Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40677
Docket No. MW-40140
10-3-NRAB-00003-070377
(07-3-377)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way 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 (Pavers, Inc.) to perform Maintenance of Way and Structures Department work (load/haul/unload track and switch panels) between Carling and Baird and (install track and switch panels and related work) at Baird on August 15, 16, 17, 18 and 19, 2005 [System File C-06-C100-3/10-06-0012(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. Leaper, J. Francke and R. Musil shall now each be compensated for thirty-five and one-third (35 and 1/3) hours at their respective straight time rates of pay and ten (10) hours at their respective time and one-half rates of pay and Claimants D. Ficke and S. Conradt shall now each be

compensated for fourteen (14) 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 states that the customary and historical practice is to assign Carrier's Roadway Equipment and Track forces to perform routine maintenance-of-way Machine Operator and Truck Driver work using Carrier equipment or similar equipment obtained by rent or lease arrangement. During conference the Organization's Vice Chairman cited his experience performing this work with Carrier forces and no contractors and provided information about a rental company with equipment available for use by the Carrier's Machine Operators. Although available and fully qualified for this work, the Claimants suffered a loss of work opportunity when the Carrier contracted with outside forces.

This work is contractually reserved to BMWE-represented employees under Rule 1 - Scope, Rule 2 - Seniority Rights and Sub-Department Limits, and Rule 5 - Seniority Rosters, which list Machine Operators and Truck Drivers within the Roadway Equipment Sub-department and Track Sub-department. Paragraphs 1 and 2 of the Note to Rule 55 state that employees within the scope of this Agreement 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 the common carrier service." The exclusivity test is not applicable to contracting.

Numerous Awards find that transporting track material and installing switches constitute construction and maintenance or repair of track falling within Rules 1, 2, 5, and 55 and is work encompassed within the scope of the Agreement and is reserved to Carrier forces. (See Third Division Awards 19924, 20338, 20412, 20633 and 21534.) Work of a class belongs to those for whose benefit the contract was made and contracting such work to others violates the Agreement. The Organization has established a prima facie case.

Although the Carrier provided notice of its intent to contract some of the work, the notice was merely pro forma and did not comport with the Note to Rule 55 and the December 11, 1981 Letter of Understanding (Appendix Y). Notice and conference provisions in the Note and Appendix Y are threshold requirements to be met in good faith before maintenance-of-way work can be assigned to outside forces. The Carrier had no intention of allowing Carrier forces to perform this track work, thereby effectively precluding any good-faith attempt to reach an understanding.

The Carrier failed to prove that the exceptions in the Note to Rule 55 apply because it possessed equipment for operation by its Machine Operators who were capable of performing this work and if the equipment was not available in inventory, the Organization provided the name and address where it was available for rent or lease and use by Carrier forces. The Carrier made no attempt to rent or lease equipment for use by its forces. Also, no special equipment was used and no special skills were required for this non-emergency track maintenance/repair work.

The Organization further argues that the Carrier's defenses are without merit. Lack of managerial foresight in planning caused the challenges faced by the Carrier's self-imposed time schedule and Amtrak would not be delayed because it runs on the track between midnight and 5:00 A.M. when there would be no work in progress.

This is not a piecemeal claim. Forces lost work opportunities when the Carrier siphoned maintenance-of-way work to non-agreement employees. The Claimants are entitled to compensation even if fully employed on the claim dates. This remedy simply makes the Claimants whole for the loss of work opportunity due to the Carrier's violation of the Agreement and damages may be awarded pursuant to findings contained in Third Division Awards 19898, 20042, 20412, 20633, 21340, and 21808. The claim should be sustained.

According to the Carrier, the claim must be denied. On July 27, 2005 the Carrier issued proper notice of its intent to use a contractor to assist Carrier forces.

> "As information, the Carrier is planning to remove 9 switches (4 - No. 11's and 5 - No. 9's) between MP 58.87 to MP 59.10 at the Baird Plant on the Creston Sub-Division. These switches will be replaced with 4 - No. 20's and 3 - No. 11's and new track panels used to tie the third mainline to the OL&B mainline. The Carrier intends to contract 4 track hoes, 2 dump trucks, and 2 loaders with operators, to assist Carrier forces with this project. Carrier is not adequately equipped to complete this work in the timeframe dictated by operational demand.
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> It is anticipated that this work will begin approximately August 12, 2005.
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> Currently, no Carrier equipment is available to support these projects. Moreover, all Carrier forces are fully employed and are not available to perform this work even if the equipment were available to be rented or leased. Historically, when faced with the amount of work that the Carrier is currently dealing with it has contracted to supplement its work force because the Carrier is simply not adequately equipped with either equipment or staff to handle this spike in its work volume[.]"

The Roadmaster's statement shows this was a time sensitive project to minimize passenger service disruption for Amtrak on a critical operating route. Placement of new components for a new switch or turnout one piece at a time as the Organization seeks would take more than one month and delay Amtrak, whereas augmenting Carrier forces with contractors facilitates completion of the project within a four to eight hour daily maintenance window. The Carrier is not required to waste time and resources. Nor is it required to hire employees that would have to be furloughed after completion of the week's work.

Once the new track structure was in place the extra equipment and operators were no longer needed. Carrier forces did most of the work assisted by contractors and its equipment. Because the Carrier's forces were integrated with the

contractor's forces, any hauling of equipment or material, or dirt work completed by the contractor forces was simply incidental and a consequence of the Carrier not being required to piecemeal this work. (See Third Division Awards 34213 and 34217.)

Reliance on Rule 1 by the Organization is misplaced because it is a general Scope Rule; the Organization failed to prove that the work is exclusively reserved to its members meaning no notice was required. There is no clear and convincing evidence showing that section gangs have or are supported by four to ten pieces of Carrier heavy equipment when they build a new switch or turnout and place them in an active track. The Organization has not established that it customarily performs the work of lifting large sections of track into place without the help of contractors. A prior Award sustained the Carrier's position to use contractors to assist in the placement of switch track panels onto a mainline. (See Third Division Award 36158.)

The Note to Rule 55 preserves the Carrier's right to contract work starting in the second paragraph (". . . 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[.]") The Note to Rule 55 (the parties' contract Rule) is derived from a predecessor Rule in the former Great Northern Lines Agreement so the Organization's reliance on "good-faith effort" in Appendix Y is misplaced because it is derived from a Rule in the 1968 National Agreement.

The Organization has nothing to lose by filing a claim. The Carrier will continue to contract out this type of work because it has done so historically. The claim will not modify the Carrier's behavior because the Carrier is authorized to contract out under the Agreement. The Organization needs to change the contract Rule at the bargaining table instead of filing claims seeking a windfall for its members through a compromise settlement or payout. The Claimants suffered no losses because they were fully employed and working overtime or assigned to a mobile gang and not available or on annual leave. Even if there is a violation, the Organization still must prove damages and it failed to do so. (See Third Division Awards 25002, 26715 and 29330.)

The Board finds that the claim dates are for contractors performing Machine Operator and Truck Driver work in connection with the transportation of track

material and switch and track work between MP 58.87 and MP 59.10 at Baird Plant on the Creston Subdivision.

The Organization provided a partial seniority roster listing Machine Operators and a partial equipment list showing that the Carrier owns heavy equipment. The Vice-Chairman established during conference that this work is performed by BMWE-represented employees. This is maintenance-of-way work encompassed within the scope of this Agreement and is contractually accorded to employees pursuant to Rules 1, 2, 5 and 55.

The Carrier did not (1) explore the use of its forces during the conference or (2) seek to obtain equipment by rent or lease that may have been needed. The Carrier was not fully aware or could not fully explain the need for special equipment. Stonewalling during conference undermines the validity of an otherwise permissible contracting arrangement.

The deadline for completing this project in one week was self-imposed by the Carrier at a time when its forces were fully employed. There is insufficient evidence showing the overriding imperative in the form of an operational dictate to complete this project at that designated and allotted time. At the same time, there is adequate explanation by the Organization that Amtrak would not be hampered because work would not be performed during the time Amtrak used the track. The delay caused to Amtrak by having BMWE-represented employees perform this work is hypothesized by the Carrier and is not a dispositive criterion in the Note to Rule 55.

The Carrier violated the Agreement and denied the Claimants the opportunity to perform the work. Compensation is appropriate to preserve and protect the integrity of the Agreement; the Carrier is fully aware that a decision to contract out scope-covered work may result in an award of compensation.

The remedy is that the Claimants shall be made whole for the actual number of hours of contractor-performed work at the Claimants' respective rates of pay. (See Third Division Awards 30661, 31521, 36093 and 37470.) With respect to the Truck Drivers, their remedy is straight time only, i.e., no overtime, because it was not requested in the initial claim. The fact that Claimant Conradt was on annual leave and not available does not exclude him from an award of compensation; his unavailability was due to annual leave being scheduled one year in advance.

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 1st day of November 2010.