NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6594

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 1
and	)
	) Award No. 1
BNSF RAILWAY COMPANY	)

Martin H. Malin, Chairman & Neutral Member
R. C. Robinson, Employee Member
W. A. Osborn, Carrier Member

Hearing Date: June 21, 2004

STATEMENT OF CLAIM:

1. The Carrier violated Article XV of the September 26, 1996 National Agreement when it contracted out the work of recovering track material on the Hettinger Subdivision between Rhame and Mobridge beginning January 5, 1998 and failed to afford employe R. J. Eisenzimmer the level of protection which New York Dock provides for a dismissed employe (System File NYD-142/MWB 98-04-21AA BNR).

2. As a consequence of the aforesaid violation, Mr. R. J. Eisenzimmer shall be afforded the level of protection which New York Dock provides for a dismissed employe beginning January 5, 1998 and continuing until the violation was corrected.

FINDINGS:

Public Law Board No. 6594, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Article XV, Section 1 of the September 26, 1995, National Agreement provides:

The amount of subcontracting on a carrier, measured by the ratio of adjusted engineering department purchased services (such services reduced by costs not related to subcontracting) to the total engineering department budget for the five-year period 1992-

1996, will not be increased without employee protection consequences. In the event that subcontracting increases beyond that level, any employee covered by this Agreement who is furloughed as a direct result of such increased subcontracting shall be provided New York Dock level protection for a dismissed employee, subject to the responsibilities associated with such protection.

The instant claim alleged that Carrier violated this provision when it failed to provide Claimant New York Dock level protection following his furlough and Carrier's contracting the work of removing certain track material to Herzog Company beginning January 5, 1998. The parties disputed whether Carrier's amount of subcontracting during the period in question exceeded the five year ratio under Article XV; they also disputed the appropriate period in which the level of Carrier's contracting is to be measured with Carrier advocating a calendar year and the Organization advocating what amounts to a monthly or rolling year basis, and whether Claimant's furlough was a direct result of the subcontracting to Herzog.

The record reflected that by letter dated January 24, 1997, the Organization requested Carrier to provide it with the following data for the years 1992-1996: engineering department purchased services for each year, adjusted engineering department purchased services for each year, total engineering department budget for each year, ratio of adjusted engineering department purchased services to total engineering department budget for each year, and the amounts of adjustments made to the data for amounts expended for contracted out work for the rebuilding of the Stampede Line. Carrier responded by letter dated March 17, 1997, that the data sought by the Organization would come directly from Carriers annual R-1 Reports and that the R-1 Report for 1996 was not due until March 31, 1997, and had yet to be compiled.

By letter dated April 4, 1997, the Organization renewed its request for the data. By letter dated August 6, 1997, the Organization again renewed its request and also requested the same data on a monthly basis for each month between January and July 1997. By letter dated September 30, 1997, Carrier provided the Organization with summary data provided by the National Railway Labor Conference reflecting an average ratio of adjusted engineering department purchased services to total engineering department budget for the five year period of 10.2%.

Before this Board, relying on similar summary data from the NRLC, Carrier argued that the ratios of adjusted engineering department purchased services to total engineering budget for 1997 and 1998 were lower than 10.2%, and that the Organization had not proven otherwise. Carrier further argued that it had no obligation to provide the Organization with the documentation underlying the summary calculations and no obligation to provide data on a monthly basis because the only relevant comparisons under Article XV are on a calendar year basis. Carrier further argued that even if the ratio exceeded 10.2%, the Organization failed to prove that Claimant was furloughed as a direct result of the increased subcontracting.

The record before this Board is comparable in every material respect to the record before the NRAB Third Division in Award Nos. 36983 and 36984. In those cases, the Board

commented on the state of the record as follows:

> [F]or the ratios required by Article XV, the Carrier supplied the Organization with summary information on an annual basis taken from the R-1 Reports; refused to supply any documentation supporting those summaries; refused to supply information relative to the ratios computed on a monthly basis; and took the position that the Organization had not met its burden of proof that the ratios specified in Article XV were exceeded because the Organization ". . . utterly failed to provide supporting evidence." The Carrier cannot provide summaries, refuse to provide the Organization with access to the underlying documentation which formed those summaries, and then argue that the Organization failed to provide "supporting evidence" that the ratios were exceeded. The Organization cannot provide that "supporting evidence" because the Carrier is in possession of the "supporting evidence" and the Carrier refused to allow the Organization to see that "supporting evidence." (Emphasis in the original.)

The Board observed that because Carrier failed to provide the Organization with access to information beyond the summaries, it could draw adverse inferences and on that basis sustain the claim. It decided not to do so because "Carrier acted in good faith and . . . this is the first dispute under this language to reach this level. . ." Instead, the Board required Carrier "to make available the source documentation used to prepare the summaries relied upon by the Carrier. Should the Carrier fail to make that source information available, we will sustain the claim." With respect to data broken down on a monthly basis, the Board stated:

> We do not know if the Carrier keeps such records on a "monthly" basis or on some other periodic basis of less than one year. However, if Carrier does have such records relevant to determining the ratios on less than an annual basis, we find the Organization is entitled to inspect those records as well.

On November 30, 2004, the Neutral Chair of this Board circulated to the partisan members of the Board a draft proposed award. The proposed award observed that the decisions in Third Division Awards 36983 and 36984 were logically reasoned interpretations of Article XV and the record and entitled to deference. The remedy provided in those awards was in keeping with a key purpose of Article XV to bring some semblance of order to the chaos resulting from a large body of conflicting precedents in the enormous number of hotly contested subcontracting claims. Indeed, the Third Division expressed its view that providing the Organization access to the underlying documentation "may well dispose of the entire dispute . . .," and that if both parties "know the precise numbers and methodologies to be used in determining the ratios in Article XV . . . [it may] prevent future challenges to the basis for the Article XV ratios."

Because the awards were not palpably wrong, the proposed award provided for a remedy identical to the remedy awarded in Third Division Awards Nos. 36983 and 36984. The proposed award, however, was never signed because Carrier sought two interpretations of the Third Division Awards and, after the Third Division sustained the claims in its second interpretation, Carrier filed suit in the United States District Court for the Northern District of Texas to vacate

the Awards. The Neutral Chair of this Board ruled consistently, over the objection of the Employee Member, that the Board would await the outcome of the post-Award proceedings with respect to the Third Division Awards before proceeding further.

In Interpretation No. 2 to Awards 36983 and 36984, the Board observed that Carrier still had not produced the source documents used to prepare the summaries on which it relied in opposing the claims and drew an adverse inference that had the documents been produced, they would have supported the Organization's position. Based on that adverse inference, the Board sustained the claim. In *BNSF Ry.Co. v. Bhd. of Maintenance of Way Employees*, 523 F. Supp. 2d 498 (N.D. Tex. 2007), the District Court held that the Board exceeded its authority and vacated the Award. The Organization appealed and in *BNSF Ry. Co. v. Bhd. of Maintenance of Way Employees*, 550 F.3d 418 (5th Cir. 2008), the Court of Appeals reversed. The court held that the Board acted within the scope of its authority when it required Carrier to provide the Organization with the source documents and when, after Carrier failed to do so, the Board drew an adverse inference. However, the court held that the adverse inference extended only to the point of supporting the finding that the amount of contracting exceeded the 1992-1996 ratio. The court held that such a finding alone could not justify sustaining the claim because Article XV also requires that to qualify for N.Y. Dock protection, the claimant must be an employee "who is furloughed as a direct result of such increased subcontracting." The court vacated the Awards and remanded them to the Board to consider whether the claimants and the Organization established the requisite causation between the increased subcontracting and their furloughed status. In Interpretation No. 3, the Board held that the requisite causation was established and again sustained the claims.

Before this Board, the Organization contends that the Third Division Awards and their Interpretations control and we should sustain the claim. Carrier, although maintaining its position with respect to whether there was the necessary increase in subcontracting, has expressed its resignation that the Board will likely defer to the Third Division Awards and their Interpretations and find that, based on the adverse inference drawn because Carrier failed to produce the source documents, the Organization has established the increased contracting that triggers N.Y. Dock protection. We do so find.

Carrier argues, however, that with respect to the issue of whether the Organization has established that Claimant was an employee "who is furloughed as a direct result of such increased contracting," the instant case is materially different from the Third Division Awards and requires a different result. In the cases before the Third Division, the claimants were furloughed after the contacting began. In the instant case, Claimant was furloughed prior to the contracting. Citing several awards which it maintains support its position, Carrier contends that because Claimant was furloughed before the contracting began, his furlough cannot possibly have been a direct result of the contracting at issue. Carrier further argues that the equipment used by the contractor was required for the job, that it was not equipment that Carrier had access to and that the contractor required that the equipment be operated by its own employees. Carrier cites several awards which found no Agreement violation from its having contracted such work in prior years and urges that Claimant's furlough could not have been a direct result of the instant

contracting because Claimant could not have performed the work that was contracted out.

Before the Third Division, Carrier argued that the claimants could not have been furloughed as a direct result of the subcontracting because the contractor was on the property performing the contracted work long before the claimants were furloughed. Consequently, Carrier argued, the subcontracting and the furloughs were not related. The Third Division rejected the argument, reasoning that had the welding work at issue not been contracted out in excess of the amount stated in Article XV, there would have been more work to do and the claimants would not have been furloughed.

Taken together, Carrier's arguments before the Third Division and this Board would mean that a claimant could not establish that his furlough was the direct result of the excessive contracting where it occurred after the contracting began (the argument to the Third Division) or where it occurred before the contracting began (the argument to this Board). Such a position would render Article XV essentially a dead letter as it would only allow N.Y. Dock protection when the contracting began on the very day that the claimant was furloughed. Such a position is inconsistent with the intent behind Article XV, which was a carefully crafted compromise intended to bring some order to the chaos of the parties' frequent battles and sometimes conflicting awards over subcontracting.

Carrier argues that because Claimant's job was abolished before the contracting in question, the Organization cannot show that Claimant "lost his job as a result of the contracting." We do not agree. As we read Article XV, the words "is furloughed" as used in Article XV, Section 1, refer to the employee's status, not to the act of abolishing the employee's job. A comparison of this case to awards relied on by Carrier illustrates why this is so. For purposes of illustration, we will refer specifically to Award No. 1 of the Arbitration Board, New York Dock Labor Protective Conditions Imposed by the Interstate Commerce Commission in Finance Docket 29430. That award held that employees who were in furlough status on the date of the consolidation of the Norfolk & Western Railway Company with the Southern Railway Company were not dismissed or displaced employees under the New York Dock II conditions. The Board there held that the consolidation of seniority lists of the two railroads was not a "transaction," and that, because the claimants were in furlough status as of the date of the consolidation, they were not displaced or dismissed as a result of the consolidation. The Board reasoned:

> [I]t must be concluded that merely because previously furloughed employees came to be placed on a consolidated seniority roster in connection with the consolidation of operations and services did not automatically entitle them to protective allowances pursuant to the New York Dock conditions. It must be presumed that even had the rosters not been consolidated the Claimants would nonetheless have remained in a furloughed status with respect to work opportunities on their former railroads.

When two railroads are consolidated, the resulting carrier will very likely eliminate positions rendered redundant by the consolidation. Under New York Dock, employees who lose their jobs or are otherwise placed in a worse position with respect to compensation and working

conditions are entitled to protection. However, an employee who was furloughed by his former railroad cannot be said to have lost his job because of the consolidation; rather he lost his job due to workforce determinations made under normal, i.e. pre-consolidation, operating circumstances. Presumably, such employees would have continued on furlough status even if the consolidation had not occurred.

In contrast, in the instant case, if Carrier had not engaged in increased subcontracting and if Claimant could have performed the contracted work, then, in accordance with Interpretation No. 3, had Carrier not contracted out the work, there would have been work for Claimant to perform. Under such circumstances, Claimant's status as furloughed after the contracting is a direct result of the contracting.

This interpretation of Article XV does not read the requirement that the employee be one who is furloughed as a direct result of the increased contracting out of the provision. On the contrary, the Organization must still prove that Claimant could have performed the subcontracted work. Furthermore, as illustrated in Case No. 3, Award No. 3, there may be other circumstances where the Organization is unable to establish the causal link between the contracting at issue and the Claimant's furloughed status.

In the instant case, we find that the Organization failed to prove that Claimant could have performed the work at issue had it not been subcontracted. It is undisputed that the work involved the use of specialized equipment to which Carrier had no access. The contractor was the owner and patent-holder of the equipment and the contractor restricted the operation of the equipment to its own employees. Accordingly, on the record presented, we conclude that the Organization has failed to prove that Claimant's furloughed status was a direct result of the contracting at issue.

AWARD

Claim denied.

Martin H. Malin, Chairman

W. A. Osborn
Carrier Member

R. C. Robinson
Employee Member

Dated at Chicago, Illinois, September 30, 2009