NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6537

BURLINGTON NORTHERN SANTA FE, INC.
(FORMERLY ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY)
(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
(Organization)

Carrier File No. 12-99-0044
BMWE File No. B-2021-2
NMB Case No. 0102
Award No. 1

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 Way work (operate one front-end loader, three backhoes, five track hoes, three trucks and lowboys, one train, and two earthmovers) in connection with siding extension construction work in Palos, Alabama between Mile Posts 710.85 and 715.18 on the

Birmingham Subdivision of the Southeastern Division beginning December 28, 1998 and continuing.

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with proper advance notice of the Carrier's intent to contract out such work or to make a good faith effort to reduce the incidents of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 99 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Special Equipment Operators B.G. Oliver, E. Gulley, A.C. Hall, J.L. Wright, R. Duckworth, J.D. Richardson, B.L. Hambrick, C.E. Green, and three Senior Trackman Drivers were deprived of twelve hours at their respective rates of pay for each day worked by the contractor beginning December 28, 1998 and continuing as long as the contractor continues to perform the disputed work.

FINDINGS

Upon the entire record and all the evidence, after the March 27, 2003 hearing at the Carrier's office in Fort Worth, Texas, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

DECISION

Claim denied.

A hearing was held in the above-entitled matter on March 27, 2003 before Public Law Board 6537, comprised of Roy C. Robinson, Organization Appointed Arbitrator; William A. Osborne, Carrier Appointed Arbitrator; and Daniel F. Brent, duly designated as Impartial Referee. The claimant was notified of the time, date, and place of the hearing. The claimant's letter submission dated September 9, 2002 was considered by the Board.

NATURE OF THE CASE

Claimants contend that they were improperly deprived of work opportunity to perform maintenance of way work operating various equipment during the construction of a siding extension at Palos, Alabama between Mile Posts 710.85 and 715.18 on the Birmingham Subdivision of the Southeastern Division of the Carrier. More particularly, the work consisted of constructing a 2,960-foot-long track siding extension on the north end and an extension of 12,050 track feet on the south end of the existing siding at Palos, Alabama.

This work was performed by outside contractor forces who also constructed two storage tracks 8,397 feet in length and 8,026 feet in length, respectively, as well as 31,435 track feet of new trackage. In addition, the outside forces were utilized to install one No. 20 turnout, four No. 15 turnouts, three No. 20 cross-over frogs, and an unspecified quantity of track retourments and realignments, including one No. 20 turnout and two No. 15 turnouts. The work commenced on December 28, 1998 and continued thereafter. The outside contractor's forces worked from 6:00 a.m. to 6:00 p.m., six days per week.

According to the Organization, "The character of work involved here is that which has been historically, traditionally, and customarily performed by the Carrier's Maintenance of Way employees throughout the Carrier's property." The Organization alerted the Carrier regarding the nature of the work assigned to outside contractors' employees. The Organization also advised the Carrier that the equipment used by the outside forces was either owned by the Carrier or could have been leased by the Carrier to be operated by the Claimants. The Claimants thereafter filed a grievance protesting the use of outside contractor's forces to perform this disputed construction work.

The Carrier defended the propriety of its assignment, contending that the disputed work was not within the exclusive jurisdiction of the bargaining unit represented by the Organization, and that similar projects had often been outsourced to contractors in the past. The Carrier further contended that the scope and nature of the projects at Palos, Alabama did not mandate that the Carrier rent equipment for use by bargaining unit employees, and that the Carrier had properly assigned the track laying portion of the work to the bargaining unit.

OPINION

The Carrier cannot invade or erode work reserved exclusively for the bargaining unit by assigning such work to outside contractors. However, where disputed work has not historically been performed exclusively by the bargaining unit and, as the evidence in the instant case persuasively established, has been performed on many occasions by outside contractors, the potential to perform the disputed work by assigning bargaining unit employees using rental equipment does not mandate that the Carrier elect to assign the disputed work to bargaining unit employees, assuming they possess the requisite skill and ability to perform the work.

The construction project at issue in the instant case was not simply track repair, maintenance, or replacement. Culverts had to be installed, and major site preparation work undertaken prior to the installation of the track, which was performed by the bargaining unit with the assistance of non-Carrier forces to perform unloading and movement of some supplies. There has been an agreement in effect since 1974 that Maintenance of Way employees could perform grading work, but there is no agreement guaranteeing that bargaining unit employees would perform all the Carrier's grading work. The scope of the Palos, Alabama

project, coupled with the absence of demonstrated exclusivity of jurisdiction over such work by the bargaining unit, insulates the Carrier's decision from reversal as violating the collective bargaining agreement.

The Organization contends that the appropriate test should not be exclusivity of jurisdiction, a very difficult standard to demonstrate, but whether the work has historically and traditionally been performed by bargaining unit employees. This less stringent standard has not, according to the record, been expressly adopted by these parties to guarantee a right to bargaining unit employees to perform all site preparation and construction work related to new construction projects, especially when no bargaining unit employee is on layoff. Neither is the less stringent standard generally applied throughout the railroad industry.

The Board need not determine whether bargaining unit employees could have competently performed the work, as the Carrier has not raised competence of the bargaining unit as a defense. Rather, the Board's evaluation of the propriety of the assignment of many aspects of this project to non-bargaining unit forces employed by outside contractors rests on the Board's determination that similar work has historically been performed on the Carrier's property by outside contractors on many occasions, thus precluding a

finding of exclusivity of jurisdiction for the bargaining unit over the disputed work in the instant case. The Third Division of the NRAB has held similarly in Cases No. 36280,36282, and 36283, among others. The holdings in these cases, especially as they involve the same parties as the instant case, afford valuable precedent for the finding herein.

Grading of road bed and compaction of substrate have not been routinely assigned to bargaining unit employees in all cases. Moreover, the portion of the work involving laying and installation of track, work traditionally within the expertise of the bargaining unit, was assigned to bargaining unit employees.

Consequently, for all these reasons and based on the evidence submitted, the decision of the Carrier was correct and proper. The instant claim is hereby denied.

By Order of Public Law Board 6537

Daniel F. Brent,
Neutral Member and Chairman

William A. Osborn,
Carrier Member

Roy C. Robinson,
Organization Member

Executed On:
October 23, 2003