Award No. 7
Case No. 7

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 (Wyoming Efficiency Contractors) to perform Maintenance of Way and Structures Department work (construct concrete pads, remove and dispose of existing pads, raise height of existing containment wall) at Eagle Grove, Iowa beginning on October 28, 2004 and continuing through November 18, 2004, instead of Seniority District B-2 employes D. Murphy, E.Lindloff, P. Asleson and D. Austin (System File 2RM-9624B/1414636 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 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. Murphy, E. Lindloff, P. Asleson and D. Austin shall now '*** each be compensated for an appropriate share of 480 hours of straight time that the contractor's forces spent performing Maintenance of Way work, at the applicable rates of pay."

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 October 4, 2004, by Service Order No. 30109, the Carrier sent notice by email to General Chairman Kent L. Bushman of its intent to contract out the following work at or near the

Carrier's yard located at 620 10th Street, Eagle Grove, Iowa:

> Specific Work: providing labor materials, supplies and equipment necessary to construct two (2) concrete truck transload pads approx 17' x 44' (sheet#-1.2), install drains and associated plumbing in the center of the pads; construct one (1) concrete tank pad approx 9' x 34' (sheet# -1.4); remove and dispose of existing concrete pad and move existing 5,000 gallon tank onto the new concrete pad; raise the height by 1-1/2' for existing concrete containment wall measuring approx 27' wide x 54' long (sheet#-2.1); install security fencing (sheet#-1.3); modify/replace stairs to allow entry into concrete containment wall that was raised 1-1/2' (sheet#-1.3)

General Chairman Bushman replied by letter on the same date requesting an immediate conference regarding the notice "in an effort to reach an understanding in accordance with Rule 1 Scope, Section (b), Paragraph 3. It is imperative," the letter continued, "the Brotherhood be able to present its position **BEFORE** the Carrier commits itself to using outside contractors." The letter quoted from Rule 1 B regarding the circumstances under which work included within the scope of the Agreement may be contracted out and asserted, "The **October 4, 2004** Notice has failed to identify any circumstances or positions which legitimately falls within these five enumerated exceptions."

A conference between the parties in connection with the contracting out notice was held on October 19, 2004. Following the conference the Organization by letter dated October 22, 2004, to the Carrier's representative at the conference reiterated the Organization's position regarding the work:

> . . .
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> The Brotherhood did indicate that this is basic concrete work covered under Scope Rule and Rule 39(e) of the CBA. Carrier has failed to cite any exceptions that would necessitate contracting out of this work. Carrier possesses backhoes, graders, dozers, loaders and trucks as well as experienced forces fully capable of performing this work. Contrary to your expressed opinion, Carrier forces have performed work on projects of this magnitude previously and are fully capable of performing this project.
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> Carrier has indicated that a contractor has already submitted the low bid and has been selected to perform this work. This clearly demonstrates Carrier failure to discuss in good faith.
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> No agreement was reached during this conference.

Between October 28, and November 18, 2004, a contractor, Wyoming Efficiency Contractors, performed the work described in the Carrier's October 4, 2004, notice of intent to contract. The Carrier contends that the Claimants did not have the skills to perform the work because they do not perform, and have never performed, plumbing work, and specifically not of the kind performed by the contractor in this case. In addition, the Carrier argues, the work had to be completed before the onset of winter. Eagle Grove, Iowa, the Carrier notes, is located in north-central Iowa near the Minnesota border, and beginning in November, through March, experiences large amounts of snow and very cold temperatures with gusty winds. Time was therefore of the essence, the Carrier asserts. Further, the Carrier contends, the Claimants have never performed work of the magnitude of the project here involved, and it was not required to portion out the work on a piecemeal basis. The Carrier also asserts in its submission, "The Board will note that the Organization has failed to present any probative evidence during the on-property handling in support of their contentions that the work was historically, customarily and exclusively performed by the claimants, that the Carrier owned such equipment, that the claimants were qualified to do the alleged work, that claimants could have performed the work in a timely manner or that the claimants had lost any compensation during the time-frame alleged."

The Organization contends that the disputed work is reserved to BMWE forces by the clear language of the Scope Rule (Rule 1) and that Claimants were fully qualified to perform all of the work done by the contractor's employees and were readily available for the work. The Carrier violated the December 11, 1981, Hopkins-Berge letter of agreement, the Organization argues, because it did not give any reason for letting the subject work. In addition, the Organization maintains, the Carrier displayed bad faith by selecting a contractor to perform the work before the conference on the notice of contracting out was held. Further, the Organization contends, none of the exceptions permitting the use of outside forces to perform Rule 1-covered work are present in this case. The contracting out of the disputed work, the Organization argues, was therefore a contract violation.

In the Board's opinion the record clearly establishes that the Claimants normally perform concrete work, including the construction of concrete pads. This is clear from Rule 3 E which expressly includes "the building of concrete forms" in the description of work performed by the B&B [Bridge & Building] Carpenter classification. In addition, the Organization provided the Carrier on the property with a written statement by the Claimants, not challenged by the Carrier, that they set up the forms and poured a concrete pad of the dimensions 10' x 36' in the Carrier's Eagle Grove, Iowa, yard and completed their work on the same day that Wyoming Efficiency Contractors pulled into the yard to do the rest of the work. Plainly then to the extent that the Carrier contends that the Claimants were not qualified to perform the concrete work, the evidence indicates otherwise with regard to any concrete work not also involving plumbing work.

The record establishes, however, that the majority of the work contracted out in this case was not Scope work. In his reply to the appeal of the Carrier's denial of the Organization's claim, Director Labor Relations Ring asserted that "the greater preponderance of the project involved plumbing, piping and setting of appurtenances, which is not BMWE work to begin with." The source of the statement by the Director was a memorandum written by Manager Bridge Maintenance James M. McQuitty dated January 17, 2005. The Organization has the overall burden of proof in a contract violation claim, which, in the present case, includes the burden of establishing that the protested work was Scope work.

The Carrier's notice of intent to contract out dated October 4, 2004, specifically mentioned plumbing work, thereby lending support to the Director Labor Relations's assertion that the greater preponderance of the project was not BMWE work. The assertion was clearly material and was not denied or even addressed on the property by the Organization. It is therefore accepted as factual by the Board. See Third Division Awards Nos. 29859 and 30460. The Board finds that the plumbing, piping, and setting of appurtenances performed by the contractor in this case was not Scope work and constituted a majority of the work performed by the contractor.

Although the Organization has the overall burden of proof in this case, the Carrier has the burden of going forward with sufficient evidence to establish that the Scope work that it contracted out met at least one of the five conditions listed in the second paragraph of Rule 1 B that must be met in order for the Carrier to be allowed to contract out the work. See, for example, Third Division Award No. 29310 (Elliott H. Goldstein, 1992), involving these same parties where the Board found that the carrier's contracting out of work violated the parties' agreement because the "Carrier failed to meet its burden of establishing [its] affirmative defense" that the claimants did not possess the skills required to complete the project.

See also Third Division Award No. 15497 (Daniel House, 1967), where the Board found that the carrier failed to prove that it was beyond its capacity to complete the required work on time with the use of its own employees. The Board declared, "Thus Carrier has failed to sustain the burden of proving the reasons it asserted to justify an exception to the Scope Rule in this case."

In the present case the Carrier relies on the language of Rule 1 that permits contracting out where "time requirements must be met which are beyond the capabilities of Company forces to meet." The particular time requirement claimed by the Carrier here is that the work had to be performed before the winter freeze. The Carrier, however, failed to meet its burden of showing that it was not practicable to schedule the Claimants to perform the minority of work that constituted Scope work in this case before the winter freeze set in. For example, it has not shown that such work could not feasibly be done by the Claimants consistent with the demands of operating the business in a safe, orderly, and efficient manner by assigning the work to them on their regular days off or by putting off some of the work that was assigned to them during the three weeks in question until after they completed the Scope work that was contracted out.

The Board does not subscribe to the position that the Organization appears to take in this case that once it is established that Scope work is involved, the Carrier can never prevail in a contracting out case on an argument based on time requirements. Thus the Organization asserts,

"The NRAB has consistently held that a carrier's failure to assign employees to a particular project does not mean that the employees were unavailable to perform that work." No case is cited, however, where the Board so held in a situation where it was shown that time requirements necessitated contracting out the work. Followed to its logical conclusion, the Organization's argument would read the "time requirements" clause out of Rule 1 B of the Agreement. The time requirements defense is rejected by the Board here not because it is not a viable reason to justify contracting out work but because the Carrier failed to meet its burden of showing that the defense applied in this case.

The only estimate in the record of the amount of Scope work involved as a percentage of the contracted out work is 30 percent. The figure appears to be reasonable, and in the absence of any other estimate, the Board will accept it as reasonably accurate. The Board finds that the Scope work could stand alone and was not an integral part of the remaining work contracted out. According to the terms of the Agreement the Scope work was required to be assigned to bargaining unit employees. Thus the Claimants were deprived of 30 percent of 480 hours of work, or a total of 144 hours of work.[1]

The Board agrees with the Organization's position that the more recent awards on the issue require a monetary remedy where work is wrongfully contracted out even though the claimants were fully employed on other assignments during the period in question. See Third Divisions Awards Nos. 32878 and 32862. The Board finds therefore that each of the four Claimants is entitled to be compensated at his applicable straight-time rate for one-fourth of 144 hours. The fact that two of the Claimants were on vacation or other leave for part of the three weeks when the contracting out occurred is not a reason for reducing their proportionate share

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[1]The Board finds no merit to the argument made in the Organization's submission that the 480-hours figure applied only to the concrete work performed. The Board is convinced that the 480-hours number proffered by the Organization on the property applied to all of the work performed by the contractor. The Carrier did not provide a specific figure as to the number of hours involved.

since there is no basis for finding that the Scope work involved in the project, which constituted less than half of the entire project, would have been performed on their vacation or leave days had the Carrier assigned the work to its own employees.

AWARD

Claim sustained in accordance with findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimants be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the award is transmitted to the parties.

Sinclair Kossoff, Chairman & Neutral Member

Dominic A. Ring, Carrier Member

Roy C. Robinson, Employe Member

CARRIER DISSENTS

Chicago, Illinois Nov. 12, 2008
Dated: October 6, 2008