Award No. 11
Case No. 11

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 161.09 on the Clinton Subdivision beginning on July 19, 2005 and continuing through October 4, 2005 (System File 3SW-2136T/1434424 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 161.09 on the Railroad's Clinton Subdivision near Marshalltown, Iowa. The letter of

notice, which was headed Service Order No. 31597, 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 on 2 tracks and replacing a both [sic] bridge. The controlling weight will be given in the pre-bid meeting.

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. The text of Mr. Steiger's letter is here set forth in full, since the first paragraph thereof appears to correct the description of the work to be performed pursuant to Service Order No. 31597:

> May 16, 2005
>
> L/R File: SO#31597
>
> Dear Mr. Jorde:
>
> This is to confirm our conference held this date, in which the Carrier's notice of its intent to use contractors to perform bridge construction including the providing of an operated crawler crane with a third drum and boom to handle 105' leads with a pile driving hammer while assisting Railroad forces in driving new bridge bents required to replace a 38' bridge with a 90' bridge at Bridge 161.09 on the Clinton Subdivision near Marshalltown, IA.
>
> 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 161.1 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 . 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.
>
> 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 700 hours at straight-time and 16 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 and accessories 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 file1434423, BMWE File No. 3SW-2135T because the location of the work was different in the two claims; 2) the Carrier served a notice of its intent to contract out the work in question but did not provide sufficient reasons to contract it out; 3) 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; 4) 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; 5) 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 and accessories in question that were 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."

The correspondence and positions taken by the parties in this case were virtually identical to their correspondence and positions in Award No. 10 of Public Law Board No. 7098. For the same reasons as stated by the Board in that case, the claim is also denied in this case. However, we will add some additional clarifying comments.

In its appeal letter dated December 14, 2005, the Organization asserted, "It is the duty and obligation of the Carrier 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." The Organization has hit on the crux of so many of the contracting out cases. What is considered adequate in terms of work force

and equipment? Surely the Board cannot be expected to make that determination absent contract language to guide us, none of which was cited in this case.

An additional comment is in order. One of the issues raised in this case that this Board has not addressed but was relied on by the Carrier in support of contracting out the work was the Carrier's contention that it was not adequately equipped to handle the work. "Special equipment" and "not adequately equipped" are separate reasons contained in Rule 1 B, second paragraph, that permit the Carrier to let work to a contractor. The Manager Labor Relations relies on both reasons in her answer dated October 20, 2005, to the claim.

The New Oxford American Dictionary (2001) defines "equip" as "supply with the necessary items for a particular purpose." Similarly The New Shorter Oxford English Dictionary (1993), in the relevant definition, defines the term as "Fit out or provide with what is necessary for action etc. . . ." At page 2 of his letter dated January 12, 2006, in reply to the appeal the Director Labor Relations stated, "Additionally, the Carrier does not have the qualified personnel to complete this work with the other commitments of the B & B department." This is another way of stating that the Carrier is not adequately equipped to handle the work. Although the Director did not use the word "equipped" in his letter, the Manager Labor Relations repeatedly used the term in her letter and the Director Labor Relations "incorporated" her letter "fully" within his own correspondence.

Neither party cited any authority on how the words "not adequately equipped to handle the work" should be applied in a contracting out case. It cannot mean the same as "special equipment not owned by the Company" because it is a separate and independent reason in Rule 1 B for permitting the Carrier to let work to a contractor. The dictionary meaning of the language is as discussed above. In view of the Board's disposition of the claim on other grounds, it is not necessary to interpret or apply the language for purposes of this case. It is important to note, however, that it is language that must be considered whenever the Carrier contends that it had to contract out particular work because its employees were assigned to other necessary duties. It

also brings to the fore the Organization's argument that the Carrier has failed to maintain adequate forces and equipment.

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 28, 2008