 2005 and continuing (System File 4RM-9652T/1424339 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman a proper advance notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. Walton, S. Koeppen, D. Perdue, K. Rosel, M. Davis, D. Bolen, G. Hart, G. Neuroth, J. Safely, M. Lindsey and J. Koeppen shall now each be compensated at their applicable rates of pay for an equal and proportionate share of the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning March 22, 2005 and continuing.

OPINION OF BOARD

By notice dated March 4, 2005, the Carrier advised the Organization of its intent to solicit bids to "furnish operated equipment to assist railroad forces in performing program work, routine maintenance and emergency work on an 'as needed' basis", identifying the location of the work to include "Clinton Sub MP 6.9 to MP 202.2, Boone Sub MP 202.2 to MP 254.8 and Oskaloosa Sub MP 247.0 to MP 270.0."

By letter dated March 7, 2005, the Organization expressed its desire to conference the contracting notice and stated that "[t]he Brotherhood requests an immediate conference of this notice .... before the Carrier commits itself to using outside contractors."

Conference was held on March 23, 2005, without agreement reached between the parties.

According to the claim and the correspondence on the property, the disputed work covered by this claim commenced March 22, 2005 — *i.e.*, 18 days after the notice issued and one day before the conference was held.

Rule 1(B) obligates the Carrier to "notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto ...." Rule 1(B) further requires that "[i]f the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose."

The 15 day advance notice requirement under Rule 1(B) was met. Notice to the Organization issued March 4, 2005 and the work began March 22, 2005 — more than the 15 day period required by Rule 1(B). Because the Organization requested a conference by letter dated March 7, 2005 and the work began March 22, 2005, we know that the Organization was *actually* aware of the Carrier's intent to contract the disputed work for at least 15 days in advance of the commencement of the work.

The problem raised in this case with respect to the Carrier's notice and conference obligations under Rule 1(B) is that the work began on March 22, 2005 and the matter was not conferenced until March 23, 2005 — one day *after* the work began. Under the circumstances of this case, we do not find that the Carrier violated its conference obligations under Rule 1(B).

While the Organization requested "... an immediate conference of this notice ...", there is no showing that any undue delay in meeting for the conference was attributable to the Carrier. Without that kind of showing, we are unable to find that the Carrier was at fault for any delay in conferencing the notice as requested so as to make a conference held after the work began meaning-

less as a *fait accompli*. *Compare Award 1* of this Board where we sustained a claim under Rule 1(B) because the work began on the day the Carrier gave the Organization notice of its intent to contract out the disputed work thereby completely frustrating the notice and conference provisions of Rule 1(B).

With respect to the merits, for reasons discussed in *Award 1* of this Board, we reject the Carrier's exclusivity arguments.

Again, with respect to the merits, Rule 1(B) provides, in pertinent part:

> ... [S]uch work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or time requirements must be met which are beyond the capabilities of Company forces to meet. ...

The Carrier asserted in its March 23, 2005 letter confirming the conference that:

* * *

> It was explained to you that the Company is not adequately equipped to handle the work in that the time requirements are such that it is beyond the capabilities of Company forces to meet. ...

The Carrier also asserts through the August 13, 2005 statement of Director Track Maintenance S. Hoerstkamp with respect to the work that:

> Work on the Clinton Subdivision at MP 66.50 required the use of equipment that Union Pacific did not have. We Removed Heavy Brush, Large Trees and many tons of waste. Also required expertise with a transit engineering tool to ensure that the ditch would drain properly when work is complete.

In its November 18, 2005 letter, the Organization responded that:

* * *

> 3). The Carrier has dozers, brushcutters, pipe jacking and boring machine, dump trucks, etc. How can they say they don't have the specialized equipment? Brushcutters are good for one and one thing: CUTTING BRUSH, pile jacking and boring machines are good for one and only one thing; INSTALLING CULVERTS, and the BMWE has many qualified operators for all the mentioned equipment.

The Organization bears the burden. As we stated in *Award 2* of this Board:

> In rules disputes such as this, the burden is on the Organization to demonstrate all the necessary elements of its claim. Based on the development of the record on the property as just discussed, there are irreconcilable factual conflicts concerning whether the Carrier did not possess the required equipment and whether the Carrier's forces were not capable of applying the chemicals. But those are the relevant criteria under Rule 1(B).

A record in factual conflict on those criteria under Rule 1(B) such as this record is not sufficient for us to conclude that the Organization has sufficiently carried its burden. On that basis, the claim shall be denied.

For the above reasons, with respect to the merits, we find this record sufficiently in conflict with respect to the criteria in Rule 1(B) therefore requiring that the claim be denied.

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

D. A. Ring
Carrier Member

R. C. Robinson
Organization Member

Chicago, Illinois

Dated: April 8, 2008