Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36504
Docket No. MW-35820
03-3-99-3-821

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Norther Santa Fe Railway (former Burlington
(Northern 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 (Herzog Contracting) to perform routine Maintenance of Way and Structures Department work (operate machine to load and remove ties) in the vicinity of Milbank, South Dakota on August 29, 30, 31, September 1, 2 and 3, 1996 (System File T-D-1216-H/MWB 96-11-26AB BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out said work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Group 2 Machine Operator R. A. Frey shall now be compensated for twenty-four (24) hours' pay at his respective straight time rate of pay and compensated for forty-four (44) hours' pay at his respective time and one-half rate of pay."

FINDINGS:

The Third 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.

The Claimant established and held seniority as a Group 2 Machine Operator on Seniority District 3, and was regularly assigned and working as such on the Crosby Subdivision.

By letter dated December 20, 1995, the Carrier issued a 15-day notice informing the four BMWE General Chairmen of the Carrier's intention to contract out certain work described as the "loading and unloading of various products throughout the system" including "the handling of switch ties, crossing timbers, cross ties, tie plates, rail, and various other materials primarily, but not necessarily always, shipped in coal cars or gondolas."

The Carrier's 15-day notice further explained that the contractor's equipment was "patented, special equipment . . . able to operate from the top of the cars, and, as necessary, lower into the cars themselves in order to maintain clearances," and that the contractor's equipment would "supplement Carrier magnetic cranes and Jimbo Cartoppers to handle the estimated 850 track miles of relay material to be shipped over the system in 1996." The letter also stated that, "The machines utilized by Herzog, Inc., . . . are patented, specially designed, not available to the Carrier and the Contractor is unwilling to allow for the operation of equipment by other than its own employees."

On January 25, 1996, the Carrier and Organization met for the purpose of discussing the Carrier's systemwide plan to contract out the loading and unloading work

scheduled for the 1996 capital program. The parties, however, were unable to reach an understanding concerning the contracting out issue. The Organization alleged that on the dates identified in paragraph (1) of the claim, the Carrier assigned Herzog Contracting Corporation to perform the work of "operating a car top material handling machine to load and remove ties from along the right of way on the Milbank Section territory left by regional and district maintenance gangs replacing ties in 1995."

The Organization avers that the contractor used car top material handling machines to accomplish the above-quoted work. The Organization maintains that the contractor's machines were similar to machines listed in Rule 5 and commonly operated by the Carrier's own M of W forces. According to the Organization, such machines include "truck cranes, backhoes with magnet attachments, front end loaders, car top material handlers, speed swings, etc."

The Organization maintains that the Carrier improperly assigned track and roadbed maintenance work to Herzog Contracting instead of allowing the Claimant to perform the work reserved to him under Rules 1, 2, 5, 55 and the Note to Rule 55. As a result of the Carrier's alleged violation of the above Rules, the Organization requests that the Claimant receive payment as detailed in paragraph (3) of the instant claim.

The Carrier contends that since the early 1980s, it has contracted with Herzog Contracting Corporation to have track material loaded and unloaded using Herzog's patented "cartopper" material handler and that the instant claim is not the result of any new practice on the Burlington Northern Santa Fe Railway (BNSF). It argues that the "cartopper" is special equipment not owned by the Carrier and operated solely by Herzog's own employees to load and unload various track material as Herzog employees have done for many years. The Carrier also asserts that previous arbitration Awards have upheld BNSF's practice of contracting with Herzog Contracting Corporation.

The Carrier maintains that the 15-day contracting notice it served complied in all respects with the Note to Rule 55 and with Appendix Y. The Carrier argues that the "cartopper" falls within the definition of "special equipment not owned by the Company." Furthermore, the Carrier stresses that it conducted a conference with the General Chairmen to discuss the "contracting transaction," and when an understanding could not be reached, it properly proceeded with the contracting work described in the notice. In addition, the Carrier states that while M of W employees on the BNSF have picked up and distributed track materials, they never have used the Herzog

"cartopper." The Carrier urges that, at best, the work of handling such materials on the BNSF is a "mixed practice."

Finally, the Carrier states that at the time of the alleged violation, the Claimant was working in the craft. The Carrier emphasizes that there is no basis for awarding any additional compensation inasmuch as the Claimant did not suffer any loss of pay.

After reviewing the extensive record and the comprehensive arguments expressed by the parties, the Board finds that the work of loading and removing ties has been performed by both M of W Department employees and by outside contractors using their own specialized equipment. The Board also finds that a "mixed practice" regarding the performance of this work exists on BNSF and holds that the Carrier properly served the Organization with a 15-day contracting notice, as prescribed by the Note to Rule 55 and the December 11, 1981 Letter of Understanding (Appendix Y).

Regarding the correctness of the 15-day notice, the Board disagrees with the Organization's characterization of the notice as "vague, blanket, ex post facto, and bad faith." The Carrier demonstrated that its December 20, 1995 contracting notice involving its use of the "cartopper" was virtually identical to the "cartopper" notices it had issued to the Organization in prior years, and that the letter itself contained sufficient information so as to comply with the Note to Rule 55 and Appendix Y. There is nothing in the voluminous record to indicate that the Organization was prevented from meeting with the Carrier and discussing the Carrier's contracting plans. The Board finds, therefore, that the Organization had an opportunity to ascertain the details regarding the contracting plans and to present its position to the Carrier during the meeting of January 25, 1996 pursuant to the requirements specified in the Note to Rule 55 and in Appendix Y.

As stated above, the Board finds that the Carrier was within its right to contract out the disputed work on the basis that it needed the specialized "cartopper" equipment owned and operated by Herzog Contracting Corporation in order to accomplish the work of loading and removing ties on a systemwide basis during the 1996 capital project year. The record contains several statements from the Carrier's M of W Department supervisors, along with literature from Herzog Contracting Corporation showing that the "cartopper" is capable of performing various special functions that the Carrier's equipment (e.g., Jimbo cranes) cannot accomplish. Regarding the Organization's assertions that many of the "cartopper's" capabilities were not required or utilized in

the instant case (e.g., there were no "clearance limitations"), the Board finds that such assertion lacks evidentiary support. As the moving party in this claim, the Organization had the affirmative burden of showing that the specialized equipment was not needed. In other words, the Organization must offer proof beyond a mere assertion; here it did not.

In sum, the Board finds that the Carrier properly served notice and contracted for the use of the Herzog "cartopper," and that the Carrier's use of the "cartopper" constituted an established practice. No violation of Rules 1, 2, 5, 55, the Note to Rule 55 or Appendix Y occurred. In further support of this Board's position, see Public Law Board No. 3460, Award 63, Public Law Board No. 4402, Award 20, Public Law Board No. 4768, Awards 28 and 47, and Third Division Awards 31615, 32153, 35386, 36157, and 36209. Accordingly, the claim is denied in its entirety.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 23rd day of April 2003.