BEFORE
PUBLIC BOARD No. 7097

Award No. 9
Case No. 9

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	
vs.	)	**PARTIES TO DISPUTE**
	)	
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 to perform Maintenance of Way and Structures Department work (install metal bollards) along the road north of Global II E Lot and by the road along the south side of Proviso Hump Yards in Proviso, Illinois on September 28, 29, 30 and October 1, 2004 instead of Messrs. K. Anetsberger, D. Johnson and M. Kress (System File 9SW-2104T/1414635 CNW)

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper written 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 violation referred to in Parts (1) and/or (2) above, Claimants K. Anetsberger, D. Johnson and M. Kress shall now '*** each be compensated an equal and proportionate share of the one hundred sixty (160) hours at their applicable rate of pay.'"

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employes and Carrier involved in this dispute are respectively Employes and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

The Claimants identified in the Statement of Claim all have established and hold seniority in their respective classes in the B&B Department. On the dates involved here, they were regularly assigned to positions under the direct supervision of B&B Supervisor K. Eich.

On June 17, 2004, the Carrier gave the General Chairman 15 days notice of its intent to contract out the following work:

> Location: Chicago, Illinois (Global 2 Inter-modal Facility North Service Road)
>
> Specific Work: furnishing and installing two (2), 15 ft HD security gates per attached specs, and furnishing and installing one (1) 16 ft HD security gate.

Attached to the letter were the specs for Service Order 29334 that covered the work in question. The Organization requested a conference regarding the notice, which was held on July 2, 2004. On September 28, 29, 30 and October 1, 2004, the Carrier assigned outside contracting forces (Midwest Fence) to perform the work of installing metal bollards along the road north of Global II E Lot and by the road along the south side of the Proviso Hump Yards in Proviso, Illinois.

The Organization contends that the Carrier violated Rule 1 and the parties' December 11, 1981 letter of agreement (the "Berge-Hopkins Side Letter") because its letter to the General Chairman failed to give proper advance notice of the planned contracting, raising questions as to the Carrier's good faith in this undertaking. As further proof of the Carrier's lack of good faith the Organization objects that the Carrier did not mention the installation of metal bollards during their July 2 conference about the work, and cites a perceived history of Carrier failures to honor the intent of the December 11, 1981 letter. The Organization also contends that the contracting violated Rules 1, 2, 3, 4, 5, and 7 of the Agreement because the augers identified by the Carrier to be special tools were readily available for rent or lease,

and because the installation of gates is work that has customarily and historically been performed by B&B forces in connection with their duties maintaining facilities and structures located on the Carrier's right of way throughout the Claimants' territory. The Carrier responds that the Organization has failed to prove that there was any violation because the record shows that the June 17, 2004 letter and the specs attached were sufficient notice of the work being contracted out, and that the work required specialized equipment that the Carrier did not own, and because the Organization failed to present probative evidence that the work was historically, customarily and exclusively performed by the Organization employes.

While the Organization makes much of the Carrier's alleged failure over time to live up to its obligations under the Side Letter, and the Carrier disputes whether the Side Letter continues to impose the obligations identified by the Organization, it is unnecessary to determine here whether the December 11, 1981, letter of agreement imposes on the Carrier any obligations over and above those of the parties' collective bargaining agreement. Rule 1B permits the Carrier to contract out work otherwise within the Scope of the Agreement where "special equipment not owned by the Company . . .are required. . . " provided that the Carrier gives the Organization proper notice and makes "a good faith attempt" to reach an understanding with the Organization concerning the contracting. Here, the Carrier identified special equipment valued at almost $90,000 that was necessary to complete the work and that the Carrier did not own. Although the Organization asserted that the equipment could be rented or leased readily, no specific evidence was offered to support this claim. The Organization bears the burden of proving a contractual violation, but having failed to overcome this dispute of fact has failed to meet its burden on this point. Even if the bollards serve the function of a maze of concrete blocks previously installed by Organization employes, the Organization has failed to refute the Carrier's evidence that it lacked the equipment to install this different structure. Thus, whether or not Organization employees "historically, customarily and exclusively" performed the work of building other types of security structures, the Carrier's lack of the necessary equipment to install these elements gave it the right under Rule 1B to contract out the work.

Nor has the Organization demonstrated that the Carrier failed to give appropriate notice or make a good faith attempt to reach an understanding as required by Rule 1B. Although "bollards" were not expressly listed in the notice letter, that

letter incorporated "attached specs" which adequately described the structures covered by the Service Order. Furthermore, according to the Company, at the July 2, 2004, the parties discussed the fabrication and installation of security gates, including "special equipment to drive the guardrails into the ground without disturbing the pavement." The bollards were shown as an integral part of the guardrails. While the Organization contends that "bollards" were not discussed at that conference, contemporaneous correspondence from an Organization official reports that "installation of guard rails, gates and security fence upgrades" was discussed, along with the augers that the Company asserted it did not own. On this record, the Board finds that the work in dispute here was adequately identified in the Carrier's notice, and that the Organization has failed to prove in this instance that the Carrier violated the requirement of Rule 1B to make a good faith attempt to reach an understanding about the contracting of the work in question. See, e.g., Third Division No.31170 ("The fact that a full discussion of all issues the parties wished to bring forward was held during the conference, . . . negates any deficiency in the specificity of the notice.") The Organization has failed to show that the Carrier violated any of the contract provisions cited, and the claim is denied on that basis, without need to reach any other issues raised by the parties.

AWARD

Claim denied.

Lisa Salkovitz Kohn
Neutral Member

Carrier Member

Organization Member

Dated: June 27, 2008