

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40667
Docket No. MW-40108
10-3-NRAB-00003-070302
(07-3-302)**

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 (Hulcher, Inc.) to perform Maintenance of Way and Structures Department work (remove track panels and install switch panels) between Mile Posts 12.3 and 12.7 on the Chicago Division on August 11, 12, 21, 22, September 11, 12, 18 and 19, 2004 [System File C-04-C100-125/10-05-0007(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 J. Ashlock, E. Wehmhoefer, M. Piper, R. Penaflor, D. Kimball, R. Reed, D. Anders, D. Furrow, R. Freeman, R. Anders, T. Stathis, S. Garcia, J. Rios, D. Kemp, G. Sheldon, G. Guisti and J. Komater shall now each be**

compensated for sixteen (16) hours at their respective straight time rates of pay and forty-eight (48) 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.

On April 7, 2004, the Carrier wrote the Organization:

“The Carrier will contract out heavy equipment with operators to assist Carrier forces in renewing existing switches and installing new turnout switches, and moving track panels on the Chicago Subdivision. At Congress Park, mile post 11.5 to 13.5, the Carrier will remove the old straight panels and replace them with new No. 24 turnouts creating a new crossover plant at that location. At the plant located between mile post 1.0 and 2.0 the Carrier will replace an old turnout with a new No. 11 turnout. And at La Verne, between mile post 8.0 to 10.0 the Carrier [will] load old track panels and relocate them as necessary and off load them. As the Carrier does not have the heavy equipment necessary to load, unload, remove, and install these switches the contractor may provide equipment consisting of but not limited to, trackhoes, side booms, front-end loaders, to lift the turnouts and track panels into place as

required. As is the case in these types of projects, Carrier forces will do most of the work being assisted by contract heavy equipment.

This work may begin as soon as April 23, 2004.

The contracting of the work here involved is consistent with Carrier policy and the historical practice of contracting out such work. Moreover, the Carrier does not have the available forces or equipment to perform this work.”

On April 8, the Organization objected to the subcontracting and requested a meeting pursuant to the Note to Rule 55. Its letter was signed by General Chairman D. D. Joynt who asked that he or Vice General Chairman D. Willing be contracted to set a joint conference. The parties dispute whether the meeting occurred.

The Carrier produced what it claims is an internal contemporary note dated June 10 from Carrier Officer B. Yeck. The internal memo states an in-person meeting occurred with Willing on June 10 in which the parties were unable to agree. The Organization insists no meeting was held. It relies on a position statement Joynt wrote the Carrier during the processing of this claim asserting the absence of any meeting.

As more fully detailed below, Hulcher, Inc., a subcontractor, used 17 of its employees to remove and replace track panels, and perform related work between August 11 and September 19, 2004. The work involved five sidewinders (an off-track bulldozer equipped with a heavy duty boom and a winch assembly).

This claim followed. Each side asserts a panoply of substantive issues common to their subcontracting disputes. Also, the Organization seeks an award in its favor because (1) allegedly the language in the Carrier's April 4 notice (“will contract out”) shows an irrevocable decision already had been made which precluded a good-faith effort to avoid subcontracting in any subsequent meeting and (2) no meeting was held pursuant to the Note to Rule 55 and Appendix Y.

The Organization parses the phrasing in the Carrier's April 4 notice too much. A statement of future intentions does not necessarily reflect bad faith or an

unwillingness to change. The parties already have more than enough reasons to contest subcontracting without holding every written communication to the strict construction of a common law pleading.

The assertion that no meeting was held, if true, is determinative. However, because material facts are disputed, the Board has no authority to decide the question. Unlike Third Division Awards 20071 (date of meeting, not its existence, contested and even the Carrier's earlier date failed the "promptness" requirement) Award 24399 (disagreement whether the claim before the Board was the claim handled on the property) and, Award 35047 (the Carrier admits that no meeting was held because it misdirected the Organization's request to the wrong person) a material factual disagreement is unresolvable without reliance on disputed evidence. If only this unproven procedural challenge were involved, the claim would be dismissed.

However, even if the Carrier is correct and a meeting did occur, the Organization's substantive claims remain to the same extent that the procedural challenge had not been made at all. Put otherwise, the unresolved factual dispute about existence of the required conference eliminates a procedural finding in favor of the Organization, but it does not compel an award for the Carrier as long as substantive issues remain.

It is unnecessary to resolve each of the several classic subcontracting issues between the parties in this dispute. Even assuming, without deciding, the Organization prevails on all of its other theories and contentions, it cannot overcome the express exceptions in the Note to Rule 55 that permit this particular subcontracting.

Thus, Carrier employees (1) hauled and off-loaded individual track panels and switches to the work site and, then (2) undercut, joined and welded them together. Because the resulting switch or turnout could be more than 200 feet long and weigh more than can be lifted by any single piece of equipment, the contractor's employees, operating four to ten sidewinders, lifted and placed the assemblies next to the active track, removed the old track structure (working with Carrier employees) and then positioned the new sections into the active track. The Carrier estimated it would take one month to perform the work the contractor's machines and employees did in four

to eight hours. The Carrier presented evidence, and there is no contrary Organization evidence, that it lacked necessary equipment; and, even if equipment could be rented, there were no qualified, available Carrier employees to perform the work efficiently within a reasonable time.

Accordingly, the subcontract involved special equipment not owned by the Carrier and/or work that is such that the Carrier is not adequately equipped to handle it. Either of these situations are express exceptions that permit subcontracting under the Note to Rule 55.

Accordingly, the claim 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 1st day of November 2010.