

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37433
Docket No. MW-36420
05-3-00-3-662**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (construct a replacement fueling facility) in the Glendive Yard at Glendive, Montana on the Dakota Division beginning October 7, 1998 and continuing (System File B-M-645-F/11-99-0155 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper notice of its intent to contract out the aforesaid 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, B & B Foremen L. A. Strohm, J. W. Pearson, E. E. Ringen, D. T. Dupea, W. D. Sutton, D. D. Marchiando, S. Riehl, J. M. Sullivan, B & B Truck Drivers G. A. Schuman, L. K. Roberts, J. F. Beehler, First Class Carpenters O. D. Gaub, D. J. Knoll, E. E. Weidner, L. G. Belden, J. F. Siegel, L. P. Hibl, L. J. Legerski, T. D. Jochim, H. L. Doll, R. C. Doyle, R. L. Kellogg, L. L. Watterson, L. D. Hofer, Water Service Foremen**

L. Metzger, R. O. Barth and R. L. Sorkness, Water Service Mechanics T. J. Kreitingner, H. E. Schneider, R. F. Wegman, K. A. Christensen, Group 2 Machine Operators R. K. Utgaard, R. A. West and T. G. Kinsey, and Group 1 Machine Operator B. J. Brenner shall each '...receive an equal and proportionate amount of pay for all straight time hours and overtime hours worked by the contractor beginning on October 7, 1998 and continuing until work has been completed.***'"

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.

In a notice dated June 24, 1998, the Carrier advised the General Chairman of its intention to remove and replace an existing inspection pit and fuel platform at Glendive, Montana. As part of the work, a snow melt and journal-oil system was to be built. Additionally, a pre-engineered building was to be installed.

On August 14, 1998, the Carrier notified the Organization that it had changed its plans. Due to environmental issues and construction concerns, it was decided to relocate the facility to an alternate location within the yard rather than attempt to modify the existing facility. The project was to be completed in phases over a two year period. The notice further stated that BMWE-represented employees would perform all track work associated with the project.

According to the Organization's April 22, 1999 and May 17, 2000 letters, a conference was held. The Organization took the position that much of the work should be done by its members rather than a contractor. The Carrier responded that it was not required to piecemeal a project of this magnitude. The instant claim followed.

The Organization contends that the work performed by the contractor was reserved for, and customarily performed by, BMWE-represented employees. In support of its position, the Organization submitted during the on-property handling a variety of documents which purport to show that Carrier forces have previously constructed fueling facilities at other locations.

The Organization also rejects as unpersuasive the Carrier's contention that it did not have to piecemeal the project. The Organization points out that the Carrier piecemealed the project from the outset when it assigned Carrier personnel to perform the electrical work during construction of the new facility. Having already piecemealed the work, the Carrier should not be heard to argue that no additional work could have been accomplished by Carrier forces.

No exigent circumstances have been identified by the Carrier that would justify contracting out the work in the instant case, the Organization maintains. The Carrier did not identify any special equipment, materials, or skills that were required in the construction of the new Glendive facility. The Claimants lost a significant work opportunity, the Organization submits, and therefore this claim should be sustained in its entirety.

The Carrier argues that the type and magnitude of work performed for the project at issue has been customarily contracted to outside forces. The Carrier asserts that it possesses neither the specialized equipment nor the special skills required, nor is it adequately equipped to handle and complete the project within the allotted time period. The Carrier not only disputes the Organization's claim that it completed projects of this kind in the past, but also argues that its own equally weighty list of projects showing that such work has been contracted out should be deemed dispositive of the matter.

After careful review of the lengthy record in this case, the Board finds, first, that the Carrier complied with its notice and conference obligations prior to contracting out the disputed work. Second, it is our view that the evidence failed to establish that the work performed by the contractor was reserved to BMW-employees by a past practice of customary performance. In that regard, this case is similar to Public Law Board No. 4768, Award 22, in which these same parties were at odds over the contracting of a major construction project in St. Paul, Minnesota. There, the Board stated:

“After reviewing all the circumstances, the Board concludes that this project was of a nature which would have prevented the use of Carrier equipment and forces on any practical basis. While there is no doubt that elements of the work are regularly performed by Carrier forces, this does not therefore determine that such major projects could have been undertaken other than by outside forces. More significantly, however, is that the Organization has failed to demonstrate that such projects are ‘customarily performed’ by Maintenance of Way forces. This is the necessary element for consideration of the application of the Note to Rule 55.”

We are persuaded that the cogent logic expressed therein is equally applicable to the matter at hand. Accordingly, the claim must be denied.

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 22nd day of March, 2005.