Award No. 9
Case No. 9

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 122.59 on the Geneva Subdivision beginning on July 15, 2005 and continuing (System File 3SW-2133T/1433943 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. 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 15, 2005 and continuing."

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 July 13, 2004, the Carrier's Manager Contract Services sent a 15-day notice of its intent to contract out work at Bridge 122.59 on the Geneva Subdivision near Morrison, Illinois. The letter of notice, which was headed Service Order No. 29558, described the work as follows:

Specific Work: providing a fully fueled, operated and maintained crawler crane with 3rd drum and conventional boom of sufficient length to handle a minimum 75' of leads with pile driving hammer and set spans. Hammer must be capable of driving 14" x 89 lbs. x 60' steel h-pile, with a minimum energy rating of 42,000 ft-lbs pile driver. Contractor will assist UPRR forces during bridge construction.

The General Chairman replied to the notice the next day with a request for an immediate conference "in an effort to reach an understanding in accordance with Rule 1 Scope, Section (b), Paragraph 3." A conference was held between the parties on July 20, 2004. The Organization's representative made notes at the conference briefly summarizing the positions of the parties as follows. Organization's position: "BMWE wrk. Have a pile driver that can do this work & can rent crawler cranes under Rule 7. Berge Hopkins letter." Carrier's position: "requires larger cranes than we have. Specialized equipment. No requirement to lease."

By letter dated August 25, 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 122.59 on the Geneva Subdivision on various dates between July 15, 2005, and August 4, 2005, utilizing two men who worked 200 hours at straight-time and 40 hours of overtime at this task in violation of Rule 1 of the applicable Agreement. The claim requested that each of the two Claimants be compensated an equal and proportionate share of all hours worked. It alleged that no special skills, special equipment, or special material was used on the project; that the Carrier has cranes with pile drivers in its inventory; and that if additional equipment was needed the Carrier could have moved another pile driver to the area or rented one in compliance with Appendix 15 (the Berge-Hopkins letter of December 11, 1981). The claim further asserted that the Claimants "are assigned to the System Y-75 Crane that is equipped with a Pile Driver." In addition to Rule 1, the claim alleged a violation of Appendix 15 and stated that it was being filed as a continuing claim in accordance with Rule 21(d) of the Agreement. In future correspondence the Organization doubled the

number of hours for which reimbursement was claimed.

The Carrier's Manager Labor Relations replied to the claim by letter dated October 14, 2005. She stated that her investigation showed that the Carrier did not violate Rule 1, Appendix 15, or Rule 21(d) of the Agreement. The Carrier contracted out the work, the Manager Labor Relations stated, "because according to Manager Bridge Construction Thomas S. Campbell the Belger Cartage crane was used for driving sheet piling which the Carrier crane is not set up to do. Thus," the Manager Labor Relations continued, "the Carrier is not adequately equipped to handle this work for this project." The Manager Labor Relations took the position that the work in question fell within the exception in Rule 1B of the Agreement permitting the contracting out when "special equipment not owned by the Company" is required. In addition, she asserted, the fact remained that the Claimants involved in the case did "not possess sufficient ability to safely and efficiently perform the duties in the time allotted." Work of the type involved, the Manager Labor Relations stated, has traditionally and historically been performed by outside forces.

The General Chairman, by letter dated December 7, 2005, appealed the decision of the Manager Labor Relations. The appeal enclosed a copy of the notes made by its representative of the parties' positions at the July 20, 2004, conference following the Carrier's 15-day notice of contracting out. The position of the Carrier at the conference that it had "no requirement to lease," the appeal argued, "shows the Carrier did not seek information to lease any needed equipment for the project and shows the notice and conference was only a formality for the Carrier." Regarding the Carrier's position that it did not have a crane equipped to drive sheet piling, the appeal asserted that a "good faith effort on the Carrier's part could have discovered rental attachments" to perform the sheet piling work.

The Carrier's Director Labor Relations responded to the appeal by letter dated January 11, 2006. The response stated that the "Carrier pointed out in conference that this work involved the contractor forces to provide a fully fueled, operated and maintained crawler crane with 3rd drum and conventional boom of sufficient length to handle a minimum 75' of leads with

pile driving hammer and set spans." It was further explained in conference, the response said, that "the work in question required special skills and equipment, not possessed by the Carrier and its employees." Further, the response to the appeal asserted, "the Carrier does not have the qualified personnel to complete this work with the other commitments of the B & B department." The response disputed the appeal's assertion that the Carrier had not acted in good faith because it did not lease the specialized equipment. "The fact of the matter is," the response asserted, "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."

In a reply dated April 10, 2006, the General Chairman contended that the Carrier failed to show the need to complete the bridge repairs to meet time requirements and reiterated that "[t]he Claimants have the skills and qualifications to safely perform the necessary duties to drive bridge piling." Regarding the Carrier's position that it lacked the equipment necessary for the work, the General Chairman contended as follows, "If the Carrier's position of a lack of necessary cranes not being in their possession is actually factual, Appendix 15 of the CNW/CBA is still applicable and the equipment should have been rented or leased for the Claimants to operate."

The Carrier's Director Labor Relations responded with a letter dated April 18, 2006, asserting that the General Chairman's letter of April 10 reiterated the Organization's prior arguments and contending that the Organization had the burden to prove the Agreement was violated and had "utterly failed to meet its prerequisite burden of proof. . . ." The Director disputed the General Chairman's position that the Carrier's failure to lease or rent the specialized equipment demonstrated bad faith and reiterated his position that "neither Claimants, nor any other Carrier employee has ever operated, utilized, or been trained on such equipment." Therefore, the Director Labor Relations insisted, "the Carrier had no alternative but to contact 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 provided the Organization with a statement from Thomas S. Campbell,

Manager Bridge Construction, stating, "The Belger Crane was used for driving sheet piling which the UPRR crane is not set up to do." The Organization provided no statement or other evidence refuting Manager Campbell's assertion. The Board finds that the Carrier has established by substantial evidence that it did not own the kind of crane, or accessories for its crane, necessary to perform the contracted out work.

The Organization contends that even if it is true that the Carrier lacked the specialized equipment needed to perform the bridge repair work, Appendix 15 of the applicable Agreement mandated that the Carrier rent or lease the equipment for the Claimants to operate. Appendix 15, however, requires the Carrier to "assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees." (emphasis added). The Organization has not challenged the assertion of the Carrier in its letter to the Organization dated January 11, 2006, that none of the Claimants "has ever utilized, nor are they trained to operate such equipment." This assertion was repeated, without contestation, in the Carrier's letter to the Organization of April 18, 2006. The Board does not consider the general assertion by the Organization in its letter to the Carrier of April 10, 2006, that "[t]he Claimants have the skills and qualifications to safely perform the necessary duties to drive bridge piling" a denial of Carrier's assertion that the Claimants have never been utilized or trained to operate the specific equipment here in issue.

The Board finds that the Carrier was entitled to conclude that it was not practicable to attempt to lease or rent specialized equipment needed to perform the required bridge repair work when it did not have employees who were experienced or trained in the operation of such equipment. The claim will therefore be denied.

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 21, 2008