Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38375
Docket No. MW-37394
08-3-NRAB-00003-020425
(02-3-425)

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF 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 (Leifert Construction) to perform Maintenance of Way and Structures Department work (removing and replacing concrete and rail) at Havelock, Nebraska beginning on July 19, 1997 and continuing through July 29, 1997 instead of Foreman G. Ellis, Carpenters J. Stewart, R. Thoms and M. Maloney (System file C-97-C100-94/MWA 97-12-2AE BNR).

2. The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out said 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 Rule 55 and Appendix Y.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. Ellis, J. Stewart, R. Thoms and M. Maloney shall now '. . . be paid all hours, straight time and overtime, that are worked by the contractor employees on this project from July 19, 1997 and continuing until such time as this violation ceases.'"

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.

In a letter dated June 23, 1997 the Carrier notified the Organization of its intention to contract out repair work on its Havelock Main Car Shop. The work to be performed included replacing crane rails, replacing track and concrete on the center track of the bay area, and replacing concrete in the driveway entering the bay area. The Carrier contended in that letter that it did not have sufficient manpower or equipment on the property to complete the work during the yearly maintenance shutdown. It stated further that the work on the shop could only be performed during the shutdown.

The General Chairman requested a conference on the matter, and following that conference, the General Chairman wrote to the Carrier protesting the subcontracting. In that letter, dated July 11, 1997, the General Chairman noted that Bridge and Building Sub-department personnel had placed the original rail for the crane and had also placed the original concrete and track in the bay area. Thus, he argued, B&B employees certainly had the necessary skills to perform the work at issue. The General Chairman also contended that any lack of available employees was due to the Carrier's reduction in forces, and should not serve as a valid excuse for contracting out B&B work. Further, he suggested that the Carrier could accomplish the work in question by utilizing B&B employees on overtime and on weekends.

The General Chairman also maintained in that letter that the Carrier should have inquired about leasing the equipment needed for breaking up the old concrete,

rather than hiring a contractor. Finally, he insisted that the entire conference was held in bad faith because it appeared to him that the decision had already been made to contract out the work. Accordingly, he accused the Carrier of not holding the conference in good faith, but simply as a formality, in direct violation of the Agreement between the Parties.

The Carrier proceeded to contract out the work at issue, and the Organization filed the above claim on August 24, 1997. The Organization referred to the Note to Rule 55 of the Agreement. That note, as amended, reads in part as follows:

> "However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. . . ."

The Organization pointed out that the Claimants were doing the same work that the contractor's forces were performing. It contended that the Carrier met none of the criteria in Rule 55, because it had the employees who could perform the work in question.

The Carrier denied the claim on October 14, 1997. The Carrier reiterated its position that it did not possess employees with the necessary skills or the equipment to perform the work at issue. In its appeal, the Organization again protested that the Carrier had both employees and equipment to perform the work, and further emphasized that the Carrier had not notified the General Chairman of its intent to contract out the work "no less than fifteen (15) days prior to the contracting transaction" as specified in the Note to Rule 55. The claim was again denied. It was appealed and progressed in the usual manner, including conference on the property, after which time it remained in dispute.

The language of the Note to Rule 55 is clear. Unless the Carrier has neither qualified employees nor needed equipment, it will not contract out work normally

performed by BMWE-represented employees. In this case, even correspondence initiated by the Carrier confirms that such work (except for initially breaking up of the old concrete – which appears to have been performed normally by the Laborer Craft) "had been done by BNSF forces in the past."

The Carrier insisted that time constraints prevented it from using Carrier employees and Carrier equipment because all employees were "fully employed." It also emphasized the need to complete the project entirely during the annual shutdown of the Havelock Main Car Shop. Given the nature of the work at issue and the site at which it had to be performed the Board finds persuasive the Carrier's reasoning that the work had to be accomplished in the narrow "window" of the shut down period.

However, the Carrier has not specifically addressed the Organization's initial protest that the Claimants could have done at least some of the work within the Carrier's legitimate time constraint by working overtime and on weekends. If they were in fact available to perform at least some of the work at issue, the Board finds that, under the clear language of the Agreement, their portion of the work should not have been contracted out. The burden is on the Carrier to prove that the Claimants had neither overtime nor rest days during which they could have been doing the work performed by the contractor. It has not carried that burden.

Accordingly, the Parties shall make a joint search of the Claimants' employment records for the period of the subcontracting, from July 21 through 29, 1997. If any or all would have been available and qualified for the work at issue, beyond their normal assigned duties, they shall be compensated for time lost, at the straight or overtime rate, whichever is appropriate.

AWARD

Claim sustained in accordance with the Findings.

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 November 2007.