

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36604
Docket No. MW-33909
03-3-97-3-412**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway Company
((former St. Louis – San Francisco Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier assigned outside forces (Dunn Construction Company) to perform the work of setting forms, tying steel, placing and finishing concrete and removing forms at the Dixie Hub Center, Birmingham, Alabama on November 15, 1994 and continuing (System File B-820-1/MWC 95-01-12AA SLF).**
- 2. As a consequence of the aforesaid violation, Messrs. R. A. Smith, B. E. Colburn, H. W. Vaughn, B. G. Tribble and T. M. Bennett shall each be compensated at their respective rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces in the performance of the above-described work.”**

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.

By notice dated June 23, 1994, the Carrier advised the Organization of its intent to contract out work involving the expansion of the Intermodal Hubs located at Memphis and Birmingham. According to the Carrier's notice, the initial intention was to contract out (1) grading including clearing, demolition and grubbing; (2) placement of engineered fill material; (3) storm water drainage systems; (4) asphalt paving and associated traffic control; (5) construction of concrete craneways; (6) construction of concrete light tower foundations; (7) construction of concrete dolly pads; (8) track construction, removal and relocations; (9) crossing construction; and (10) fencing. According to the Carrier's notice "[t]he Carrier does not possess the sufficient equipment nor the expertise to properly perform this work."

As shown by the Carrier's letter dated August 18, 1994, conferences between the parties on July 29 and August 17, 1994, yielded agreement that the Carrier's forces would construct concrete light tower foundations, concrete dolly pads, trackage including removal and relocation, and track road crossings, but that a contractor would perform grading including clearing, demolition and grubbing, placement of engineered fill material, storm sewer and drainage construction, installation of asphalt paving along with associated traffic control and fencing. However, as indicated in that letter, "[t]he construction of concrete craneways is an open issue and will be decided prior to the start of construction."

By letter dated September 15, 1994, the Carrier advised the Organization that "... we have decided to contract the construction of the concrete craneways for the Intermodal Hub expansion at Birmingham, Alabama." The Organization objected to the contracting out of that work. The Carrier gave the work to Dunn Construction Company. This claim followed for the work at Birmingham.

The Carrier's argument on the property that the Organization's claim must fail because of a lack of demonstration of exclusive performance of the work is not persuasive. "Exclusive performance of the work by covered employees is not required in contracting out disputes." See Third Division Award 36603 and Awards cited therein. Under Rule 99, the work in dispute - construction of the concrete craneways for the Intermodal Hub expansion at Birmingham - is clearly "... work within the scope of the applicable schedule agreement ..." for these employees.

Turning to the work, according to the claim the Organization's specific protest is the contracting ". . . to perform the work of setting forms, tying steel, placing and finishing concrete and removing forms at the Dixie Hub Center, Birmingham. . . ." According to the Carrier's September 22, 1994 letter:

* * *

- "3. Design of the craneway is very complex and construction must be handled in such a manner to handle extremely high wheel load. The concrete structure as well as the base material and subgrade must all be constructed to very high standards and the contractor must be responsible for all aspects in order to guarantee the outcome of the job. No part of this construction can be piecemealed out as it would be impossible to ensure responsibility of structural integrity of final product. We have no obligation to piecemeal a project of this type. Also, this is not the normal concrete slab construction that the B&B Department constructs for driveways, walkway, etc.
4. The company possesses neither the specialized equipment nor the special skills required, nor is the company adequately equipped to handle the work and to complete the new construction within the allotted time."

According to a July 18, 1995 letter from the Carrier:

* * *

"The work involved was to form and pour concrete craneways for equipment to load intermodal platforms. Approximately 3,912 cubic yards of concrete for 9,726 linear feet of 8' wide platforms. . . ."

* * *

The employees did not view the work claimed by the Organization as complex as the Carrier viewed the work. According to an October 8, 1995 letter from several employees:

* * *

- “3. As for . . . [the] reference to driveways, that is exactly what the craneways are — a little thicker, a little more reinforced, but a driveway nonetheless. This job would have been very little challenge to us, considering some of the projects we have successfully completed. This craneway is far less complex than the scale pits, diesel shop inspection pits, and pollutant retaining walls meeting exacting EPA standards that B&B has poured in the past. It also does not have to handle nearly as high a wheel load as B&B’s many bridge piers over which diesel engines and loaded grain cars weighing far more than a crane must pass on a daily basis. . . .
4. The craneway job required no tools that were not already owned by BN or that could not have been rented or purchased locally. There were no skills required that this gang does not possess, and inspection of some of our other work will prove this to be the case. . . .”

* * *

In a letter dated April 22, 1997, the Carrier further addressed the complexity of the disputed work:

* * *

“. . . The Carrier did not have adequate forces and equipment to perform the massive project and be able to complete quickly enough to handle the increased intermodal traffic.

The Claimants have also argued that the work is similar to pouring a driveway, only the craneway is a little thicker and more reinforced. However, to a Civil Engineer, Construction Engineer or a Structural Engineer that are responsible for the structural side and construction of the craneway there is a great deal of difference. . . . [T]he design of the craneway is very complex and construction must be handled in such a manner to handle extremely high wheel load. The concrete structure as well as the base material and subgrade must all be constructed to very high standards and the contractor must be responsible for all aspects in order to guarantee the outcome of the job. No part of this construction can be piecemealed out as it would be impossible to ensure responsibility of structural integrity of the final product. . . . [C]raneway construction is not the normal concrete slab construction that the Bridge and Building Department constructs for driveways and walkways.

. . . In this case, the placing of the concrete was just one portion of an extensive project which included the placement of engineered fill material, the installation of storm water drainage systems, asphalt paving and traffic control, construction of light tower foundations, construction of dolly pad, track construction and relocation, crossing construction and the installation of fence around the facility. It is well established that the Carrier is not required to piecemeal a project of this size in order to provide employees represented by the Organization work. However, in this case some of the work was performed by Carrier forces. However, since the Carrier's forces did not have the expertise to construct the craneway to the rigid specifications required, the work was contracted."

For the sake of discussion, we will assume (and we believe the record supports) the fact that contrary to the Carrier's assertions, the Claimants were capable of performing the disputed work identified in the claim. Again, as set forth in the claim, that work was ". . . setting forms, tying steel, placing and finishing concrete and removing forms at the Dixie Hub Center, Birmingham. . . ." The employees adequately described that claimed work - "[a]s for . . . [the] reference to driveways, that is exactly what the craneways are - a little thicker, a little more reinforced, but a driveway nonetheless." B&B forces have

constructed driveways and more complex structures, and the work claimed "... setting forms, tying steel, placing and finishing concrete and removing forms at the Dixie Hub Center, Birmingham. . . ." - precisely describes that kind of work which the employees have previously performed. Thus, at first blush, it appears that this work could have been performed by Maintenance of Way forces.

But there is more to this case. On the property and as set forth in the above quoted letters, the Carrier consistently maintained that it was not obligated to piecemeal the work on the craneways by assigning some work to an outside contractor and some work to covered employees. Precedent exists for the principle that a Carrier is not obligated to piecemeal a contracted project. See e.g., Third Division Awards 34123 ("... it is an established principle that a Carrier is not required to piecemeal a large project in order to provide some portion of the work to the Organization-represented employees"); 31526 ("... the Carrier need not piecemeal . . ."); 29187 ("... insufficient support for the contention that the Carrier was required to 'piecemeal' a portion of the work to Maintenance of Way employees").

The expansion of the Intermodal Hub at Birmingham was a large project. It appears at first that the Carrier desired to contract out the vast majority (if not all) of the work. See the Carrier's initial notice (where the Carrier notified the Organization that it was going to contract out grading including clearing, demolition and grubbing; placement of engineered fill material; storm water drainage systems; asphalt paving and associated traffic control; construction of concrete craneways; construction of concrete light tower foundations; construction of concrete dolly pads; track construction, removal and relocations; crossing construction; and fencing). After conferences between the parties, agreement was reached that the Carrier's forces would construct concrete light tower foundations, concrete dolly pads, trackage including removal and relocation, and track road crossings, but that a contractor would perform grading including clearing, demolition and grubbing, placement of engineered fill material, storm sewer and drainage construction, installation of asphalt paving along with associated traffic control and fencing. What is significant here is that the craneway work claimed by the Organization i.e., "... the work of setting forms, tying steel, placing and finishing concrete and removing forms . . ." - is part and parcel of the overall craneway construction work, which, according to the Carrier's description of the work, also includes placement of the base material and subgrade for the craneways. But, as stated in the Carrier's August 18, 1994 letter, after conferences the Organization agreed that "... a contractor would perform grading [and] . . . placement of engineered fill material. . . ." [emphasis added]. The only disputed work as set forth in the claim concerns "... the work of setting

forms, tying steel, placing and finishing concrete and removing forms. . . ." Thus, with respect to the craneway, the Organization sought to piecemeal the construction of that portion of the craneways identified in the claim from the work of placement of the base material and subgrade for the craneways which the Organization previously agreed could be performed by a contractor. Under established precedent, the Carrier is not obligated to piecemeal the work in that fashion. We must therefore deny the claim.

In light of the above, the Carrier's other arguments are moot.

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 29th day of July 2003.