Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39685
Docket No. MW-37890
09-3-NRAB-00003-030300
(03-3-300)

The Third Division consisted of the regular members and in addition Referee Susan R. Brown 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 (Dickey-Burnham, Inc.) to perform Maintenance of Way and Structures Department work (install windows) on the south side of the Main Car Shop at Havelock, Nebraska beginning on November 19, 2001 and continuing through March 10, 2002 instead of B&B Foreman R. A. Larimer, B&B 1st Class Mechanics/Carpenters J. N. Stewart and R. L. Thoms [System File C-02-C100-111/10-02-0183(MW) 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 R. A. Larimer, J. N. Stewart and R. L. Thoms shall now each be compensated at their respective straight time rates of pay for all hours expended by the outside forces in the performance of the aforesaid work beginning November 19, 2001 and continuing through March 10, 2002."

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 October 19, 2001 the Carrier notified the Organization of its intention to contract out the work of installing window panels and an automatic window opening system at the Main Car Shop in Havelock, Nebraska. The notification letter noted that "all Carrier forces in the area are fully employed and do not have the extra capacity to perform the work before the onset of winter weather. In order to have the building prepared for winter it is imperative that the work be performed as soon as possible." The notice also asserted that contracting of this work is "consistent with Carrier policy and the historical practice of contracting out such work."

The Organization responded, requesting a contracting-out conference for the purpose of making a good-faith attempt to reduce subcontracting pursuant to the Agreement. The General Chairman also asserted that BMWE-represented employees possessed all the needed skills to accomplish this work and the necessary equipment was readily available; moreover, this type of work was customarily performed by Carrier forces.

The parties met on November 8, but failed to reach agreement regarding employees' performance of the work. Contractor Dickey-Burnham, Inc. began performing the work on November 19, 2001 and completed it on March 15, 2002.

The footnote to Rule 55 states:

> "The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employes in the Maintenance of Way and Structures Department:
>
> Employes included within the scope of this Agreement - in the Maintenance of Way and Structures Department, including employes in former GN and SP&S Roadway Equipment Repair Shops and welding employes - perform work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service, and work performed by employes of named Repair Shops.
>
> By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. 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 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 note concludes by requiring the Carrier to notify the Organization 15 days prior to contracting out (except in an emergency) in order to allow time to discuss the Carrier's intended action and to give the representatives an opportunity to "make a good faith effort to reach an understanding concerning said contracting." If no agreement is reached, the Carrier may proceed to contract and the Organization may grieve.

Appendix Y to the 1982 agreement is in letter form from the Carrier to the Organization which states:

> "The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of the maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employes.
>
> The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefore."

The letter was also signed by a representative of the Organization.

As the Board has noted in prior Awards, there are different standards for resolving intra-craft jurisdictional disputes and the contracting out of work. For the former, it is well established that the Organization must demonstrate exclusive performance, system-wide, by the classification claiming that work was improperly assigned. See Public Law Board No. 2206, Award 55, as well as Third Division Awards 757, 4701, and 37889.

The right to subcontract work is a different story; retention of bargaining unit work is the life blood of a Collective Bargaining Agreement. This has been an issue of contention for many years and the record reveals repeated promises by the parties to reduce contracting out where possible by a combination of defining what work may be contracted out and under what circumstances with a pledge for good-faith discussion to increase work by members of the bargaining unit. This issue goes to the heart of job security for employees.

For this purpose, bargaining unit work is defined by a combination of the Scope Rule, classification specifications set forth in Rule 55, and some custom. It is clear that Maintenance of Way employees' work includes, by definition, the repair, and

maintenance of buildings such as the Havelock Main Car Shop. Although the Carrier asserted that this type of work has "customarily" been contracted out, there is no evidence in the record that supports such a contention.

By definition and common sense, window replacement is included in the maintenance and repair of a building. The record reveals one concrete example of prior window replacement at this location in the early 1990s. In that case, the Carrier proposed to contract out the work, the parties consulted, and the work was performed by BMWE-represented employees. The Carrier did not dispute that B&B employees also performed window replacement prior to that incident. Thus, we must conclude that the Carrier has not proved that this particular type of maintenance and repair work has been customarily contracted out.

This of course did not prohibit the Carrier from contracting out the work in this instance. It means only that the Carrier, in order to do so, had to meet one or more of the contractual standards for subcontracting work that is customarily performed by bargaining unit employees set forth in the Note to Rule 55: that the Carrier is not adequately equipped to handle the project because the work requires special skills not possessed by the Carrier's employees or special equipment not owned by the Carrier, or that an emergency exists which was not contemplated and is beyond the capacity of the Carrier's forces. The Carrier bears the burden to prove any such affirmative defense. See Third Division Awards 30661, 31521, 32320, 36515, and Public Law Board No. 2206, Award 57.

The Carrier's argument that this window replacement job was an emergency because it had to be completed before the winter set in is not persuasive for at least two reasons. First, as the Organization points out, winter comes every year in Nebraska, and as such, winter time is not an emergency within the plain meaning of the word. Prior Boards have held that lack of proper planning on the part of the Carrier, either with respect to timing or manpower, does not constitute a contractual excuse for contracting out work. See Public Law Board No. 6204, Award 33. Second, the Carrier initially scheduled this work to begin on November 6, 2001. Although it was begun less than two weeks later (November 19) by the contractor forces the Carrier contended were necessary, the project was not finished until mid-March, after the bulk of the winter had passed. Clearly then, the work could have been performed by BMWE-represented employees starting in November 2001 and continuing over the

entire winter, spring, summer, and fall in order to be finished before the start of the next winter, to get the same benefit as was achieved by the contractors.

Nor did the Carrier establish that BMWE-represented employees did not have the skills to perform this work. The skills at issue appear to have been certain aspects of the carpentry, welding and electrical tasks involved, all routine components of maintenance and repair. The Carrier first asserted on the property that the electrical components on the automatic operation were so specialized that it was necessary for the manufacturer to install the windows and the automatic opening mechanism, but apparently the contractor used was not the manufacturer. The Carrier also asserted that the welding skills required were beyond the capacity of its employees, but offered no proof to that effect; B&B employees routinely use welding skills on bridges and other structures.

Finally, the Carrier asserted that it was necessary for a contractor to do the work because of the equipment required – two telescoping boom lifts. It made no response, however, to the Organization's assertion on the property that such lifts are available for lease in nearby towns. Because Appendix Y specifically includes the use of rental equipment as a means to reduce subcontracting, the Board must conclude that the Carrier did not carry its burden on this point either.

The Carrier notes that all employees were fully employed at the time this work was performed and, therefore, could not have done the work except on overtime, establishing both that using the contractor was less expensive and that, in any event, no employee is entitled to a remedy. With respect to the expense, we note that cost is not a contractual standard for determining whether the Carrier may subcontract bargaining unit work; the only contractual reasons have been previously laid out in the various quoted provisions and addressed above. With respect to remedy, there is a long line of Awards on this property that holds that a remedy is proper under these circumstances. First, the Carrier's manning decisions cannot be used to deprive employees of non-emergency bargaining unit work; to rule otherwise would completely vitiate the contractual rights of employees to that work. Second, prior Boards have pointed out that if the Carrier suffers no penalty for such violations, it will have no reason to cease them, thereby undermining the Collective Bargaining Agreement. See Third Division Awards 29313, 30408, 31569, 39297, and Public Law Board No. 6204, Award 33.

Finally, the Carrier asserts that the Organization did not carry its burden of proving the specific hours and manpower expended on the project. The record is clear that the Organization repeatedly requested such information from the Carrier, who is the sole possessor of those data. It is not clear, however, whether all the records were ultimately provided. What records have been presented indicate that between November 19, 2001 and March 15, 2002, one, two, three or four contractors worked various hours on the window installation on any given day. The Organization presented no rationale for its designation of these three particular Claimants as the appropriate employees to receive a remedy. The parties are instructed to identify the number of hours worked by contractors each day and the number of workers on any given day and to identify the appropriate employees who would have been eligible to perform the work on the specified days. Each employee so identified shall be paid straight time at his appropriate rate for the identified hours.

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 26th day of May 2009.