

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40775
Docket No. MW-40202
10-3-NRAB-00003-070481
(07-3-481)**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (Belger Cartage Services, Inc.) to perform Maintenance of Way and Structures Department work (crane operator work) at Bridge 171.93 on the St. Joseph Subdivision beginning on May 23 and continuing through June 9, 2006 [System File C-06-C100-157/10-06-0280(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 violation referred to in Parts (1) and/or (2) above, Claimant R. Anderson shall now be compensated for one hundred four (104) hours at his respective straight time rate of pay and one and one-half (1.5) hours at his respective time and one-half rate of pay and Claimants L. Watson and C. Smith shall**

now each be compensated for one hundred eighty-four (184) hours at their respective straight time rates of pay and for twelve and one-half (12.5) 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 Carrier issued a notice to the Organization on January 11, 2006:

“As information, the Carrier plans to contract specialized equipment with operators and oiler to assist Carrier forces with bridge renewals at various locations on the St. Joseph Sub-Division. The contractor will provide a 250-ton off-track crane with operator and oiler that will be used to remove existing bridge spans and place new spans each weighing approximately 63,000 pounds. In addition to removing and setting bridges spans, the off-track [crane] will also assist with driving piling due to space constraints. Carrier forces will perform remaining bridge work. The Carrier is not adequately equipped to perform all aspects of this project, nor does it have necessary skilled forces. The contractor possesses the necessary specialized equipment and skill[ed] forces necessary for a successful completion of this project. The bridges to be renewed are as follows:

St. Joseph Sub-Division [Line Segment 3000]

Bridge 126.10: Anticipated Start Date: March 13, 2006

Bridge 171.93: Anticipated Start Date: March 20, 2006

Bridge 185.61: Anticipated Start Date: April 10, 2006

The contracting of the work here involved is consistent with Carrier policy and the historical practice of contracting out such work[.]”

On July 19, 2006, the Organization filed a claim alleging the Carrier breached “Rules 1, 2, 5, 29, 55, Note to Rule 55 and Appendix Y, but not limited thereto when [it] contracted for men and equipment to work on a bridge renewal project,” specifically, “drive piling, remove existing bridge spans and place new spans using a 250-ton off-track crane at Bridge 171.93[.]” In addition to the Crane Operator, the contractor provided two more employees and used a 165-ton off-track crane. The Carrier’s bridge derrick delivered all materials to the site; all materials were within the bridge derrick’s capability to hoist. The Carrier did not meet any criteria in the Note to Rule 55 and Appendix Y.

On September 1, 2006, the Carrier denied the claim stating it was “out of time limits. Work started on May 22, 2006 (not May 23 as claimed), and the Organization’s claim was not received until July 21, 2006.” The Carrier reiterated its reasons in the notice and remarked that many of the Claimants worked on the bridge renewal project and all were fully employed.

On October 5, 2006, the Organization appealed and asserted it was timely because the Carrier received it within the 60-day time limit (Rule 42). It restated its arguments as set forth in the claim, noting that it historically and customarily performs this work. The off-track crane is not specialized equipment, because the Carrier has it on the property (with qualified Operators) or can lease or rent one. Carrier forces possess the skills and expertise to perform the claimed work because they built the bridges.

On November 21, 2006, the Carrier denied the appeal on the basis the work began on May 22, 2006, but the claim was not received until July 21, 2006, which is

beyond 60 days. Based on the Organization's view in Third Division Award 19803 that claims begin on the first day of contract work, the Carrier states that time limits began to toll on May 22. The Carrier does not own this size of crane and none were available for lease or rent; its forces are not qualified to operate it. Also, there is no support for damages which would constitute a punitive payment not provided for under the Agreement.

By letter dated April 3, 2007, the Organization confirmed the conference held on January 30, 2007. It maintains the claim is timely under Rule 42 whether or not the first day (May 22) is excluded or included because it was presented to the Carrier when mailed on July 19, 2006. Other arguments remained unchanged from prior responses. On August 20, 2007, the Organization filed its claim with the Board.

The contractor commenced work on this project on May 22, 2006; that is the date of its invoice to the Carrier. Given the Organization's position in Award 19803 that the claim commences on the initial date contract work begins, the 60-day time limit in Rule 42 began on May 22. According to the Organization, the claim was presented when mailed on July 19, 2006. May 22 to July 19 is less than 60 days. The claim is timely.

The Organization customarily performs this claimed work. Rules 1, 2 and 5 set forth classes of employees within the Bridge and Building and Roadway Equipment Sub-departments (B&B Foreman, Group 1 Machine Operators) required to perform work stipulated to in Paragraphs 1 and 2 of the Note to Rule 55, that is, "work in connection with the maintenance or repairs of structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service." In other words, Carrier forces customarily perform work of maintaining or repairing bridges.

The Organization received timely and proper notice. At the time of notice (January 11, 2006) the Carrier planned to contract for a 250-ton, off-track crane. Thereafter it discovered that a 250-ton was not available; it contracted for a 165-ton, off-track crane. The Carrier does not own a 250-ton or a 165-ton off-track crane. This is equipment it does not have available.

Furthermore, there is a factual disparity between the parties whether Carrier forces are qualified to operate a 165-ton off-track crane. The Organization states they are qualified because Carrier forces operated different sized cranes in the past; the Carrier states they are not qualified because OSHA regulations are more stringent than in the past when Carrier forces operated cranes which were smaller than the one used in this dispute.

Given the OSHA standards or regulations in place at the time of this claim that govern the operation of cranes and the fact that the Carrier has not owned the size of crane contracted for in this dispute, the Board finds that Carrier forces are not qualified to operate a 165-ton, off-track crane. The Carrier satisfied a criterion in Appendix Y for contracting, that is, "special skills not possessed by the Company's forces." Therefore, this 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 15th day of December 2010.