

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40866
Docket No. MW-40692
11-3-NRAB-00003-080447

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees 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 (Otto Baum Construction Company) to perform Maintenance of Way and Structures Department work (dismantle/construct overpass bridge and related work) at Mile Post 141.15 in the vicinity of Vermont, Illinois beginning on August 22 and continuing through September 15, 2006 [System File C-06-C100-210/10-06-0373 (MW) BNR].
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance notice of its intent to contract 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, Claimants P. Johnson, J. Cable and R. Burr shall now each be compensated for one hundred thirty-eight (138) hours at their respective straight time rates of pay, Claimants T. Floyd and J. Abernathy shall now each be compensated for forty-eight (48) hours at their respective straight time rates of pay and Claimants R.

Dejaynes, K. Griffel and L. Collings shall now each be compensated for eight (8) hours at their respective straight time 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 Organization filed a claim with the Carrier by letter dated October 8, 2006, alleging a lost work opportunity, in that employees of the Otto Baum Construction Company, rather than Carrier forces, dismantled the existing wooden overpass bridge at MP 141.15 and constructed a new, larger bridge. According to the Organization, the work began on August 22 and continued to September 15, 2006. The Organization contends that the Carrier violated Rule 55 of the Agreement, in that it failed to give proper notice of the work and it improperly contracted work that it should have assigned to its own forces. The Carrier responded that the work was not bargaining unit work and, indeed, was not even work performed by the Carrier. According to the Carrier, the bridge was constructed by the Village of Vermont, Illinois, and it had nothing to do with the project.

The record developed on the property establishes that the bridge demolition and reconstruction was part of a larger project undertaken jointly by the Village of Vermont and the Carrier. On June 10, 2004, the Village of Vermont and the Carrier jointly petitioned the Illinois Commerce Commission for permission to modernize and/or remove a number of grade crossings in the Village and to demolish and reconstruct a one-lane wooden highway overpass bridge at MP 141.15 that did not meet existing Illinois Department of Transportation design standards for such a highway overpass structure.

On December 15, 2004, the Commission granted the Petition, setting forth certain conditions and circumstances under which permission for the project was granted. The Commission allocated responsibility for different pieces of the project between the Village and the Carrier. The Carrier would be responsible for part of the work and part of the cost, but the bulk of the work would be done under the supervision of the Village, with the majority of the cost being underwritten by the State of Illinois Grade Crossing Protection Fund (GCPF). Paragraph four on page four of the Commission's Order allocates the costs between the parties. Of the projected \$2,825,580.00 total cost, GCPF would be responsible for \$1,803,975.00 and the Carrier for \$1,021,605.00, as well as for 100% of the cost of installing temporary stop signs at two crossings and for closing, abolishing and barricading four other crossings. Most relevant to this claim, the Commission ordered that "The Village will be the lead agency with responsibility for construction of the new North Alley Street Bridge and the new connecting road, including construction oversight and billing; the Village will be responsible for all construction costs after payment from the GCPF and the Company, as well as all future maintenance costs for the new bridge and roadway." Additionally, the Village would own and maintain the new bridge and roadway upon their completion. The Carrier was ordered to maintain the new warning devices at the remaining crossings and to pay all future operating costs. In its closing, the Commission stated, "It is further ordered that the Village of Vermont is hereby required and directed to remove and reconstruct the North Alley Street grade separation structure over the Burlington Northern and Santa Fe Railway Company's track, located in the Village of Vermont, Fulton County, Illinois, and thereafter maintain the same."

The record includes an e-mail from the Carrier's Manager of Public Projects that explains the nature of the work and the division of ownership and responsibility between the Carrier and the Village of Vermont:

"This grade separation project is part of a large Illinois Commerce Commission (ICC) project in the Village of Vermont, IL. The project involved construction of a new highway bridge, installation of new crossing warning signals at 2 grade crossings, and closure of 4 at-grade crossings. BNSF did cost participate in the project, as the closure of the 4 at-grade crossings represents a benefit to the company. . . .

The Village of Vermont selected a contractor to perform the services highway-related stipulated in the Order. BNSF MoW forces provided flagging services while the contractor was working on/near our R/W. BNSF Signal teams were responsible for the signal work at two crossings,

and MoW provided surface work at the 4 other crossings. The cost for these services was partially paid by the ICC and partially absorbed by BNSF during negotiations and by order of the ICC. . . .

. . . Aside from the flagging requirement, the Village was responsible to obtain the necessary permits and easements for a new highway overpass. This bridge replacement was not a BNSF project, it was a Village (public) project in which the Village is responsible (by ICC Order) for ownership and all future maintenance of the structure. . . .”

Finally, the record includes copies of correspondence between the Village and McClure Engineering, the firm retained by the Village to manage the bridge demolition and reconstruction, regarding bidding and the award of the bridge contract to R. A. Cullinan & Son, Inc. (There is no mention of Otto Baum Construction Company, the entity alleged by the Organization to have done the work; it is possible that Cullinan subcontracted the work to Otto Baum Construction, but the record is silent on the matter.)

The record thus establishes that while the Carrier had an obligation to pay part of the cost of the bridge project, it did not have control over the project. It had control over other aspects of the overall project, namely the signal work and work associated with closing four at-grade crossings and upgrading the signaling at the remaining two crossings. Moreover, it appears from the record that that latter work was performed by Carrier forces. Control of the bridge demolition and reconstruction was lodged in the Village of Vermont by Order of the Illinois Commerce Commission. The Village worked with an engineering firm to put the project out for bid and selected the lowest bidder to do the job.

The only conclusion that the Board can reach on the record before it is that the work claimed by the Organization was not Carrier work, because it was under the authority and jurisdiction of the Village of Vermont. The Village was named lead agency by the Commission in its Order. The Village had the responsibility, by ICC Order, to oversee and direct the project. It is true that BNSF paid part of the cost of demolishing and rebuilding the overpass bridge, but it did not have control of the project. It had control over other parts of the overall project (signal modernization and crossing closings) and Carrier forces performed that work. Responsibility for the bridge, however, was transferred to the Village of Vermont by the ICC’s Order. If the work at issue is not even Carrier work, the Note to Rule 55 cannot apply, and the Carrier has no obligation to

notify the Organization of the project. Although Carrier forces had worked on the bridge in the past, the ICC's Order put control of the bridge work at issue squarely under the control of the Village and out of the hands of the Carrier.

Because the work was not Carrier work, it falls outside the parties' Agreement and, hence, the Note to Rule 55. The Carrier literally could not assign the work to its own forces because, by order of a state agency, it did not have authority to perform the work in the first place. Accordingly, the Carrier did not violate the parties' Agreement when it failed to give notice of the work claimed by the Organization, because the work was not a Carrier project and fell outside the scope of the Note to Rule 55. The work was not contracted out by the Carrier, because it was not the lead agency and had no control over the bidding and awarding of the work to outside forces. 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 7th day of February 2011.