

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36156
Docket No. MW-34931
02-3-98-3-668

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe (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 (Woods Construction) to perform Maintenance of Way and Structures Department work (installation of water and sewer line) in Alliance, Nebraska Yards beginning September 6, 1994 and continuing (System File C-95-C100-11/MWA 95-01-17AB BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Messrs. L. E. Quick, R. K. Frahm and P. J. Sherlock shall each be compensated at their respective and appropriate rates of pay for an equal proportionate share of the total number of hours expended by the outside forces in the performance of the work in question beginning September 6, 1994 and continuing until the violation ceased.”

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.

Under date of June 14, 1994, the Carrier presented the General Chairman with a notice of its intention to utilize outside forces to perform the work of constructing a Roadway Work Equipment Building at Alliance, Nebraska. That notice described the work which the Carrier proposed to subcontract, as follows:

"The following is a description of the work involved:

Construct Work Equipment Building

Main floor 60 Ft. X 104 Ft. with concrete foundation and floor. Construction will be rigid frame metal building.

Construct an Asphalt Parking Lot.

Approximately 50 Ft. X 50 Ft. - 2500 Sq. Ft. including 3" asphalt and base material."

In the July 28, 1994 conference held in accordance with the Note to Rule 55, the General Chairman and the Carrier's representatives discussed the Carrier's reasons for wishing to contract out that described work. However, because the notice made no reference whatsoever to water or sewer line work, there was no discussion of that subject. When no Agreement was reached concerning the construction Work Equipment Building, the Carrier went forward with the contracting out. After the Claimants reported to the General Chairman that the outside forces were in fact performing such water and sewer line work, the Organization filed the instant claim which remained unresolved on the property.

In all such cases, it is critically important to focus as specifically as the evidentiary record permits on the work that is the subject of the contract violation. In this particular case, the generically described work of installation of water and sewer line in Alliance, Nebraska Yards beginning September 6, 1994 and continuing was described with particularity and never refuted by the Carrier, in a letter from Claimant Sherlock to General Chairman Joynt, dated December 21, 1996, as quoted in the General Chairman's letter of January 8, 1998, to Director -Labor Relations D. J. Merrell:

"... I will again outline for you the work that was performed by the contractor and is being claimed in this case.

Outside of the building:

Approximately 600 feet of water service line and tap into city water main.

Approximately 475 feet of sanitary sewer line and tie into existing sanitary sewer line.

Approximately 550 feet of gravity industrial sewer line. Approximately 250 feet of forced industrial sewer lines.

Approximately 225 feet of air line for the industrial sewer lift station.

Approximately 425 feet of natural gas line.

Also installed industrial sewer lift station with air lift pump, a small self contained grit chamber, two manholes and at least six sewer cleanouts.

Inside the building:

Installed drains, vents, and industrial sewer lines for the inspection pit.

Installed drains, vents, and industrial sewer lines to drain the entire floor and track area, approximately 80 feet X 120 feet (5 tracks).

Installed floor drains, vents sanitary sewer and water lines for two bathrooms, janitor room and a lunch/break room.

Installed a water meter.

Installed water lines overhead that drop down for water hose access all over the building.

Installed air lines overhead that drop down for air hose access all over the building.

Low pressure natural gas line for the heating system.

Installed the heating system."

As the handling on the property plainly shows, the crux of this case is that the Carrier's June 14, 1994 notice makes no reference at all to its intent to subcontract the installation of water and sewer line water work in connection with the construction of the Roadway Work Equipment Building at Alliance, Nebraska. Nor was the subcontracting of water and sewer line installation ever mentioned or discussed during the ensuing conferences requested by the

General Chairman. In that connection, the following facts and arguments set forth in the General Chairman's January 8, 1998 appeal of the claim denials are not effectively refuted by the Carrier:

"The main problem for the Carrier is the fact that you never provided me with a notice of the Carrier's intent to contract out the water service work. The Carrier provided a notice to me stating they intended to contract the construction of a Roadway Equipment Building at Alliance, Nebraska. The notice stated;

The following is a description of the work involved:

Construct Work Equipment Building

Main floor 60 Ft. X 104 Ft. with concrete foundation and floor.
Construction will be rigid frame metal building.

Construct an Asphalt Parking Lot.

Approximately 50 Ft. X 50 Ft. - 2500 Sq.Ft. including 3" asphalt and base material.

This is the description of the work that the Carrier provided me. It clearly says nothing about contracting out the water service work. Furthermore, as I have previously stated, the water service work was never mentioned during the contracting conference either. The notice is to provide me with advance notice of what work the Carrier plans to contract out. The conference is intended to allow the parties to discuss the work the Carrier wants to contract out and try to reach some agreement on that work. If I am never advised of certain work being contracted out and it is never mentioned or discussed during a conference, the only logical conclusion must be that the water service work was not part of the work the Carrier intended to contract out. The Carrier has failed to provide me with a notice of their intent to contract out this work and they are in clear violation of the note to Rule 55." (Emphasis added)

For its part, the Carrier urged that the General Chairman should have "assumed" that water and sewer line installation was encompassed in the above-quoted June 14, 1994 notice and/or that during the ensuing conference the Organization representatives were obliged to ask whether the Carrier intended to subcontract such water and sewer line installation work. We do not find the Carrier's position tenable because the plain intent of the Note to Rule 55

and Appendix Y is to place on the Carrier the duty of disclosure in such a case, so that the Organization can make an informed judgment about exercising its conference rights and the Parties can make a good-faith effort to reach a meeting of the minds.

It would be contrary to the manifest mutual intent of the contracting Parties for the Board to accept the Carrier's theory that it can transform its contractual duty of full disclosure and good faith discussion into an obligation on the Organization to interrogate the Carrier about subject matters not reasonably included in the notice served by the Carrier. In that regard, the record amply demonstrates that in other such new construction cases the Carrier has served and discussed advance disclosure notices, inclusive of water and sewer work, prior to subcontracting. In this case, the Carrier's failure to do so effectively precluded any possibility of discussion of the Carrier's reasons for subcontracting the water and sewer service work now in dispute and thus prevented good faith effort to reach an understanding concerning the contracting out of that work. For that reason, we shall sustain this claim.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 20th day of August 2002.