Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39943
Docket No. MW-38115
09-3-NRAB-00003-030569
(03-3-569)

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division
(
(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 to perform Maintenance of Way work (dismantle and rebuild a bridge) on the Cement Spur in New Westminster, British Columbia beginning on September 11 and continuing through October 16, 2000 (System File S-P-812-G/11-01-0041 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper notice of its intent to contract out the foresaid work or make a good faith effort to reduce the incidence of subcontracting and increase the use of 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 C. Griffin, K. Gray, J. Mayville, L. Page, J. Rowbottom, E. Samborsky, W. Kelton, D. Miles, R. Overton and P. Sill shall now be compensated for '. . . an equal proportion of the total number of hours the Contractors worked at the straight time rate, and an equal proportion of the total number of

overtime hours the Contractors worked at the overtime rate of one and one-half (1.5) times, at their current rate 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.

In a letter to General Chairmen Glover dated August 18, 2000, the Carrier stated, in pertinent part:

"Dear Sir:

As information the Carrier plans to contract out the construction of Bridge #1 on the Cement Spur in New Westminster, B.C. This work consists of demolition of the existing bridge, and construction of the new bridge including grading, pile driving and setting new concrete spans with an off track crane. The Carrier does not possess the equipment to perform this work nor do BNSF forces possess all the necessary skills to perform the work.

This work is scheduled to begin September 5, 2000 and be completed by October 6, 2000."

The Carrier initially contends that the Board does not have jurisdiction over the instant matter because the work was done exclusively in Canada, citing In the

Matter of the Arbitration between Brotherhood of Maintenance of Way Employes, AFL-CIO and Burlington Northern, Inc., in support. There is no need for the Board to provide a lengthy recitation of the cited case – other than to state that the cited arbitration Award was decided by agreement of the parties under Chap L-1, Secs. 154-59 of the Labour Code of Canada. Canadian Labour Code is inapplicable to this matter and the Carrier's jurisdictional argument is rejected. The matter is properly before the Board.

The Organization maintains that the Notice of Intent was improper and that the bridge work was work customarily performed by Carrier forces. The Carrier responds that the Notice of Intent was proper and that the contracting of the work did not violate the Agreement.

The Rules require the Carrier to provide notice to the Organization of its intent to contract. Here, the Organization received the notice, but later challenged its form as improper alleging that it identified the contract work as already being scheduled. To the Organization, the contracting was a fait accompli and the scheduling of the work prior to the conference indicates bad faith by the Carrier. If the Carrier already scheduled the contracting work, the Organization maintains that the subsequent conferences could not have been in good faith. The Carrier counters that the Organization changed the claim because receipt of the notice of intent "in accordance with Rule 55" was acknowledged by the Organization in the initial claim, but the Organization later claimed that the notice was improper.

A review of the evidence before the Board indicates that the Organization's argument is not contradictory. The Organization acknowledged that the notice was sent in conformity with the Rule requiring notice of contracting to be sent to the Organization. However, the correspondence during the handling of the claim clearly indicates that the Organization saw the notice as improper and in bad faith. Acknowledging a notice sent pursuant to applicable Rule does not preclude a party from attacking the substance of that notice.

The Board carefully reviewed the evidence and that evidence does not support the Organization's claim that the notice was improper or in bad faith. Contracting with the third party prior to sending the notice, absent more, does not

establish bad faith by the Carrier. The Note to Rule 55 provides that the Carrier shall notify the Organization of the contracting not less than 15 days prior to the work. It further provides:

> "If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose."

Under the above provision, the Organization is required to request a meeting to discuss the contracting work and pursue an understanding with the Carrier. That provision does not require that the Carrier must negotiate over the decision to contract prior to the Carrier entering into a contract. The Carrier met with the Organization and discussed the bridge work. No understanding was reached. Contracting for the work and not reaching an understanding in conference about using Organization-represented employees, absent more, does not support the conclusion that the Carrier was operating in bad faith.

In addition to arguing that it did not possess the necessary off-track crane for the bridge work, the Carrier also argues that the location of the work is the controlling factor in deciding this matter and references the September 28, 1977 Letter of Agreement contained in Appendix K, No. 4 (N) of the Agreement. In its letter to the General Director of Labor Relations, the Organization maintained that the Carrier used American forces to supplement Canadian forces in the past and cannot show that sufficient manpower was lacking to perform the bridge work in British Columbia.

The Letter of Agreement provides:

> "This refers to conferences held concerning Maintenance of Way employes working that portion of Burlington Northern operating in Canada.
>
> The immigration status requirements of both the Canadian and the United States governments greatly restrict employes from passing

back and forth between the two countries. In fact, about the only way the necessary help can be acquired on the Canadian side of the border is to hire Canadians. The problem on the U.S. side is not so burdensome since the preponderance of maintenance of way employes are US citizens.

In view of the foregoing, the following is agreed to:

1. When vacancies of new positions in Canada are bulletined, the bulletin will describe the conditions and requirements imposed by Canada that must be met to work in that country.

2. If there are no bids received from qualified employes who meet the Canadian requirements, the assignment will be made to the senior qualified applicant working in Canada who meets those requirements. Should such assignment give an employe seniority in rank where he had not previously established seniority, such seniority will only be valid while working in Canada.

3. An employee working in the US whose job is abolished and the only position in his rank he can hold is in Canada will not forfeit seniority in that rank if he does not meet Canadian immigration requirements, and may exercise seniority in next succeeding lower rank of the highest rank on another roster which will permit him to continue working in the US. The same will apply for Canadian employes who do not meet US immigration requirements.

4. It is further understood that because of Canadian immigration law restrictions the Carrier may contract work in Canada covered by the scope of the Maintenance of Way Agreement when such undertaking is beyond capacity of employees working in Canada or Carrier does not have proper equipment in Canada as additional criteria to those listed in Note to Rule 55."

The Board carefully reviewed the evidence and finds that the 1977 Letter of Agreement is controlling. "[T]he Carrier may contract work in Canada covered by the scope of the Maintenance of Way Agreement when such undertaking is beyond capacity of employees working in Canada or Carrier does not have proper equipment in Canada." While Organization-represented employees living and working in the United States may have been available, the provisions of Paragraph 4 allow for contracting of the Canadian work in certain circumstances. The Carrier asserted that it did not have the Canada-sited employees or the requisite equipment. The Organization has not shown available Canadian-sited employees or available equipment in Canada.

In a thorough review of the record and the Submissions of the parties, the Board finds that the Organization has not met its burden. Accordingly, the claim is 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 30th day of September 2009.

LABOR MEMBER'S DISSENT
TO
AWARD 39943 Docket MW-38115
(Referee Clauss)

This dispute involved the Carrier's decision to contract out the dismantling and removal of a bridge in New Westminster, British Columbia. Ultimately, the Board held that location of the work placed it under the provisions of the September 28, 1977 Letter of Agreement and that the Carrier's decision to contract out the work was not in violation of the Agreement. That the Board reached such a conclusion is understandable based on the facts developed on the record. Had that been the sole issue to be considered here no dissent would have been required. However, this decision requires dissent because the Board made a threshold finding that runs contrary to the clear language and intent of the Agreement; particularly as it relates to the advance notice and meeting requirement stipulated in the language of the Note to Rule 55 and the promises codified within the December 11, 1981 Letter of Agreement (Appendix Y). Within its discussion the Board held:

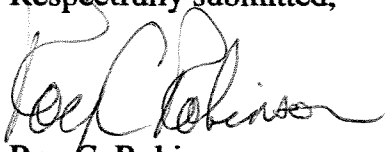
> "The Board carefully reviewed the evidence and that evidence does not support the Organization's claim that the Notice was improper or in bad faith. Contracting with the third party prior to sending the Notice, absent more, does not establish bad faith by the Carrier. The Note to Rule 55 provides that the Carrier shall notify the Organization of the contracting not less than 15 days prior to the work. It further provides:
>
> > 'If the General Chairman, or is representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose.'
> >
> > Under the above provision, the Organization is required to request a meeting to discuss the contracting work and pursue an understanding with the Carrier. That provision does not require that the Carrier must negotiate over the decision to contract prior to the Carrier entering in to a contract. ***"

The above-quoted finding is, on its face, erroneous. It is erroneous based upon a faulty reading and understanding of the language of the Note to Rule 55 and the promises codified within the December 11, 1981 Letter of Agreement (Appendix Y). The Note to Rule 55 very clear stipulates that, "In the event the Company **plans** to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the

Organization in writing as far in advance of the date of the **contracting transaction** as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirement' cases. ***" The word "plan" refers to any method of thinking out acts and purposes beforehand. The phrase "contracting transaction" clearly refers to the agreement between the Carrier and a third party for performance of work. Thus, under the Note to Rule 55, when the Carrier PLANS to contract out work, it must provide written notice not less than fifteen (15) in advance of the CONTRACTING TRANSACTION. The Carrier is in clear violation of the Note to Rule 55 if it has already consummated an agreement (entered into a contract) with a third party prior to providing advance written notice to the General Chairman and engaging in good faith pre-contracting discussions. Any other reading of the Note is strained, at best. It is at the pre-contracting conference that the Organization is supposed to be given an opportunity to engage in good-faith discussion with the carrier regarding the planned/proposed contracting. For example, do the specific criteria listed within the Note to Rule 55 apply? Where is the work supposed to occur? When is it supposed to occur? In addition, the pre-contracting conference is where the Organization is supposed to be given a bonafide opportunity to persuade the Carrier not to use outside forces to perform the work. To ensure that there would be no misunderstanding with respect to the type of information required within the advance notice, the parties elected to adopt and apply the provisions of the December 11, 1981 Letter of Agreement (Appendix Y). Said letter provides that the advance notices shall identify the work to be contracted out and the reasons therefore. The intent of the parties was to ensure that the Organization would be provided with complete and accurate information regarding each and every contracting out of work transaction contemplated by the Carrier in order to properly prepare for the good-faith discussions mandated by the rule. Under the Note to Rule 55 the advance notice must be given BEFORE the Carrier enters into a contracting transaction AND it must be discussed BEFORE the Carrier enters into a contracting transaction. Again, if the Carrier has already consummated an agreement to have outsiders perform work before discussing the matter with the Organization in accordance with the requirements of the Note to Rule 55; where is the good faith? Indeed, how could the Carrier possibly engage in good faith discussions with a deal already having been made? This leads us to the central point of this discussion relative to the instant case. In this instance, the Carrier provided the General Chairman with a notice stating: "**This work is scheduled to begin September 5, 2000 and be completed by October 6, 2000**." (Employes' Exhibit "A-1"). Hence, it is absolutely clear that the Carrier's advance notice was nothing more than advance notice that the Carrier had already entered into an agreement to have outsiders perform the work. The Carrier's notice did not

provide information of its 'plans' to contract out the work; it was already a done deal. The notice was simply pro forma. As such, the Board should have found that the Carrier failed to comply with its threshold obligation to provide proper advance notice under the Note to Rule 55 and the claim should have been sustained. Third Division Awards 29121 (UP), 29312 (MP) and 30066 (UP). For the above reasons, I dissent.

Respectfully submitted,



Roy C. Robinson
Labor Member