Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13821
Docket No. 13709
05-2-03-2-56

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(
(BNSF Railway Company

STATEMENT OF CLAIM:

"1. That the Burlington Northern Santa Fe Railway Company violated the current Agreement, effective April 1, 1983, as amended, in particular Appendix G-2, Sections 1, 2, 3 and 4 (CB&Q Labor Agreement No. 75-69, as amended), when they wrongfully subcontracted the T.K.D.A. Engineering the programming of Programming Logic Controllers [P.L.C.'s] for the diesel fuel tank car unloading at Pasco, Washington, on or about June 2001.

2. That the Burlington Northern Santa Fe Railway Company further violated the current Agreement, in particular Appendix G-2, Section 4, when they failed to furnish the General Chairman with the required notice of intent to contract and the requested data relative to the subcontracting transaction.

3. Accordingly, the Burlington Northern Santa Fe Railway Company, due to this violation which caused a loss of work opportunity, should be ordered to compensate System Electricians William R. Jones, Dean Forshee, and Greg Ratzlaff in the amount provided for in the Agreement. Said time lost by the Claimants was approximately 150 man-hours."

FINDINGS:

The Second Division of the Adjustment Board, 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

Without prior notice to the Organization, the Carrier subcontracted the programming of Programming Logic Controllers ("P.L.C.'s) to T.K.D.A. Engineering for the diesel fuel tank car unlading at Pasco, Washington.

Appendix G-2 provides, in pertinent part:

"ARTICLE I. SUBCONTRACTING

* * *

Section 2.

Work set forth in the classification of work rules of the crafts parties to this agreement or work generally recognized as work of the crafts as referred to therein will not be subcontracted except in accordance with the terms of this agreement. ...

* * *

Section 3.

Subcontracting of work ... will be permitted only under the following conditions:

(a) When such work cannot be performed by the carrier except at a significantly greater cost ....

(b) Skilled manpower is not available on the property from active or furloughed employees. ...

(c) Essential equipment is not avialable on the property. ...

(d) The required time of completion of the work cannot be met with the skills, personnel or equipment available on the property. ....

* * *

Section 4.

(a) If the carrier decides to subcontract work (except for minor repairs and in emergency situations) in accordance with this agreement, it will give the general chairman of the craft or crafts involved notice of its intention, which will include the reasons therefor ....

* * *

(c) The General Chairman or his designated representative will notify the carrier within ten days from the post-mark date of the Carrier's notice to subcontract work of any desire to discuss the involved transaction and a conference will be arranged to discuss such transaction within ten days from the date the General Chairman or his representative notifies the Carrier of his desire to discuss the matter. If the parties are unable to reach an agreement at such conference the carrier may nevertheless proceed to subcontract the work and the organization may process the dispute to a conclusion as hereinafter provided."

* * *

There are two distinct sets of obligations and rights established by Appendix G-2. The first is the obligation of the Carrier to give notice to the Organization of

its intent to subcontract. The second is the right of the Carrier to subcontract. This case is about notice.

The Carrier did not give the General Chairman notice of its intent to contract the work of programming the P.L.C.'s. Rule 50(a)(2) provides that "Electricians' work will consist of the ... repairing, rebuilding, maintaining, overhauling, adjusting ... testing, and other electrical work of or on ... motors and controls, rheostats and controls ...." Statements from an employee show that electricians "... have been installing & programming P.L.C.'s for the last 15 to 20 years" and "[t]he P.L.C. is a controller for all the controls & pumps, valves, motors at the Pasco, Wash. Diesel Fueling Fac."

The record therefore sufficiently establishes that under Appendix G-2, Article I, Section 2, such work is "[w]ork set forth in the classification of work rules ..." as work on "motors and controls, rheostats and controls" under Rule 50(a)(2) or "work generally recognized as work of the craft ...." Notice of contracting the work was therefore required. The Carrier's failure to give the proper notice therefore violated Appendix G-2, Article I, Section 4.

The Carrier's arguments that the electricians were only recently trained to assist engineers in diagnostic trouble shooting and lending assistance in part replacement of the P.L.C.'s and that the work does not fall under the classification of work rule are not persuasive arguments. Based on what is before us (particularly that similar work has been done by the electricians in the past), those arguments really have little to do with the Carrier's obligation to give notice. Those arguments go the Carrier's right to subcontract once it gives notice.

Given the description of work in Rule 50(a)(2) and the employee's statements that similar work has been performed by electricians in the past, we are satisfied that the Carrier was obligated to give the required notice. Exclusive performance of the kind of work is not required as a pre-condition for the Carrier's obligation to give the required notice. The only requirement to give notice of subcontracting is that the work be "... set forth in the classification of work rules ..." or "work generally recognized as work of the craft ...." Again, work on "motors and controls, rheostats and controls" is set forth under Rule 50(a)(2) and the employee's statements show that in the past similar work has been performed by electricians. Notice was required.

It may well be that had the Carrier given the proper notice as required by Article I, Section 4, it would have had the right to subcontract the work because of the conditions specified in Article I, Section 3 (i.e., significantly greater cost of the work, skilled manpower or essential equipment not available, required time of completion of the work could not be met. But the threshold obligation for the Carrier was to give notice. The Carrier did not do that.

Appendix G-2 provides for the remedy:

"ARTICLE II. RESOLUTION OF DISPUTES

* * *

(c) Remedy ...

If ... the Carrier failed to give notice in accordance with this agreement, it [the Board] shall award liquidated damages to be determined by multiplying 10% of the number of hours charged by the subcontractor for performing the work by the hourly rate of pay of claimants. Such amount thus determined shall be divided equally between claimants.

If the Board holds in a particular case that the carrier subcontracted work in violation of Article I of this Agreement and the monetary relief sought is on behalf of a named furloughed employee who would have otherwise performed the work, it shall award such employee the amount of wages lost and other benefits necessary to make him whole. If the monetary relief sought is on behalf of employees in active service who were not adversely affected by the subcontracting, the Board shall nevertheless award minimum liquidated damages as specified above. It is understood that the Board cannot award liquidated damages in accordance with the previous paragraph if it awards such damages under this paragraph."

The Claimants were fully employed at the time the dispute arose. Under the above language, the most they could receive as a remedy is "... multiplying 10% of the number of hours charged by the subcontractor for performing the work by the hourly rate of pay of claimants."

The Carrier asserts that T.K.D.A. performed 59 man-hours on the project. The Organization estimates that 150 man-hours were required. The matter is remanded to the parties to determine the number of hours it took T.K.D.A to perform the work. The Claimants shall receive the 10% liquidated damages amount based upon the provisions of Article II(c) of Appendix G-2.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 1st day of April 2005.