

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40501
Docket No. MW-39891
10-3-NRAB-00003-070072
(07-3-72)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (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 to perform Maintenance of Way and Structures Department work (construct lunch room and an office) at Building #600 in the Galesburg Yard, Galesburg, Illinois on October 15, 16 and 17, 2004 [System File C-05-C100-24/10-05-0047(MW) 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, Claimants L. Stockdale, J. Cable and L. Tracy shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and twenty-four (24) hours at their respective time and one-half rates 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.

In 2004, General Electric ("GE") worked exclusively in a portion of the Galesburg, Illinois, Diesel Shop. On September 15, 2004, the Carrier wrote to the Organization about "Galesburg - Prefabricated Building for GE." The letter read:

"General Electric is purchasing two prefab buildings and having them installed inside the Diesel Shop at Galesburg IL. These building are for GE's use and being paid for by GE. As these buildings will not be used by the Carrier in common Carrier service, and are being built by a third party for their exclusive use, their assembly does not fall under the scope of the agreement.

This work may begin as soon as September 30, 2004.

The contracting of the work here involved is consistent with Carrier policy and the historical practice of contracting out such work. . . ."

The parties met and discussed the September 15 letter, but did not reach mutual agreement.

In fact, GE added prefabricated buildings in its area. One included a lunch room. GE initiated, planned, and controlled the project and paid its entire cost. After completion, both GE and Carrier employees used the lunchroom.

The disputed work was done by a Florida contractor chosen by GE. The contractor used three workers, 16 hours/day on October 15, 16, and 17.

The Claimants are a Foreman, an Assistant Foreman and a Shop Carpenter in the Bridge & Building Subdepartment. They were fully employed or on voluntary vacation at the time that the disputed work was performed.

The Organization contends that the Carrier violated Rules 1, 2, 4, 44, as well as the Note to Rule 55 and Appendix Y. It contends that (1) the September 15 letter inconsistently and falsely asserted that the buildings were for GE's exclusive use and that it followed Carrier contracting out policies (2) the Carrier acted in bad faith in its purposefully misleading letter (3) assigning common, ordinary building work to outside forces violates Rule 55 and Appendix Y because it belongs to BMW-employees (4) the building was not exclusively for GE because it benefited the Carrier and was used in common service (5) whatever reasons GE agreed to pay for the building construction and whom it chose to do the work are irrelevant (6) the Carrier's "fully employed" defense to the requested remedy lacks merit and (7) arbitral precedent favors the Organization.

The Carrier responds (1) evidence does not prove the claim (2) the prefabricated buildings are outside the Agreement's scope because construction was conceived, contracted, controlled, financed and used exclusively by GE (3) the Carrier had no dominion or control over any disputed work and did not use the prefab buildings for common service (4) although not required, the Carrier provided the September 15 notice as a courtesy and discussed the matter in good faith (5) use of the lunchroom by Carrier employees does not require that Carrier employees construct it (6) because Claimants either were fully employed or on voluntary vacation, they suffered no loss, thereby making any monetary award improper and punitive and (7) prior arbitration Awards support the Carrier.

Given the lack of independent evidence of material omissions, intentional misstatements, or bad faith, the Organization's procedural notice argument is a mirror image of its substantive complaint. If it prevails on the merits, the notice argument becomes redundant. If it loses on the merits, its procedural position has no predicate.

On this record, there is no dispute that BMW-represented employees perform the particular type of disputed work for the Carrier under normal circumstances. The threshold and decisive issue is whether the Carrier is bound by its subcontracting promises to the Organization when a lessee plans, controls and pays for subcontracting a prefabricated lunchroom on leased property when the lunchroom is used by employees of both the lessee and the Carrier.

The Carrier cannot do indirectly through a lessee what it cannot do directly. Still, subcontracting not performed at the Carrier's instigation, under its control, at its expense or for its exclusive benefit is not embraced by the Agreement's scope and notice provisions.

Elements in the balance have been repeated often. A carrier is not liable for subcontracting (1) where the work, while perhaps within its control, is totally unrelated to railroad operations (2) where the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on the Carrier's property and is undertaken at the sole expense of the other party and (3) where the Carrier has no control over the work force for reasons unrelated to having contracted out the work. See, Third Division Award 32941, as well as Public Law Board No. 6493, Award 43 and cases cited in them.

Virtually all factors in tests (1) and (2) support the Carrier. Nothing indicates subterfuge by the Carrier and GE. The single militating thread for the Organization is that Carrier employees use the lunchroom. However, the nature and extent of the use are far from clear.

The evidence consists of statements from one employee that Carrier employees use the lunchroom "all of the time" and are "the only people that I have seen use the lunchroom" and from another employee that "these buildings are used

by everyone working there be it GE or BNSF [personnel].” Contradictions between the two statements suggest that the first is not meant literally. As it is, it appears that employees from both employers use the facility, but the number, mix, and other circumstances are very murky. Moreover, nothing tells how frequently or at what times either declarant observed lunchroom operations. Nothing suggests that the presence of Carrier employees resulted from an agreement or arrangement between the Carrier and GE that benefits the Carrier in any significant manner. In short, the single fact favoring the Organization is insufficient to counterbalance the multiple factors supporting the Carrier.

Accordingly, the claim is unproven. It is 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 15th day of June 2010.