Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40668
Docket No. MW-40109
10-3-NRAB-00003-070320
(07-3-320)

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

(Brotherhood of Maintenance of Way Employes 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 (Belger) to perform Maintenance of Way and Structures Department work (crane operator work) at the Bridge at Mile Post 172.8 on the St. Joseph Subdivision beginning on May 18 and continuing through June 10, 2005 [System File C-05-C100-93/10-05-0225(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 C. Wilson and J. L'Heureux shall now each be compensated for one hundred thirty-six (136) hours at their respective straight time rates of pay and for thirty-four (34) 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 February 15, 2005, the Carrier wrote the Organization, in part, regarding "Heavy Equipment to Assist Carrier Forces in Bridge Projects" that:

> "As information, the Carrier will need to contract out for off track cranes to assist Carrier forces in two bridge projects on the St. Joseph Subdivision. The Bridges are located at 32.4 and 172.8. Carrier forces [will] do the majority of the work assisted by the cranes and operators.
>
> This work may begin as soon as March 5, 2005.
>
> 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. If you wish to discuss this work please contact. . . ."

On February 16, 2005, the Organization responded that BMWE-represented employees were able to perform the work and necessary equipment could be rented without outside operators in Omaha. It requested a conference. The Carrier contends a March 8 telephone conversation occurred in which the parties essentially

took their current positions. It produced an apparently contemporaneous internal memo reflecting the participants, subject and parties' positions. The Organization asserts the Carrier never responded to its conference request, and no conference occurred. It references a written position statement during the claim procedure where the Organization was represented by the same agent who supposedly participated in the March 8 telephone conference stating that his records reflected no response to his February 16 request for a conference.

The Carrier contracted with Belger Cartage Service to perform certain off-track crane work on a bridge renewal project located near MP 172.8 on the St. Joseph Subdivision. Two Belger employees performed the disputed work ten hours per day on certain days between May 18 and June 10, 2005. The subcontractor's forces used a 150-ton Link Belt LS238 H crane, i.e., an off-track crane not owned by the Carrier. Belger's contract required the use of its employees. BMWE-represented employees had not operated the equipment previously and were not trained or certified on it.

At one time, the Carrier owned and operated fifteen 30-ton off-track rubber tired crawler cranes with a short reach, which were sometimes used in bridge construction. The crawler cranes were replaced some years ago with high capacity locomotive cranes.

The Claimants hold seniority as a Machine Operator in the Railway Equipment Sub-department or as a Foreman in the Bridge and Building Sub-department.

The Organization grieved, alleging violation of seniority Rules, as well as Rules 1, 5, 55, the Note to Rule 55 and Appendix Y. A virtually identical claim was filed and processed separately to the Board, regarding Belger's prior work at the bridge at MP 32.4. See Third Division Award 40664.

In this dispute, the Organization reasons (1) despite the Organization's request, no conference was scheduled and held pursuant to the Note to Rule 55 (2) bridge construction, maintenance and repair is embraced in the Agreement's scope clause and has been historically and customarily reserved and assigned to BMWE-

represented employees (3) the Carrier's reasons are specious, in bad faith, unsubstantiated, misplaced and/or gravely erroneous (4) equipment used by Belger consisted of an ordinary crane and pile driver (5) the Carrier has not met its burden of proving a past practice (6) the Claimants are entitled to payment notwithstanding the Carrier's "fully employed" and similar defenses and (7) arbitration decisions support the Organization.

The Carrier responds (1) insufficient evidence exists that it failed to give proper notice or violated the Agreement's substance (2) neither the Agreement's express language, nor past history, tradition, custom or practice establish BMWE forces perform the disputed work exclusively on a system-wide basis (3) Rules cited by the Organization do not reserve work exclusively to employees of a given class (4) because, at most, a mixed practice exists, subcontracting is not restricted (5) no notice is required if the work is not reserved exclusively to BMWE-represented employees but, in fact, the Carrier provided notice and otherwise acted in good faith (6) the Belger crane is special equipment unavailable to the Carrier without contractor employees so that the Carrier does not have the necessary equipment or employees to operate it safely without training and experience (7) the Carrier lacks certified, qualified employees to operate the particular crane (8) any monetary award amounts to improper punitive damages because the Claimants suffered no damages because all were fully employed or on leave and (9) arbitration decisions support the Carrier.

The weight of evidence shows a Note to Rule 55 phone conference occurred on March 8, 2005, during which the parties essentially took identical positions to those espoused here. There is evidence of disagreement, but none of bad faith.

The Organization's denial of a meeting primarily rests on a statement in a claim handling memo in which the Organization's agent characterizes the contents of his records. Seen in its best light, the Organization's position does not ultimately advance its cause.

The dispute is not whether a conference was requested, only if it was held. The Carrier's apparent contemporaneous internal memo is evidence a conference occurred. The Organization denies the authenticity of the document based on its

agent's characterization of his file. The Carrier's contemporaneous memo potentially outweighs the naked assertion of the Organization's claim statement. Yet, even if each irreconcilable statement constitutes potentially probative evidence, there is fundamental disagreement about the authenticity and relevance of crucial documents and events.

This creates a dispute over material facts beyond the Board's jurisdiction. The end product is not, as the Organization argues, proof no conference occurred, thereby requiring the claim be granted. It is a matter of disputed fact that, if it was the only issue, would result in dismissal.

If the Organization is incorrect and, in fact, a required conference occurred, there remains a need to consider the substance of its claim. The parties have raised the profusion of issues and sub-issues common in their long history of subcontracting disputes. No point is served now by revisiting the conflicting principles, fine distinctions, and irreconcilable decisions urged by the parties. Even assuming, without deciding, that the Organization prevails on all its other theories and contentions, it cannot overcome an express exception that permits this particular subcontract.

Specifically, the Note to Rule 55 contains narrow exceptions to broad general prohibitions against subcontracts. In part, the limited exceptions include work involving special equipment not owned by the Carrier and/or special skills not possessed by Carrier employees. The exceptions do not apply if the "special" equipment can be readily obtained or if Carrier employees can be trained and competent before the work needs be performed. Appendix Y obliges the Carrier to attempt to procure rental equipment in good faith to be operated by its employees. When special equipment can be obtained on the open market, the Carrier normally is expected to establish why it did not do so.

Here, however, the crane was not owned by the Carrier, its employees had not operated it, or similar equipment, for many years and were not certified. As far as the record demonstrates, the cranes were not available (if at all) in a timely manner in the open market and Belger would not lease its equipment without its own operators. Therefore, the exceptions in the Note to Rule 55 apply.

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.