Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40491
Docket No. MW-39545
10-3-NRAB-00003-060331
(06-3-331)

The Third Division consisted of the regular members and in addition Referee Daniel F. Brent when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
(
(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 (Hulcher) to perform Maintenance of Way and Structures Department work (remove/replace switch panels) at the 38th Street Yards in Denver, Colorado on July 23, 2002 [System File C-02-C100-213/10-02-0451(MW) BNR].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an 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 L. Rael, A. Eifert, G. Patton and C. Bachicha shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for three and one-half (3.5) hours at their respective time and one-half rates 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.

The Organization contends the Carrier violated the Agreement by engaging outside forces employed by Hulcher to perform Maintenance of Way and Structures Department work, more particularly removing and replacing switch panels at the 38th Street Yards in Denver, Colorado, on July 23, 2002. The Organization further contends that the Carrier violated the Agreement by failing to provide the General Chairman with adequate advance notice of its intent to contract out said work or to make a good faith effort to reduce the incidence of sub-contracting.

The Carrier denied the claim, contending that the City of Denver had hired the contractors and that the City of Denver planned, paid for and controlled the disputed work. The Organization contends that the Carrier maintained complete control over this project and was simply reimbursed by the City of Denver for the expense of performing the work, and thus the contracting out of the disputed work violated the Agreement.

The Carrier contends that the City of Denver hired the contractors and that the City of Denver planned, paid for and controlled the disputed work. The Carrier further contends that the disputed work has not exclusively been performed by Maintenance of Way bargaining unit employees. Although the Carrier's assertion that the City of Denver instigated the project and paid for the disputed work is credible, the Carrier's contention that the City of Denver planned and controlled the disputed work cannot be accepted, because the evidentiary record did not demonstrate that the City had the professional expertise to plan and control the work. The Organization established persuasively that the City of Denver's participation in the project did not authorize the Carrier to contract out for equipment or operators, as the City of Denver agreed only to reimburse the Carrier for labor and material. Thus, the Carrier's reliance on the City of Denver is insufficient to excuse the Carrier from complying with the prerequisites for exceptions for contracting out work customarily performed by

bargaining unit employees. These requirements are set forth in the Note to Rule 55 and elsewhere.

The nature of the disputed work performed in the instant case clearly falls within the customary scope of employment of maintenance of way bargaining unit employees. Although the City of Denver may have funded the work, the Carrier was responsible for performing the work. The evidentiary record in the instant case does not establish persuasively that the Carrier could not perform the work with equipment that it owned or could easily rent, or that there were inadequate bargaining unit employees available to perform the work. Consequently, the contracting out cannot be deemed as being either procedurally proper or substantively correct under the applicable Agreements between the parties.

Therefore, the instant claim must be sustained. Claimants L. Rael, A. Eifert, G. Patton and C. Bachicha shall be compensated for eight hours each at their respective straight time rates and for three and one-half hours at their respective overtime rates of time and one-half.

AWARD

Claim sustained.

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 15th day of June 2010.