BEFORE
PUBLIC BOARD No. 7100

Award No. 13
Case No. 13

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 (Horizontal Boring and Drilling) to perform Maintenance of Way and Structures Department work (bore and install culverts) at Mile Post 60.8 on the Clinton Subdivision beginning on October 10, 2005 and continuing through October 14, 2005, instead of System Pipe Jacking and Boring Gang employes R. Knipfel, J. Peterson and A. Scavo (System File 2RM-9694T/1435744 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a 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 violations referred to in Parts (1) and/or (2) above, Claimants R. Knipfel, J. Peterson and A. Scavo shall now each be compensated for forty (40) hours at their respective straight time rates of pay and for ten (10) hours at their respective time and one-half rates of pay.

OPINION OF BOARD:

This claim arises out of the October 10, 11, 12, 13 and 14, 2005 assignment by Carrier of Maintenance of Way and Structures Department work to Horizontal Bore and

Drilling. The Organization objects to said assignment.

By their adoption of the December 11, 1981 letter into succeeding contracts, both the Organization and Carrier have agreed to hold themselves to the terms laid out in it both in terms of notice for all subcontracting and in the mechanisms for reaching an understanding about subcontracting. As such, it is incumbent on this Board to determine, based on the facts that each side has presented, whether each side has fulfilled their obligations as dictated by the December 11, 1981 letter.

Both the spirit and letter of the December 11, 1981 letter clearly puts upon Carrier the burden of providing sufficient notice to the Organization in terms of both calendar notice as well as reasons for the subcontracting in order to demonstrate "good faith efforts to reduce the incidence of subcontracting and increase the use of maintenance of way forces." In this case, a review of the evidence submitted indicates while the Carrier in fact provided sufficient notice with respect to the scheduling of the subcontracting, Carrier failed to provide sufficient notice regarding the "reasons therefor" that are clearly required by the December 11, 1981 letter.

In its December 20, 2005 letter, Carrier claimed the reason for the use of subcontractors was a lack of equipment of the requisite size to complete the work. While the Organization countered that such equipment was in the inventory of Carrier, the question of whether said equipment was immediately available to Carrier for usage on the crossover work at Lisbon, IA is not at issue. This is because subcontracting solely based on the unavailability of equipment runs counter to both the spirit and the letter of the December 11, 1981 letter. In this letter, the Carrier indicated a willingness to execute the "procurement of rental equipment" in order to "reduce the incidence of subcontracting

and increase the use of maintenance of way forces." In order to gauge Carrier's compliance with this facet of the Agreement, one must examine the chronology of events.

Initial notice of the intent to subcontract the crossover work was provided on June 27, 2005. That same day, the Organization requested a conference to discuss this notice. This conference took place on July 7, 2005. As work on the crossover began on October 10, 2005, it is clear to the Board that there was ample time to provide for the "procurement of rental equipment" in order to facilitate the use of BMWE forces. Carrier's failure to do so in order to assure the work was done by BMWE forces indicates violation of the Agreement.

What is troubling to the Board in this case is Carrier's perfunctory notice for the subcontracting work and inadequate discussion about the decision. By their own correspondence to the Organization, Carrier admits the initial June 27, 2005 notice was "was merely for informational purposes only." This sentiment indicates any future conversations about the decision to subcontract the crossover work in Lisbon, IA would be theoretical at best, with no real intent on Carrier's part to explore alternatives to using the subcontractors. In essence, the evidence presented makes it clear Carrier had already made the decision about the work, four months before the work would begin, and was not open to discussions about that decision.

The Board finds where it concerns the sufficiency of notice regarding the subcontracting, Carrier has failed to meet the standards of providing the rationale behind the decision to subcontract. Further, the Board finds Carrier failed in its obligation to "make a good faith attempt to reach an understanding" regarding the decision to subcontract the crossover work.

With respect to remedy, in this particular case only, this Board applies the standards applied in Public Law Board No. 1844, Award 13 which held:

> *"monetary compensation is not awarded in the absence of a proven loss of earnings or work opportunity by Claimants. See Awards 19305, 19399, 19657, 20071, and 20275. Claimants in this case have not demonstrated such loss since the record shows that they were working and under pay at all times when the outside forces operated the rental cranes."*

At no time did the Claimants suffer a loss of earnings or work opportunity. As such, the Board will not award the compensation sought by the Claimants in this particular case.

AWARD

Parts 1 and 2 of the claim are sustained. Part 3 is denied.

Martin F. Scheinman, Esq. Chairman
Neutral Member

Carrier Member

Organization Member
I Dissent

Dated:
March 4, 2009

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