Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40824
Docket No. MW-40564
10-3-NRAB-00003-080347

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Leifert Concrete Construction) to perform Maintenance of Way and Structures Department work (remove and replace concrete on piers at the base of crane columns) on the 40 Ton Crane Way outside of the Main Car Shop and Fab Shop in the Havelock Shops at Lincoln, Nebraska on August 3, 4 and 7, 2006 [System File C-06-C100-209/10-06-0371 (MW) BNR].[1]

(2) The Agreement was violated when the Carrier assigned outside forces (Mackey and Sons) to perform Maintenance of Way and Structures Department work (remove, replace and align track) on the 40 Ton Crane Way outside of the Main Car Shop and Fab Shop in the Havelock Shops at Lincoln, Nebraska on August 8, 9, 10 and 11, 2006 [System File C-06-C100-208/10-06-0370 (MW)].

(3) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its

[1] In its Submission, the Organization pointed out that there was a typographical error in the original claim, omitting Saturday, August 5, 2006, when the contractor's forces worked eight hours overtime. This oversight was corrected in subsequent correspondence between the parties.

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.

(4) As a consequence of the violation referred to in Parts (1) and/or (3) above, Claimants R. Larimer and J. Stewart shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and eight (8) hours at their respective time and one-half rates of pay and Claimants R. Thoms, F. Schrum and T. Nichelson shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay.

(5) As a consequence of the violation referred to in Parts (2) and/or (3) above, Claimants R. Latimer, J. Stewart, M. Maloney and R. Reimers shall now each be compensated for thirty-two (32) hours at their respective straight time 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.

This claim arises from work that was done by outside contractors in association with the removal and replacement of components on the 40-ton crane way at the Main Car Shop in Havelock, Nebraska. By letter dated November 11, 2005, the Carrier notified the Organization of its intent to contract out the work:

> "The work includes but is not limited to the removal of approx. 250' of crane rail and weld and repair as needed to the crane way stantion and support base on crane way in accordance with OSHA standards. The Carrier is not adequately equipped to perform this work. The contractor possesses the equipment, and skilled forces necessary to perform this work.
>
> It is anticipated that the work will start on approximately November 28, 2005."

According to the Organization, the work proceeded in two phases: in December 2005, outside forces performed some work on the crane rails, the exact nature of which is unclear (and is not part of this claim) and then left the job site. On August 3, 4, and 7, 2006, Leifert Concrete Construction removed and replaced the concrete piers at the base of the crane. After Leifert had completed its work and gone, Mackey and Sons returned to remove and replace the crane rail, make welding repairs, and to remove crane stops that it had installed as part of the December 2005 work. Mackey and Sons worked during the period of August 8-11, 2006. The crane was out of service between December 2005 and the completion of the work in August 2006.

According to the Organization, the work that was contracted out is work that has been performed by B&B forces "many times" in the past, and it should not have been contracted out. In a letter dated September 5, 2007, the Local Chairman explained to the General Chairman that:

> "The crane referred to in this claim has been repaired and modified many times by B&B forces in the past. I have personally been involved in projects on this crane from simple repairs such as replacing broken or missing rail clips and bolts, welding repairs, and rail alignment to more extensive projects such as removing crane rails, beams, and columns and reinstalling them to new locations within the crane way. B&B forces have also removed and replaced the crane cab and catwalks on this crane. B&B forces have also removed existing bracing and installed new bracing needed between the crane columns on this crane way. B&B forces have removed concrete piers and installed a new concrete pier required for a modification of the crane way. . . . All of the work listed above was accomplished by skilled Carrier forces to the exclusion of contractors. All of the work listed above was

accomplished using Carrier equipment. All of the work listed above was accomplished with the crane out of service when necessary, and returned to service when needed."

The letter was given to the Carrier on September 13, 2007. At no time has the Carrier raised the issue of employee skills. In addition, the Organization contends that the Carrier's notice was defective. Specifically, it did not indicate that the work would be progressing in two separate phases, and it did not indicate that the Carrier would be using two separate contractors. The seven months' lag between the first phase and the second phase demonstrates that there was no time urgency to the work, and it could have been performed by B&B forces. Moreover, this is not a case where the Organization is asking the Carrier to piecemeal the work; all of it should have been done by B&B forces.

According to the Carrier, the Organization is attempting to prove its case with nothing more than assertions. Carrier forces were not adequately equipped to do a job of this size. Here, the entire crane needed to be disassembled, which required equipment that the Carrier did not have. While B&B forces may have done some similar work in the past, there is no evidence that they did the work exclusively, the concrete work especially. Third Division Award 38375, on which the Organization relies, does not apply in this case (it was directed at concrete work done in connection with the yearly maintenance shutdown). The work at issue here was a much larger project. In addition, the days and hours when the Organization claims that Mackey and Sons was working do not match with the dates and hours submitted by it. Finally, the work needed to be inspected by OSHA, and the Carrier needed to hire an outside contractor to ensure that the work would pass inspection.[2]

In this case, the Organization failed to submit sufficient evidence to corroborate its contentions. Rule 55 reserves to Carrier forces work that has been customarily, historically and traditionally performed by BMWE-represented employees. The only evidence of that here is a statement from the Local Chairman, which establishes that B&B forces have done some similar work in the past, but not that they have "customarily, historically and traditionally" performed it. Third Division Award 38375 establishes that Carrier forces have performed some types of concrete and rail work.

---

[2] Initially, the Carrier contended that the claim was not timely filed. This argument was not raised in the Carrier's Memorandum for the Referee, or at the arbitration hearing, so the Board assumes that the argument was dropped.

But that case focused on annual maintenance. This case involves a much larger job that required disassembly of the entire crane and significantly more substantial concrete work than was considered in Award 38375.

The other problem with the Organization's evidence here is that the record includes a daily timesheet from Mackey and Sons for July and August 2006. The Organization alleges that Mackey and Sons worked during the period of August 8-11. But the daily timesheet submitted by the contractor shows no work was performed after August 2. The Organization has not sustained its burden of proof regarding the dates of the alleged work.

Accordingly, the claim must be 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 2011.