Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29741
Docket No. MW-29645
93-3-90-3-642

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside contracting forces consisting of two (2) crane operators, four (4) laborers and two (2) truck drivers to blacktop the Route 22 crossing in Lake Zurich, Illinois on May 12, 1989 and the Otis Road crossing in Barrington, Illinois on May 19, 1989 (System Files BJ-12&13-89/UM-33&34-89).

(2) As a consequence of the aforesaid violations, B&B Carpenter Foreman T. Legner, Crane Operators G. Haggerty and M. Bachman and B&B Carpenters O. Salaiz and M. Clinton shall each receive pay for sixteen (16) hours at their respective time and one-half rates of pay and B&B Carpenters J. Cheney and B. Ruzich shall receive pay for eight (8) 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 employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

On March 20, 1989, Carrier gave the Organization advance notice of its intent to contract out the resurfacing of 27 separate crossing aproaches. On May 12, 1989, an outside contractor performed work at the Route 22 crossing in Lake Zurich, Illinois. This work involved the removal of the track structure, excavation of nearly five feet of roadbed, installation of a drainage system, installation of a filter fiber, filling the hole with ballast, installation of a track panel consisting of new ties, plates, anchors, rail and laying fresh bituminous material both within and upon the approaches of the crossing. On May 19, 1989, an outside contractor performed the same type of work at the Otis Road crossing in Barrington, Illinois.

By letters dated July 6 and 17, 1989, the Organization presented claims for the work performed at the crossings at Route 22 and Otis Road which, according to the Organization, was work that had "customarily and historically been performed by B&B Subdepartment forces and is contractually reserved to them...." The correspondence further stated the following:

> "On May 12, 1989 the carrier utilized outside contracting forces to blacktop Route 22, Lake Zurich, Ill. To perform this job, the contractor used (2) crane operators, four (4) laborers, and two (2) truck drivers.
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> "Therefore, due to said violation, the organization requests that Crane Operators ... Haggerty ..., Bachman and Carpenter Foreman ... Legner and Carpenters ... Salaiz, ... Cheney, ... and Clinton ... be fully compensated at their respective time and one-half rates of pay, eight (8) hours ..."
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> "On May 19, 1989, the carrier utilized outside contracting forces to blacktop Otis Road crossing, Barrington, Il. To perform this job, the contractor used two (2) crane operators, four (4) laborers, and two (2) truck drivers.
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> "Therefore, due to said violation, the organization requests that Crane Operators ... Haggerty ..., Bachman ..., Carpenter Foreman ... Legner, ... Carpenters ... Salaiz, ... Ruzich, ... and Clinton ... be fully compensated at the respective time and one-half rates of pay, eight (8) hours...."

The Carrier maintained that it has "historically contracted out" this type of repairs, and had contracted out the "majority" of the blacktopping of roadway approaches to railroad crossings for the past decade. Further, the Carrier submitted that the "Claimants were fully employed and have been for over three and one-half (3 1/2) years and suffered no pecuniary loss."

Subsequent correspondence between the Parties failed to resolve this dispute. It is now properly before this Board for adjudication.

Two additional claims were submitted for the truck work: removing old blacktop from the crossing approaches and bringing the new bituminous material to renew the approaches. These claims were denied on March 22, 1990, by the Carrier's highest designated officer and were not progressed further.

Agreement provisions pertinent to this dispute state:

"CLASSIFICATION OF WORK RULES

Rule 2 - Bridge and Building Sub-Department

(a) All work of construction, maintenance, repair or dismantling of buildings, bridges, including tie renewals on open deck bridges, tunnels, wharves, docks, coal chutes, smoke stacks and other structures built of brick, tile, concrete, stone, wood or steel, cinder pit cranes, turntables and platforms, highway crossings and walks, but not the dismantling and replacing of highway crossings and walks in connection with resurfacing of tracks, signs and similar structures, as well as all appurtenances thereto, loading, unloading and handling all kinds of bridge and building material, shall be bridge and building work.

* * *

(j) All work described under Rule 2 shall be performed by employes of the B&B sub-department, except as stated in paragraph (f) and as provided by agreement with shop

crafts effective April 3, 1922 and Memorandum of Understanding (Supplement No. 1) dated November 8, 1939 (printed below in part for ready reference:"

"TIME CLAIMS

Rule 58 Time claims shall be confined to the actual pecuniary loss resulting from the alleged violation."

"Rule 6 - Contracting Out Work

(a) Memorandum of Understanding (Supplement No. 1) with the shop crafts dated November 8, 1939 (printed here in part for ready reference):

GENERAL

It is understood where reference is made in this understanding to fabrication of parts of iron, tin, sheet metal or other material or metals, that no such reference shall in any way prohibit the Railway Company from purchasing such parts from outside manufacturers, and that the right of the company to have repair work performed by outside contractors, agencies, etc., is not disturbed.

(b) Letter of Understanding dated September 28, 1945

It is agreed that any construction project of such magnitude or intricacy that cannot be performed by employes covered by the agreement or when city or other ordinances do onto permit the work to be done by railroad employes, may be performed by outside contractors.

(c) From the National Agreement of May 17, 1968."

"ARTICLE IV - CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the Organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the Carrier involved at any time within 90 days after the date of this agreement."

The Organization maintains that this dispute pivots on "bad faith" on the part of the Carrier for its decision to assign outside forces to perform work "clearly encompassed within the scope of the Agreement while capable, qualified and willing Maintenance of Way employees were available to perform the work." The Organization points to Rule 2(a) as quoted above which states that "all work of construction, maintenance and repair of highway crossings shall be bridge and building work." The Organization further submits that the work has been "customarily and

historically" performed by the building and bridge employees. During the handling of this dispute on the property, the Organization submitted ten written statements from B&B employees attesting to the fact that "B&B forces have customarily and historically performed precisely the same crossing rehabilitation work." The Organization maintians that the Carrier has "established no justification for contracting out the work involved here."

Finally, the Organization submits that the Carrier has engaged in "an ongoing and systematic depletion of its Maintenance of Way forces with the intention of eventually eliminating the collective bargaining unit and rendering the collective bargaining agreement worthless."

According to the Carrier, the classification work rule, Rule 2, paragraph (j), the Memorandum of Understanding (Supplement No. 1), and the contracting out rule, Rule 6, paragraph (a), "all recognize that the Carrier retained the right to contract out all repair work."

The Carrier asserts that the crossing work between the ties, end of tie to end of tie, continues to be performed by Carrier B&B forces. However, the road crossing work is "largely dictated by the federal government through funds made available to all railroad and governmental bodies urging them to participate in improving grade crossings." The Carrier maintains that it therefore became the "general contractor" for many of these projects, and was obligated to seek bids and accept the lowest bids while still adhering to government standards.

The Carrier maintains that even though it has retained its unique contractual right to contract out repair work within the controlling agreement, it provided the Organization advance notification and held a conference on the contracting out of the approach work at Route 22 and Otis Road. Further, the Carrier asserts that the Agreement permits it "to lay claim only to the roadway crossing work extending across the width of the ties," work which the Carrier stated, "continues to be performed by B&B forces."

Finally, the Carrier maintains that "all B&B Sub-department forces were fully employed while the disputed work was performed, and have been for over three and one-half (3 1/2) years, working substantial overtime." According to the Carrier, the Claimants worked "an average of 1824 regular hours and they also averaged 276 hours of overtime, 15.1% of their regular hours or 22.6% of their regular wages." The Carrier maintains that the "magnitude of the Carrier's planned 1989 Construction Project, required all available employees to be assigned to work on other areas."

The essence of this dispute is not a matter of first impression. The Carrier's contractual right to contract out this type of repair work has been upheld by Board Awards on this property. In rendering Third Division Award 11103, the Board stated the following:

> "The Board finds that the Memorandum of Understanding is valid and is in effect; that the wording of the Agreement and the wording of the Memorandum are both clear and that they are not indefinite or ambiguous and under such circumstances the plain meaning controls. There is a statement in the record that this is the first time the carrier has asserted this defense but the record does not support this statement. Even if there had been a different mutual interpretation in the past either party to the Agreement could proceed to enforce the Agreement as made at any time. This latter statement follows the reasoning of the Board as set out in Award No. 7294 (Edward F. Carter, Referee).
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> The Board, therefore, finds that the work involved herein is repair work within the meaning of the Memorandum of Understanding; that the carrier has specifically reserved its right to contract our repair work; and that it was within its right in doing so in this case, and that, therefore, the Agreeemnt has not been violated."

Further, in rendering Third Division Award 11104, the Board stated:

> "After examination of the record the Board finds that the work involved here, that is, replacing a thermopane type window pane, was 'repair work' within the meaning of the Memorandum. A distinction is made in one of the arguments by the claimants as to whether or not the work as repair work or maintenance work, but the Board fails to see the distinction as applied to the facts in this case.
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> The Board finds that the Memorandum of Understanding is valid and is in effect; that

> the wording of the Agreement and the wording of the Memorandum are both clear and that they are not indefinite or ambiguous and under such circumstances the plain meaning controls.
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> The Board, therefore, finds that the work involved herein is repair work within the meaning of the Memorandum of Understanding; that the carrier has specifically reserved its right ot contract out repair work; and that it was within its rights in doing so in this case, and that, therefore, the Agreement has not been violated."

In making his Award, the Board ruled further:

> "Even if there had been a different mutual interpretation in the past either party to the Agreement could proceed to enforce the Agreement as made at any time. This latter statement follows the reasoning of this Board as set out in Award No. 7294 (Edward F. Carter, Referee)."

Additionally, Third Division Award 27650, concerns the Carrier's right to contract out blacktopping approach work based solely on past practice. The Board stated:

> "This case centers on whether the carrier was in violation of the agreement scope rule cited above when it did not use B&B forces, in this case on furlough, to do the work of blacktopping roadways at crossings...
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> "The merits of the claims must center on whether the B&B forces, as a matter of past practice, had always done the work in question. Since the carrier paid for the work involved, irrespective of what the source of revenue was which ultimately paid the contractors, the Board must reasonably conclude that all repair work at crossings, including the work to public right of ways, may indeed be B&B work if such had always been done by B&B forces in the past. As moving party to the instant claim, however, the organization has the burden of proof by means of substantial evidence to show that it had always done this work in the past. A close scrutiny of the record shows that the

organization has not adequately met this burden. The carrier argues that after the mid-1970's, B&B forces did place blacktop on public roadways approaching crossings. In the early 1980's however, the carrier states that some local jurisdictions advised the carrier that they were not satisfied with the qualify of the work done by railroad forces when they blacktopped public accesses to crossings and that public sector employees would do this work in the future. This resulted in public accesses being blacktopped by, in given instances, B&B forces but also by county forces and by outside contractors. The carrier has documented this in record. In its February 21, 1985, correspondence to the carrier, the organization does not deny that it shared this type of work with either public employees or contractors."

Finally, with relation to the pecuniary damages sought, Rule 58 restricts time claims to the actual pecuniary loss to the Claimants. Clearly, the Claimants in this dispute suffered no monetary loss, and therefore are precluded from claiming the same. Based on the foregoing, this claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever
Nancy J. Dever, Secretary to the Board

Dated at Chicago, Illinois, this 12th day of August 1993.