Award No. 10
Case No. 10

PUBLIC LAW BOARD NO. 7098

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
(
(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 (Belger Cartage) to perform Maintenance of Way and Structures Department work (operate crane with pile driver) to drive pile for a bridge replacement at Mile Post 157.34 on the Clinton Subdivision beginning on July 19, 2005 and continuing through October 4, 2005 (System File 3SW-2135T/1434423 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance 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 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Kalfas and M. Hubble shall now each be compensated at their respective and 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 July 19, 2005 and continuing through October 4, 2005."

FINDINGS:

Public Law Board No. 7098, 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On May 5, 2005, the Carrier sent a 15-day notice of its intent to contract out work at Bridge 157.34 on the Railroad's Clinton Subdivision near Marshalltown, Iowa. The letter of

notice, which was headed Service Order No. 31594, described the work as follows:

> Specific Work: Providing a fully fueled, operated, and maintained crawler crane with 3rd drum and a minimum 150' conventional boom, 105' of leads and pile driving hammer capable of driving 14" x 89 lbs x 60' steel H pile, with a minimum potential energy rating of 45,000 ft. lbs. pile driver while assisting Railroad's forces in driving new bridge bents consisting of 24 piles on 2 tracks and replacing a 38' bridge with a 90' bridge. The controlling weight is 21, 500 lbs

At the Organization's request the parties met in conference on May 16, 2005, on the notice regarding contracting. On the same date J.P. Steiger, Assistant Director Labor Relations, sent a letter to Mr. W.C. Jorde, Assistant Chairman, BMWE, purporting to state the respective positions of the parties in the conference. Mr. Steiger's letter stated as follows in pertinent part:

> During our conference, you took the position that your members had an exclusive right to perform this work.
>
> It was explained to you that the work involved the use of special equipment that the Carrier does not own and special skills not possessed by BMWE represented employees. This project requires larger cranes than those accessible to the Carrier and Carrier forces do not have the skills to operate such equipment and complete indicated work in a timely basis.
>
> Under the circumstances, Carrier's use of a contractor to perform this work is not a violation of that agreement, and you were advised that the Carrier would proceed with the contracting of this work.

Mr. Jorde's understanding of the parties' respective positions at the conference apparently differed from Mr. Seiger's, and he wrote to Mr. Steiger in pertinent part as follows on May 25, 2005, purporting to state their positions:

> In conference Carrier alleged that their existing equipment was not available to perform the pile driving in a timely manner.
>
> The Brotherhood expressed the position that Carrier forces are regularly assigned to drive piling with Carrier owned equipment. Carrier forces are trained and fully capable of performing this work. Any time constraint is of the Carrier's own design and is not a legitimate reason for contracting out this work. It was also pointed out that this work is to be performed on double main territory and the track with the bridge segment involved will be out of service during this project.

No agreement was reached during this conference with regards to this pile driving project.

By letter dated August 30, 2005, the Vice Chairman of the Organization for the Chicago & North Western System Federation filed a claim alleging that a contractor, Belger Cartage, drove piles for a bridge replacement at milepost 157.34 on the Clinton Subdivision on various dates between July 19, 2005, and August 25, 2005, utilizing two men who worked 460 straight-time hours driving the pile on the Carrier's property. The use of a contractor, the claim alleged, violated the Scope clause, Rule 1, and Appendix 15 of the November 1, 2001, CNW/CBA Agreement. The claim continued:

> There were no special skills, special equipment or special material used in this project. The Carrier has Cranes with Pile Drivers in its inventory. If equipment was needed the Carrier could have easily moved a Pile Driver to the area or rented one in compliance with Appendix 15.
>
> Driving piling for bridges is work belonging to and historically performed by the Brotherhood of Maintenance of Way Employees through out the former C&NW territory.
>
> The Carrier has the equipment and trained operators at various locations throughout the system that could have been used.
>
> Claimants Kalfas and Hubble are assigned to the System Y-75 Crane that is equipped with a Pile driver and are qualified to perform the needed work.

The claim stated that it was being filed as a continuing claim in accordance with Rule 21(d) of the Agreement.

The Carrier's Manager Labor Relations answered the claim by letter dated October 20, 2005. The answer denied any violation of Rule 1 or Appendix 15 of the Agreement. The work was contracted out, the answer stated, because it "involved the use of special equipment that the Carrier does not own and special skills not possesse[d] by the BMWE." The project, the answer stated, "requires larger cranes than those accessible to the carrier and Carrier forces do not have the skill to operate this equipment and complete the work in a timely basis." The Carrier, the answer asserted, "is not adequately equipped to handle this work for this project." Further, the answer stated, the Claimants were not deprived of a work opportunity because they "were

working on other projects at the time of the work listed above." In addition, the answer declared, "the Carrier needed the Claimants to perform their duties elsewhere." Finally, the answer maintained that the claim was defective because it duplicated another claim for the same two claimants on another project for the same dates.

The General Chairman, on behalf of the Organization, by letter dated December 14, 2005, appealed the denial of the claim. The appeal took the position "that BMWE operated Cranes could perform the work and any necessary equipment not owned by the Carrier could be procured by leasing under Rule 7 and the Berg-Hopkins letter which is Appendix 15. . . ." The appeal further stated:

> Claimants Kalfas and Hubble both possess the skills to safely perform pile driving as this work has been performed by them many times in the past. Had the Carrier leased or rented a larger Crane if needed, the Claimants could have performed the pile driving. The skills needed to operate a larger crane are the same as the Y Cranes presently operated by BMWE employees.

Regarding the Carrier's position that the Claimants did not lose a work opportunity because they worked on other assignments, the appeal stated that "there are several Board Awards that uphold the principal that full employment is not a deterrent to an award of damages."

The appeal disputed the Carrier's contention that the present claim was duplicative, asserting, "This is not true in the instant cases as the Carrier failed to show or claim the bridge work was of an emergency nature or had to be completed within certain time limits. It is the duty and obligation of the Carrier," the appeal argued, "to schedule and provide men and equipment to properly maintain and upgrade their facilities. The Carrier has failed in these endeavors by failing to maintain adequate forces and equipment necessary to perform the B&B work." Noting that the present claim was for an alleged continuing violation, the appeal stated that the claim was being amended to seek reimbursement for a total of 730 hours' straight-time and 32 hours at

time and a half.

The Carrier, by its Director Labor Relations, replied to the appeal by letter dated January 12, 2006. The Carrier described the crawler crane allegedly required for the work in issue and reiterated that "the work in question required special skills and equipment, not possessed by the Carrier and its employees." In addition, the Carrier asserted that it "does not have the qualified personnel to complete this work with the other commitments of the B & B department." It denied that the fact that it did not lease the equipment involved showed that it did not act in good faith, asserting that "[t]he fact of the matter is that none of the named Claimants, or any other Carrier employee for that matter, has ever utilized, nor are they trained to operate such equipment." There was "no basis for the penalty claimed," the Carrier stated, because the Claimants were fully employed by the Carrier at all relevant times. Further, the Carrier declared, both Claimants were being utilized on other projects and were therefore unavailable to perform the work in question.

The claim was conferenced on March 15, 2006, and on April 13, 2006, in a letter to the Carrier's Director Labor Relations, the Organization, by the General Chairman, summarized the Organization's position as stated at the conference, as follows: 1) the claim was not a duplicate claim of Carrier file1434424, BMWE File No. 3SW-2136T because the location of the work was different in the two claims; 2) the Carrier failed to show the need to complete the bridge repair to meet time requirements, and no time limits or requirements were ever specified; 3) the Claimants have the skills and qualifications to safely perform the necessary duties to drive bridge piling and perform such work on a regular basis; 4) regarding the Carrier's position that it did not have the necessary equipment in its possession, Appendix 15 of the CNW Agreement is applicable, and the equipment should have been rented or leased for the Claimants to operate.

The Carrier replied by letter dated April 21, 2006, from its Director Labor Relations in which it once again asserted that the Carrier does not own equipment such as the crawler crane in

question that was furnished by the contractor. "[N]or," the Carrier stated, "did the Carrier have in its possession capable equipment to perform the work in question." The fact that it did not lease or rent the equipment in question, the Carrier maintained, did not show bad faith since "neither Claimants, nor any other Carrier employee has ever operated, utilized, or been trained on such equipment." It therefore had no alternative but to contract out the work, the Carrier insisted, to "an outside contractor who not only possessed the necessary equipment, but also a skilled and qualified operator to assist the Carrier in the completion of this project." The Carrier asserted that the Organization "has failed to demonstrate or provide any proof or documentation that any of the Claimants have ever operated such equipment to perform the work in question, in the past."

According to Board authority, if one party asserts a material fact that is not denied by the other party, the assertion is accepted as factual. Third Division Awards Nos. 29859 and 30460. The Carrier asserted on the property that the equipment used by the contractor to perform the work in question was a particular crawler crane of a kind that it does not own and that the Claimants had never used or been trained on. The Organization did not deny that assertion. The Board therefore accepts it as factual. In the Board's opinion it is a reasonable deduction that if the Claimants have never operated or been trained on a particular piece of equipment, it may be accepted that they do not have the skill to use the equipment.

The Carrier has thus established that the contracted out work in question was performed by equipment not owned by the Carrier and which the Claimants did not have the skill to operate. The Organization asserted on the property that BMWE-operated cranes could perform the work and that if a larger crane was needed, the Carrier could have leased or rented one. Had this been done, the Organization asserted, the Claimants could have performed the pile driving since the skills needed to operate a larger crane are the same as the Y crane presently operated by the Claimants. The Carrier asserted on the property that it did not have in its possession equipment

capable of performing the work in question and that the Claimants did not have the skills to operate larger cranes of the kind needed to perform the work in question.

An assertion that is denied by the other party is not considered to be factual or evidence that can be relied on by the Board in support of a party's position. In the present case we have nothing but assertion with regard to whether equipment owned by the Carrier could have been used to accomplish the work in question. The Organization asserted on the property that the Carrier's cranes could have been used for that purpose, and the Carrier asserted on the property that it did not own such equipment. The Board will not accept either party's assertion as evidence in this case.

Similarly the Organization asserted that even if the Carrier did not own the necessary equipment, the latter could have rented or leased larger cranes that could have been used to perform the necessary repair work and that the Claimants possessed the skills to operate the larger cranes. The Carrier, on the other hand, asserted that the Claimants did not have the skills to operate the larger cranes. Again we have nothing but assertion on the factual issue of whether the Claimants were qualified to operate larger cranes of the kind necessary to perform the work in question.

Neither side saw fit to produce first-hand evidence. For example, the Carrier did not present an affidavit or written statement from the supervisor or manager of the Claimants explaining in detail precisely what was involved in performing the work in question; why a crawler crane of the kind provided by the contractor was needed to do the work; and why none of the cranes owned by the Carrier was suitable for performance of the work. Nor did the Carrier provide an affidavit or written statement from a supervisor or manager with first-hand knowledge of the work involved and the Claimant's skills and abilities stating whether there was another kind of crane, other than the one provided by the contractor, that could have been rented or leased to do the work and whether the Claimants' skills and abilities were sufficient to perform

the required repair work on such other crane and, if not, why not.

The Organization, on its part, did not provide an affidavit or written statement from the Claimants identifying any job similar to the project in question that they have performed with Carrier equipment and explaining why the Carrier's equipment could perform the work in dispute just as well as the crawler crane provided by the contractor. Nor did the Organization provide an affidavit or written statement from the Claimants or anyone else with the necessary knowledge explaining why another kind of crane, besides the crawler crane that actually did the work, could have been used had the Carrier rented it; and what similarities there were between such a crane and the crane that the Claimants normally operated that would permit one reasonably to conclude that they would have been able to operate such a rented crane to perform the work. Both sides saw fit to limit their evidence in support of their positions to assertions made by representatives (Labor Relations Manager, Director Labor Relations, Assistant General Chairman, General Chairman) of the respective parties. The Board has no control over the evidence the parties choose to present in support of their positions. It can rule only on the basis of the evidence before it.

The only uncontested assertion that the Board has before it in this case is the Carrier's assertion, not denied by the Organization, that the Carrier did not own a crawler crane of the kind used to perform the bridge repair work in question and that the Claimants never operated or were trained to use such equipment. In the absence of any evidence that the Carrier contrived to have the work done with equipment that its own employees did not have the skill to operate, so as to come within one of the contractual situations in which bargaining unit work may be contracted out under Rule 1 B of the applicable Agreement, the Board finds that the Carrier properly let the work in question to a contractor. In other words there is no evidence in this case that the Carrier could have rented equipment that its own employees were qualified to operate to accomplish the work but intentionally requested the contractor to use equipment its (the Carrier's) own

employees could not operate in order to have an excuse for contracting out the work. The claim will be denied.

It is in order to comment on certain of the Organization's arguments. The Organization contends that the claim should be granted because the Carrier had no intention of making a good faith effort to reduce contracting out and increase the use of its Maintenance of Way forces in this case. The Organization bases its argument on the inclusion in the Carrier's contracting out notice of the statement, "Work cannot begin prior to conference with BMWE and any necessary contracts executed." The Organization asserts that the quoted statement "makes it absolutely clear that the Carrier had no intention of making a good-faith attempt to reach an understanding concerning said contracting out and serving notice was a mere sham presented to portray compliance with the Scope Rule."

The Board fails to see any evidence of bad faith in the quoted statement. The Board discerns nothing in the quoted sentence that would preclude the Carrier from assigning the work to its own employees and deciding not to execute a contract with a contractor concerning the work should the conference with the Organization persuade it not to contract out the work. Nor does the solicitation of bids for particular work obligate the Carrier to accept any of the bids. Indeed it would have been foolish for the Carrier to tip its hand and include the statement if its plan was to proceed in bad faith and not have an open mind regarding the contracting out of the work. Having an open mind, however, does not necessarily mean accepting the other side's arguments. The Board believes that the Organization is reading meaning into the statement that was never intended by the Carrier and that is not a fair interpretation of the language used.

With regard to notice of contracting out, the Carrier did provide timely notice to the Organization. The Organization is correct that the notice was deficient in that it did not include the reasons for the contracting as required by Appendix 15. It is incumbent upon the Carrier to comply with Appendix 15 and include the reasons for contracting out the work in the notice. The

Carrier should make a special effort in the future to conform with that requirement. Indeed it is in the Carrier's interest to inform the Organization of the reasons in the notice because the very act of preparing a proper notice and formulating the reasons for letting the contract will insure that the Carrier carefully reviews its contemplated action beforehand to see if it is in conformance with the terms of the collective bargaining agreement, including Appendix 15.

However, there was no showing of prejudice to the Organization by the Carrier's omission from its notice of the reasons for letting out the work. The notice is dated May 5, 2005, and within 11 days thereafter a conference was held between the parties concerning the contracting. At that conference the Carrier fully informed the Organization of its reasons for deciding to contract out the work before any claim was filed by the Organization. Under these circumstances the failure to include the reasons for contracting out the work in the notice is not a basis for sustaining the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby

orders that an Award favorable to the Claimants not be made.

Sinclair Kossoff, Chairman & Neutral Member

Dominic A. Ring, Carrier Member

Roy C. Robinson, Employe Member

Chicago, Illinois
Dated: November 24, 2008