

**PUBLIC LAW BOARD NO. 6538**

**Carrier File No. 97-09-04AB  
Organization File No. C-97-C100-50**

**BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYES )  
And ) AWARD NO. 2  
BURLINGTON NORTHERN ) CASE NO. 2  
SANTA FE RAILWAY )**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces (Judd Brothers Construction) to perform Maintenance of Way and Structures Department Work (construct footings and a pad for a fuel tank) in the Lincoln yards, Lincoln, Nebraska beginning May 19, 1997 and continuing.**
- (2) The Agreement was further violated when the Carrier failed to make a ‘good-faith’ effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Appendix Y.”**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B & B employes F. S. Fankhouser, R. L. Kuwamoto, R. J. Reimers, W. D. Brehl, W. J. Flentie, R. G. Tayler, B. A. Sullerns, S. McPherson and W. D. Timmerman shall now be compensated at their respective straight time, time and one-half rates of pay for the hours worked by the outside forces.”**

**FINDINGS:**

**Public Law Board No. 6552, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.**

**The Organization in the instant claim contends that Carrier violated the Note to Rule 55, Appendix Y and other Agreement provisions when it contracted with a construction company for the construction of a new one million gallon fuel**

tank and failed to assign Carrier forces the work of pouring the footing and pad for the tank. The record shows that Carrier provided advance notice of the project and a conference was held at which the parties were unable to agree concerning the assignment of different aspects of the project.

In order to prevail in this case, the Organization had to show as a threshold matter either that the Agreement clearly reserved to the employees the right to the work in question, or that they performed the work in accordance with custom and practice. We find no express reservation of the work in question in the Scope Rule, which, by its own terms, is general in nature. Equally important, no specific evidence was presented to support the assertion of practice.

Instead, the Organization relied in particular on Rule 55 F, which states in pertinent part:

**F. First Class Carpenter.**

**An employe assigned to construction, repair, maintenance of dismantling of buildings or bridges, including the building of concrete forms, erecting false work, etc. He shall be a skilled mechanic in house and bridge work and shall have a proper kit of carpenter tools sufficient to carry out the work employed upon, except such tool as are customarily furnished by the Company.**

We are unpersuaded that the foregoing language reserves to the Organization the work claimed in this case. Rule 55 F says that a First Class Carpenter can build concrete forms; it does not say that Carrier carpenters pour and finish concrete. Thus, Rule 55 does not lend support for the Organization's claim.

As the Carrier correctly points out, there is also authoritative precedent between these same parties holding that Carrier is not required to piecemeal a large project in order to provide some portion of the work to BMW represented employees. Third Division Awards 34213 and 34217 are indicative of the cases upholding this general principle. Moreover, Carrier has shown that it has historically contracted out large new projects of a similar nature.

For all these reasons, the Board finds that the Organization did not establish that Carrier violated the Agreement or that it failed to comply with the good-faith provisions of the December 11, 1981 Letter set forth in Appendix Y when it contracted with outside forces to construct a one-million gallon fuel tank. Even if the concrete work for the new fuel tank could be considered independently from the whole project -- and there is no evidence which suggests that such an arrangement could have been undertaken -- the record does not contain substantial evidence that concrete work is reserved to Carrier forces. The claim, therefore, must be denied.

AWARD

**Claim denied.**

Ann S. Kenis  
**ANN S. KENIS, Neutral Member**

William A. Osborn  
**Carrier Member**  
**William A. Osborn**

Roy C. Robinson  
**Organization Member**  
**Roy C. Robinson**

**Dated April 10, 2003.**