Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36715
Docket No. MW-35807
03-3-99-3-799

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Santa Fe Railway
((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 ditching and bank widening work between Mile Posts 66.3 and 66.9 near Bagley, Minnesota beginning October 20 through and including November 3, 1997 (System File T-D-1470-H/MWB 98-02-13AG 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, Group 2, Machine Operators K. O. Bingham, T. D. Gunst, J. D. Zon, B. L. Oppegaard and Truck Drivers D. D. Hoff, L. T. Hendrickson, D. A. Klein, D. M. Jarombek and W. H. Panzer shall each '. . . receive eighty-eight (88) straight time hours pay, at their respective rates of pay, and fifty-six (56) hours at one and one-half times their respective 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.

On September 17, 1997 the Carrier sent the Organization the following notification:

> "As information the Carrier proposes to perform the following flood repair project at Bagley, Minnesota. Flooding in 1997 has washed away embankment materials at various locations on the north side of the track on the Grand Forks Subdivision, LS31, from MP 66.3 to 66.9. This embankment will have to be replaced with structural fill. On the south side of the track at this location, the drainage needs to be re-established to halt future overtopping of the grade. This work is on a side-hill cut section with steep banks to the south and fill section 8-10ft. high on the north side. As has been customarily done in the past, it is proposed that the work will be performed by a contractor adequately equipped and who has the required skills and expertise necessary to perform all aspects of the work in a timely fashion before freeze-up. The general detail of the project is as follows:
>
> Contractor:
> Earthwork incl. clearing, grubbing and seeding 5,000 CY
> Culverts (FES and rip-rap) 5 each

Carrier forces:
Construct temporary grade crossings 2 each

It is anticipated that the work will begin as soon as possible but no later than October 8, 1997. If you wish to discuss the work in further detail please contact me to arrange for a meeting."

In a September 23, 1997 reply, the General Chairman stated the following:

"This concerns your letter advising of Carrier's desire to assign the work of ditching, embankment and fill work on the Grand Forks subdivision to an outside contractor. Please be advised that we cannot concur with your desire to assign this work to others, and we are herewith requesting a conference to meet in an effort to resolve this matter.

We do not agree that this type of work has been customarily done by others in the past. Based on the small size of this project, only 5000 cubic yards, this indeed is a project that is customarily performed by the employees. We find nothing in your notice which would persuade us to concur in this matter. Obviously, MofW employees operate the type of equipment necessary to perform this work. Further, the installation of culverts is specifically reserved to the employees under the terms of the collective bargaining agreement."

During an October 9, 1997 conference, the Carrier asserted that the reason for the subcontracting was the "lack of necessary equipment, lack of skill possessed by Maintenance of Way employees and a 'timely' need for completion."

For his part, the General Chairman opined as follows:

"The Note to Rule 55 and Appendix Y requires the Carrier to reduce the incidence of subcontracting work customarily performed by the Maintenance of Way. In past correspondence, you have acknowledged that MofW employees do perform ditching and bank widening work. . . .

During this conference it was evident that the Carrier had no intention of deviating from its notice provided the Organization. The Carrier could not tell me what machinery would be used, let alone of any attempts the Carrier had made to acquire rental equipment. The Carrier has stated that Maintenance of Way forces would retain the work of the placement of two at grade crossings, the number and locations as determined by the subcontractor. The lack of good faith effort, indeed the lack of any effort to reduce the incidence of subcontracting constitutes a violation of the Agreement."

Thereafter, on December 1, 1997, the Organization filed a claim on behalf of the individuals noted supra, in which it alleged that the Carrier had violated Rules 1, 2, 5, 6, 24, 25, 29, 55, and the Note to 55, when, on October 20 - 31 and November 3, 1997, it allowed outside forces to perform work that is "customarily performed" by Maintenance of Way employees. According to the General Chairman, the Claimants "suffered a substantial loss of work opportunity" account outside contractors performed the work which the Carrier outlined in its September 17, 1997 Notice. As a result of the alleged violation, the General Chairman requested that each Claimant receive 88 straight time hours' pay, at their respective rates of pay, and 56 hours at one and one-half time their respective rates of pay.

In its denial, the Carrier noted at the outset that, pursuant to the Note to Rule 55, it had provided proper advance notice to the Organization. With regard to the merits of the issue, the Carrier maintained that the Organization failed to carry its burden to prove that the disputed work was exclusively reserved to BMWE-represented employees on a system-wide basis.

The Carrier further maintained that the Organization was "incorrect" in its interpretation of Appendix Y when it stated that the Carrier was required to rent equipment to complete the disputed work.

Finally, the Carrier maintained that the claim was excessive, in that: (1) records demonstrated that all Claimants were fully employed during the claim period, and therefore, suffered no loss of earnings; (2) the labor agreements and

interpretations thereof did not provide for punitive damages; (3) payment for time not actually worked cannot be paid at the time and one-half rate; and (4) certain Claimants were on vacation or personal leave day on dates of claim and not available for work. The Organization replied to the Carrier's denial reiterating that the disputed work had been "customarily performed by Carrier forces and is reserved to them in accordance with the terms of the Agreement." Specifically, the General Chairman asserted that Agreement Rules 1, 2, and 5 establish the classes of employees within the Track and Roadway Equipment Subdepartment required to perform the work specifically stipulated within Paragraphs 1 and 2 of the Note to Rule 55, i.e., work in connection with the construction of tracks and structures located on the right-of-way.

The General Chairman also maintained that the Carrier had not made a "good faith effort" to reduce the incidence of outside contracting, thereby denying Maintenance of Way employees a work opportunity. Finally, the General Chairman alleged that the Carrier had not produced any evidence to support its allegation that the disputed work required any special equipment or special skills that its forces did not "readily" possess.

At the outset, we note that the Carrier's notice and conference obligations were met. The Carrier gave advance notice of its intent to contract out the work in dispute, and the parties met to conference the issue prior to the onset of the project.

Turning then to the merits of the dispute, careful review of this record has convinced the Board that this claim must be denied. The Organization argued that the Claimants were "qualified and available," however, the record demonstrates that those Claimants who were available were fully employed throughout the claim period. Therefore, the Claimants were not available to operate the necessary equipment, rented or otherwise. And because of this full employment, the Carrier was ". . . not adequately equipped to handle the work . . ." as clearly set forth in the second paragraph of the Note to Rule 55.

Further, it is noted that Rule 55 is identified as a classification Rule and does not reserve work to the Organization. While there is no doubt that elements of the disputed work have been performed by Carrier forces, the Organization was unable to establish that projects such as the one involved here are "customarily performed"

by Carrier forces. Finally, a review of this extensive record demonstrates that projects such as this have, on numerous occasions, been performed in whole or in part by outside forces. The Carrier has convincingly demonstrated that the project now in dispute did involve "special skills," and "special equipment" not owned by the Carrier. Accordingly, this 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 17th day of September 2003.

LABOR MEMBER'S DISSENT
TO
AWARD 36715, DOCKET MW-35807
(Referee Nancy F. Eischen)

The Majority's findings that the work was not customarily performed by the Claimants and denial based on the Claimants' work status is both poorly reasoned and clearly ignores the record as it was developed on the property.

The Majority's first error was that, allegedly based on the extensive record, the Carrier had on numerous occasions contracted out such work in whole or in part by outside forces for a number of years. The problem here is that the only evidence of past performance of such work was presented by the Organization, not the Carrier. In fact, there was absolutely no evidence presented by the Carrier during the handling of this dispute on the property that it ever contracted out such work in the past. The assertion that the evidence presented by the Organization was insufficient to establish "customary performance" is incredible to say the least. The General Chairman pointed out, **without refutation**, that over a period of nearly twenty (20) years, the Carrier had assigned its own forces to perform ditching, slope restoration and bank widening work. If the assignment of Carrier forces to perform such work over at least the past twenty (20) years is insufficient to establish customary performance, what does?

Second, the Majority held that: "*** the record demonstrates that those Claimants who were available were fully employed throughout the claim period. Therefore, the Claimants were not available to operate the necessary equipment, rented or otherwise. And because of this full employment, the Carrier was '. . . not adequately equipped to handle the work . . .' as clearly set forth in the second paragraph of the Note to Rule 55." That finding is plainly and simply wrong. What is perplexing is how the Majority arrived at this plainly wrong conclusion. There is no precedent cited in the award. However, a review of the record establishes that the following list of on-property awards was cited to the neutral member by the Organization as precedent concerning alleged fully employed claimants and their entitlement to a remedy based on a lost work opportunity: Third Division Awards 20892, 25968 and **Award 52 of Public Law Board No. 2206. Typical thereof is Award 20892**, which held:

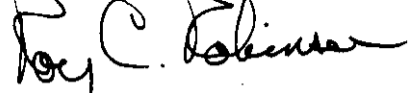
> "Carrier's argument with respect to the propriety of awarding damages in a case of this type has been decided adversely to the position taken by Carrier in this claim a number of times. (See Award No. 19924). The Board will follow the line of decision discussed in that Award and will award damages for the work opportunity lost by Claimants."

Had the Majority taken the time to review the authority found within the above-cited award, as well as the other awards cited in connection therewith, and applied said authority to the circumstances in the instant case, it would have been hard pressed to render the finding that it did.

A monetary award is not the equivalent of punitive damages. Instead, it is compensating the Claimants for work they otherwise would have performed and wages they would have earned. That is precisely the theory upon which the vast majority of awards have relied to sustain monetary claims for fully employed claimants. After all, if it were an established principle to deny a monetary award based on the claimants' fully employed status, what sense would it make to there being such a dispute at the National Railroad Adjustment Board. All the Carrier would have to do is contract out the employes' work with impunity while the forces were fully employed; perform perfunctory Note to Rule 55 notification; and receive a mere slap on the wrist from the Board for doing so. If that were the case, the Carrier would begin to cut back its forces even further than it has and hire contractors to do all seasonal work while the skeleton work force preformed the basic maintenance. After that, the death of the Agreement would not be far off. Such a scenario is clearly not what the framers of the Railway Labor Act intended when it wrote Section 3 of the Act.

Therefore, I dissent.

Respectfully submitted,



Roy C. Robinson
Labor Member