

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40776
Docket No. MW-40258
10-3-NRAB-00003-080041**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
(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 Cartage Services, Inc.) to perform Maintenance of Way and Structures Department work (drive piling, remove/place bridge spans and related work) at Bridge 126.10 on the St. Joseph Subdivision beginning on April 17 and continuing through May 16, 2006 [System File C-06-C100-145/10-06-0245(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 R. Anderson, P. Waldron and C. Wilson shall now each be compensated for one hundred seventy-six (176) hours at their respective straight time rates of pay and eleven and one-half (11.5) 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.

The Carrier issued a notice to the Organization on January 11, 2006:

“As information, the Carrier plans to contract specialized equipment with operators and oiler to assist Carrier forces with bridge renewals at various locations on the St. Joseph Sub-Division. The contractor will provide a 250-ton off-track crane with operator and oiler that will be used to remove existing bridge spans and place new spans each weighing approximately 63,000 pounds. In addition to removing and setting bridges spans, the off-track [crane] will also assist with driving piling due to space constraints. Carrier forces will perform remaining bridgework. The Carrier is not adequately equipped to perform all aspects of this project, nor does it have necessary skilled forces. The contractor possesses the necessary specialized equipment and skill[ed] forces necessary for a successful completion of this project. The bridges to be renewed are as follows:

St. Joseph Sub-Division [Line Segment 3000]

Bridge 126.10: Anticipated Start Date: March 13, 2006

Bridge 171.93: Anticipated Start Date: March 20, 2006

Bridge 185.61: Anticipated Start Date: April 10, 2006

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

The Organization requested a conference which was held on January 30, 2006; no resolution was reached during conference.

On June 2, 2006, the Organization filed a claim alleging the Carrier breached “Rules 1, 2, 5, 29, 55, Note to Rule 55 and Appendix Y, but not limited thereto” beginning April 17, 2006, “when the Carrier contracted for men and equipment to work on a bridge renewal project,” specifically, “drive piling, remove existing bridge spans and place new spans using a 250-ton off-track crane at bridge 126.10[.]” In addition to the Crane Operator, the contractor provided two more employees and used a 165-ton off-track crane. The Carrier’s bridge derrick delivered all materials to the site and “drove eleven piling and the contractor’s crane drove one piling.” The Carrier did not meet any criteria in the Note to Rule 55 and Appendix Y.

On July 18, 2006, the Carrier denied the claim, reiterating its reasons in the notice and remarking that the Claimants were fully employed and working on other bridge projects needing timely completion.

On September 6, 2006, the Organization appealed, restating its arguments as set forth in the claim, and noting that it historically and customarily performs this work. Also, the Carrier has off-track Galion cranes and can rent or lease the equipment for use by its qualified and skilled forces.

On October 25, 2006, the Carrier denied the appeal on the basis there was no proof the Carrier owns off-track Galion cranes, that they can hoist a 63,000 pound bridge span, or that such a crane was available to rent (without operator) on the dates needed. Also, there is no support for damages which would constitute a punitive payment not provided for under the Agreement.

By letter dated April 30, 2007, the Organization confirmed the conference held on March 19, 2007. It maintains that the Carrier’s notice inflated the size of the crane needed (250-ton) and the material weight (63,000 pounds) because it contracted for a 165-ton crane and the heaviest bridge span was 48,500 pounds. The Carrier owns three cranes with qualified Operators that can handle this material and one was at the site feeding the material to the contractor’s crane. Also,

a smaller crane makes more of the Carrier's cranes available to handle this work, as well as rental cranes without operators.

Rules 1, 2 and 5 set forth classes of employees within the Bridge and Building and Roadway Equipment Sub-departments required to perform work stipulated to in Paragraphs 1 and 2 of the Note to Rule 55, that is, "work in connection with the maintenance or repairs of structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service."

BMWE-represented forces customarily and historically perform this claimed work because they construct repair and maintain bridges and perform related bridge work on Carrier-owned property for the furtherance of the Carrier's operations as a common Carrier.

The Organization received timely and proper notice. At the time of notice (January 11, 2006) the Carrier planned to contract for a 250-ton off-track crane that could hoist a 63,000 pound bridge span. A 250-ton off-track crane was not available; accordingly, it contracted for a 165-ton off-track crane which hoisted a 48,500 pound bridge span. The Carrier does not own a 250-ton or a 165-ton off-track crane. There is no evidence that the Carrier engaged in bad faith and or intentionally misled the Organization about the size of crane and material weight when it issued the notice.

The Carrier's cranes are smaller in size than the off-track crane used on this project as evidenced in the statement of S. Millsap, AVP Structures Engineering. The AVP states further that OSHA regulations are more stringent and require specific training and qualification for a dedicated crane (such as off-track) whereas in the past, the training was more generic in nature and applicable to a variety of cranes (off-track, on-track, large and small). The regulations are not challenged by the Organization other than to note that a Carrier employee was at the site using an on-track crane to drive 11 pilings. This supports the Carrier's position that its forces performed the majority of the work on this project.

Given the OSHA standards and regulations in place at the time of this claim and the fact that the Carrier does not own the size of crane contracted for in this dispute and does not have such sized cranes available in its inventory, the Board finds that Carrier forces are not qualified to operate a 165-ton off-track crane. The

Carrier satisfied two criteria in Appendix Y for contracting, that is, “special equipment not owned by the Company” and “special skills not possessed by the Company’s forces.” Therefore, this 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 15th day of December 2010.