Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36157
Docket No. MW-34935
02-3-98-3-672

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 Employes
(
(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 to perform Maintenance of Way and Structures Department work (pick up scrap metal along the right of way) between Creston and Glenwood, Iowa on District Four on October 10 through 27, 1994 (System File C-95-C100-27 / MWA 95-02-10AB BNR).

(2) The Agreement was further violated when the Carrier failed to 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, Foreman M. S. Terry and Machine Operator T. F. Smith shall each be allowed one hundred twelve (112) hours' pay at their respective straight time rates and fifty-six (56) hours' pay at their time and one-half rates."

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 4, 1994, the Carrier served written notice on the Organization, in accordance with the Note to Rule 55, of its intent to utilize a contractor (Herzog Corporation) to provide specialized equipment known as a "Cartopper" in connection with the removal of scrap material generated by a massive track renovation project. In parts pertinent to the instant case, that notice read as follows:

> "The contractors patented, special equipment used to perform this work is able to operate from the top of the cars, and, as necessary, lower into the cars themselves in order to maintain clearances. The Contractor's equipment will supplement Carrier magnetic cranes and Jimbo Cartoppers . . . In addition to the new material, used material, ties and scrap will also be loaded or unloaded with the Contractor's equipment since that material will be shipped in higher capacity cars and/or because of clearances and accessibility to the work locations. Certain Contractor equipment is capable of carrying up to 1000 ties or up to 100 tons of material. Where possible, the Carrier proposes to use Maintenance of Way flagmen to accompany the equipment.
>
> The machines used by Herzog Inc., who is the major, but not exclusive, supplier of these services, are patented, specially designed, not available to the Carrier and the Contractor is unwilling to allow for the operation of this equipment by other than its own employees. As well, the equipment used by other Contractors is patented and not available to the Carrier for operation by its employees."

The General Chairman requested a conference and when the Parties were unable to arrive at a meeting of the minds, the Carrier initiated the contract and utilized the Herzog Corporation equipment and operators to remove track side scrap material. The instant claim alleges violations of the Note to Rule 55 and Appendix Y by the Carrier's use of subcontracted Herzog Cartoppers and two operators to pick up debris between Creston and Glenwood, Iowa, between October 10 and October 27, 1994.

The operative language of the Note to Rule 55, which governs the proper disposition of this case, reads as follows (emphasis added):

> "By agreement between the Company and the General Chairman, <u>work</u> as described in the preceding paragraph which is <u>customarily performed by</u>

employes described herein, may be let to contractors and be performed contractors' forces. However, such work may only be contracted provided that . . . special equipment not owned by the Company, . . . is such that the Company is not adequately equipped to handle the work. . . . "

Under the plain language of the quoted contract provision, the Carrier's reliance on the so-called "exclusivity test" is misplaced and the Organization made a prima facie showing that the work in question had been customarily performed by Carrier forces in the past. But we are convinced from considering the facts and circumstances of this record and authoritative on-property precedent, which thoughtfully analyzed the various factors involved in such cases, that the Carrier sustained its burden of proving applicability of the "specialized equipment" condition for subcontracting under the Note to Rule 55 in this case. See Public Law Board No. 4402, Award 20 and Public Law Board No. 4768, Award 28. See also Third Division Awards 30092, 31615, 32274 and 34019.

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 20th day of August 2002.