

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36744
Docket No. MW-36237
03-3-00-3-445

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 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 (Patrick Construction) to perform embankment stabilization work (install drains and place rip-rap) at Mile Post 300.4 on the Montana Division mainline in the vicinity of Vandallia, Montana beginning March 17, 1998 and continuing (System File B-M-602-F/MWB 98-08-13AA 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 G. W. Sinclair, Truck Drivers W. E. Arnold, G. S. Blackman, Group 2 Machine Operators R. C. Rodriguez, M. W. Sinclair, J. W. Peltier, G. L. Sinclair and K. R. Johnson shall each ‘. . . receive an equal and proportionate amount of pay for all hours straight time hours and overtime hours worked by the contractor beginning March 17, 1998 and continuing until work has been completed.”**

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 November 24, 1997 the Carrier informed the General Chairman as follows:

“As information, the Carrier plans to perform the following project near Vandalia, Montana. As has been customarily done in the past, it is proposed that the work will be performed by contractors who are properly equipped and possess the necessary expertise to perform all aspects of the work. A description of the work is as follows:

Rehabilitate approximately 600' of embankment on the main line that is failing due to water infiltration. Plans include the installation of French drains throughout the fill at strategic locations and the construction of a buttress at the toe of the embankment using rip rap. It is anticipated that the following materials will be used during the project:

**7,000 tons of crushed rock for the French drains
150 rail cars of rip rap**

It is anticipated the project will begin on December 11, 1997, and will take approximately 45 days.

The type and/or magnitude of work in the above project is such that it is and has been customarily performed by outside contract forces. The Company possesses neither the specialized equipment nor special skills required, nor is the Company adequately equipped to handle the work and to complete this project within the allotted time period.

If you or your designated representative wish to discuss any of the work described in greater detail, please contact me so that arrangements can be made for a meeting.”

On December 4, 1997, the General Chairman replied to the Carrier's November 24 notice in which he asserted that:

“The description of the work in your letter clearly shows that this project is not of such magnitude to support an argument for the use of contractors. Further, while you have made an allegation, you have failed to provide any evidence which support your position that the work is specialized or that special skills are required. We hope you can see why we cannot concur in your desire to assign this work to others.

Pursuant to the Note to Rule 55 and Appendix Y of our Agreement, we are herewith requesting a conference. Would you kindly contact BMW Vice General Chairman G. E. Frank to arrange for a mutually convenient time and place for this conference.”

On or about March 17, 1998 Patrick Construction commenced on the project which the Carrier set forth in the November 24 Notice, and, on April 28, 1999, the Organization submitted a claim in connection with same in which it asserted that the Carrier had violated Rules 1, 2, 5, 6, 7, 24, 25, 29, 55, and the Note to Rule 55 and Appendix Y.

Specifically, the General Chairman noted that “most” of the Claimants are heavy equipment Operators who had been assigned to operate machines “similar or identical” to those operated by Patrick Construction employees, and had done “the very same” type of projects now in dispute. In that connection, the Organization asserts that Patrick Construction used machines on the disputed project which were either “owned by Carrier or available to rent.” Finally, the General Chairman maintained that: “Carrier's refusal to exert an effort to reduce outside contracting is reason sufficient to justify sustaining this claim.”

In its denial to the claim, the Carrier argued that:

“Embankment stabilization and French drain installation work is often assigned to outside contractors because they have both the equipment and the expertise to handle what is a dangerous project. Just in recent years, outside forces have been assigned to perform similar work at the following locations:

- MP 10.4-106 and MP 8 & MP 16 at Seattle and Everett, Washington;
- MP 15.9-16.1, and MP 8 & MP 16 at Seattle and Everett, Washington;
- MP 26.5 and MP 26.8 at Edmond and Mukilteo, Washington;
- MP 1784.4-1784.6 at Everett, Washington;
- MP 1736.9-1737.0 at Skynomish and Baring, Washington.

As the moving party in this dispute it is not enough for the Organization to simply make an assertion and then sit back to see what the Carrier does next. It is your burden to show that such work has been exclusively performed in the past by the employees. The Organization has failed to meet that burden. Moreover, the list of locations where the Carrier has contracted out the work in question refutes those statements. Another factor to consider is that most of the work took place off the right of way and as such was not

Scope covered work. In fact, all of the buttressing work was off of the Carrier's right of way.

The project at issue had to be completed in an expeditious manner. The track was almost completely out of service, having a ten mile per hour slow order placed on it, and the work was going to take place below what the normal water line of the Milk River usually would be. Once Spring arrived the water level would rise and the track would be taken out of service.”

This dispute involves a claimed violation of numerous Agreement Rules, including the Scope Rule, when following due notice the Carrier contracted out the work of bank stabilization at MP 300.4 in the area of Vandalia, Montana. Careful review of this voluminous record, persuades us that the Organization failed to make out a prima facie showing that the cited Agreement Rules were violated by the Carrier's subcontracting of the Vandalia bank stabilization project. Despite the Organization's contention that the disputed work is “specifically reserved” to MofW employees, there is no specific contract language, history, or record evidence, which substantiates such a contention. In fact, the record supports the Carrier's assertion that there has been a “mixed practice” on this property, and while MofW employees may have participated in similar projects, there is no reservation of the disputed work to MofW employees.

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 22nd day of October 2003.