Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36857
Docket No. MW-36319
04-3-00-3-548

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Burlington Northern and 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 to do routine Maintenance of Way and Structures Department work (install pre-cast concrete curbing for retaining ballast) along main track between Mile Posts 14 and 15.5 at Northtown on the Staples Subdivision on November 24, 25, 26, December 8 and 9, 1997 (System File T-D-1493-B/MWB 98-04-21AB BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with the proper advance notice of its intent to contract the aforesaid work or make a 'good-faith' effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman R. G. Pechmann, Assistant Foreman G. J. Wonsewicz, First Class Carpenter S. C. Archibald, Second Class Carpenter H. C. Rydberg and Truck Driver R. S. Spencer shall now each be compensated for an equal and proportionate share of one hundred forty-four (144)

hours straight time at their respective straight time rates of pay and an equal and proportionate share of thirty-three (33) hours at their respective time and one-half rates of pay and Group 4 Machine Operators T. F. Maurer and L. P. Hennen shall be compensated for an equal and proportionate share of forty-eight (48) hours at their respective straight time rates of pay and an equal and proportionate share of nine and one-half (9.5) hours at their respective time and one-half rates of pay, in connection with the total man-hours expended by the contractor in the performance of the aforesaid work."

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.

The Organization alleges that on November 24, 25, 26, December 8 and 9, 1997, the Carrier allowed outside forces to install pre-cast concrete curbing for retaining ballast without proper advance notice or a "good-faith" effort to reduce subcontracting. It maintains that the work performed was routine Maintenance of Way work that should have been performed by BMWE-represented employees and, therefore, violated the Note to Rule 55 and Appendix Y.

The Carrier provided the Organization notice on December 1, 1996 for 11 new construction projects to be performed by outside contractors during the 1997 season. Central to this dispute, the proposed work was listed as:

"1. DOUBLE TRACK THROUGH NORTHTOWN, MINNESOTA

Track laying including ballast	10,000TF
Turnouts	6 each
Earthwork with clearing and grubbing	31,000CY
Subballast	11,000CY
Bituminous paving	2,444 Tons
Fencing	10,000 Feet"

The Carrier stated, "work of this nature and magnitude . . . has customarily been performed by contract in the past and the Carrier does not possess the specialized equipment, special skills and is not adequately equipped to handle the new construction work through to completion within the time periods allotted for this work."

There were conferences concerning the project and, thereafter, it was contracted out. By letter dated January 13, 1998, the Organization filed a claim asserting that "installing cement curbing" was "customarily performed by B&B forces." The Organization argued that the curbing was installed to retain the ballast and was secured by driving a metal rod through the curbing to anchor it down. The Carrier denied the claim on February 23, 1998 stating that the installation of "concrete curbing as a retaining wall" has been performed by outsiders in the past.

One of the central elements of this claim is the dispute over the actual work performed. Is the work that which is reserved under the Scope of the Agreement and is customarily performed by employees in the Maintenance of Way and Structures Department? The nature of the work claimed changed throughout this dispute. Initially, on January 13, 1998, it was "installing concrete curbing as a retaining wall." If this work was customarily performed by BMWE-represented employees then the Note to Rule 55 holds the Carrier to provide notice and show that special skills, equipment or materials are required. By letter dated April 21, 1998, the Organization alleged, "this case involves the pouring of a cement curb" which "the Claimants have performed work of constructing retaining walls" in the past. It provided statements and a photo arguing that the work was Scope protected and performed without advance notice.

During the progression of this claim the Organization specifically made reference to Rule 55F, relating to First Class Carpenters, which states, in pertinent part:

> "An employe assigned to construction, repair, maintenance or dismantling of buildings or bridges, including the building of concrete forms. . . ."

It stated, "the building of concrete structures, including that of retaining walls, the work claimed in this dispute is specifically reserved for Claimants' benefit." The problem for the Board is that we find no evidence in this record for the "building of concrete forms" and, in fact, find that this work was clearly otherwise. We find that the Organization later acknowledged that the work was "the placement of prefabricated concrete curbing" and then argues that it was a retaining wall. The Carrier clearly denied that argument maintaining that it was a part of the whole project meant to prevent "vehicles from driving past a certain point."

While there is a great deal to this complex claim, there is no proof that the work was customarily performed by BMWE-represented employees and covered by the instant Scope Rule. Nor is there any proof that the curbing work was anything other than work associated with the new track construction project about which notice was given and discussed.

There is evidence provided by the Carrier that prefabricated concrete curbing was previously performed by outside forces. And the Board cannot find this to be work associated with either building concrete forms or a retaining wall. The Organization provided insufficient proof that it was not a curb, as argued by the Carrier. Accordingly, the Board lacks a sufficient basis to find a violation of the Agreement and must deny the claim

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 28th day of January 2004.