PUBLIC LAW BOARD NO. 2960

AWARD NO. 149
CASE NO. 219

PARTIES TO DISPUTE

Brotherhood of Maintenance of Way Employes

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

"1. The Carrier violated the Agreement when it contracted with an outside concern to construct a 70 foot by 123 foot building for the Car Department in East Minneapolis, Minnesota (Organization File 8LF-3116 T; Carrier File 81-87-28).

"2. The Carrier further violated the Agreement when it did not give the General Chairman advance notice of its intent to contract out this work and did not allow for a conference to reach an understanding before the contractor began work.

"3. Because of 1 and/or 2 above, Claimants D. L. Decker, R.A . O'Neil, D. D. Buesgens, T. P. Anderson, J. M. Vossen, R. A. Engler, R. M. Anderson, B. R. Elmberg and J. P. McCormick shall each be compensated on an equal and proportionate share of the 2,970 hours of service rendered by the private contractor in the performance of the B&B Department duties."

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employe and Carrier involved in this dispute are respectively Employe and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

On December 26, 1985 the Carrier sent the General Chairman the following notice concerning the construction of a new covered RIP track facility at East Minneapolis:

> "Please accept this as notice under Rule 1(b) of the BMWE Agreement that the Carrier intends to contract out certain work in connection with the construction of a 65 foot by 120 foot clear span, ridged frame, pre-engineered metal building on concrete foundations with a concrete floor. Due to the size and magnitude of this project, and also due to the fact that the contractor will be furnishing all specialized material for the completion of this project, it is necessary that the majority of the work described herein be performed by a contractor, as it falls within the exceptions in Rule 1(b).
>
> "For your information, C&NW forces will perform the following work on this project:
>
> > "1. Rough grade an area of approximately 4,500 square feet for building and roadway.
> >
> > "2. Perform all track work, including the installation of approximately 2,100 lineal feet of track and 3 turnouts.
> >
> > "3. Bring electrical service to the building site.
>
> "Please contact me if you wish to discuss this matter."

On January 6, 1986, the General Chairman responded as follows:

> "This has reference to your letter dated December 26, 1985, and received in my office on December 30, 1985, which notified my office of the Carrier's intent to contract out certain work in connection with the construction of a new covered rip facility at East Minneapolis.
>
> "Please be advised that the Brotherhood is not agreeable to the contracting out of the work described in your letter, as this project would not require any special equipment that is not available to the Carrier or any special skills not possessed by the Carrier's employes.

furloughed on Seniority District T-7, in which this new building is being constructed.

"This letter will serve as notice that the Brotherhood is not agreeable to the Carrier contracting out the work described and is requesting a conference on this matter in compliance with Rule -Scope of the current June 1, 1985 Agreement."

A conference was held shortly thereafter. It is undisputed that the Organization did not consent to the subcontracting. Beyond this, the precise nature of the conference is disputed. However, it is probably safe to say that it was understood the project was put on the back burner. Next, without further contact with the Organization the Carrier had an outside contractor begin construction of the building on or about August 25, 1986.

The Organization argues that the advance notice requirements were not met since when the January conference was held they were told by the Carrier the project was cancelled because it was purchasing an existing building. Thus, they were deprived of the opportunity to discuss the merits of the matter. They also argue that the construction of buildings is scope-related work and that the subcontracting doesn't fit any of the exceptions set forth in the relevant rule which would permit the work to be subcontracted.

The Carrier claims the Organization was not told that the project was cancelled or that they, in any other way, implied that the original notice was null or void. As for the merits, it is their position that because of the size and magnitude of the

project, plus the fact that the contractor would furnish specialized material and equipment for the completion of this project, that this project falls within the exceptions listed in Rule 1(b).

Relevant to this dispute is Rule 1(b). It states:

> "(a) The rules contained herein shall govern the hours of service, working conditions and rates of pay of all employes in any and all subdepartments of the Maintenance of Way and Structures Department (formerly covered by separate agreements with the C&NW, CStPM&O, CGWQ, FtDDM&S, DM&CI, and MI) represented by the Brotherhood of Maintenance of Way Employes.
>
> "(b) Employes included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.
>
> "By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or, time requirements must be met which are beyond the capabilities of Company forces to meet.
>
> "In the event the Company plans to contract out work because of one of the criteria descdribed herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in "emergency time requirements" cases. If the General

> Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representatives of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Comapny may nevertheless proceed with said contracting and the Brotherhood may file and process claims in connection therewith.
>
> "Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employes included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible. (See Appendix J to this Agrement)."

Regarding the question of whether notice was properly given, we must conclude that it was. The December 26, 1985 letter satisfied the technical requirements of Rule 1(b). Beyond this we are unable to resolve the factual dispute as to whether the notice was later voided. Thus, we are left with the original notice which comports with the contractual requirements.

Applying the relevant facts to this language, it can be determined at the outset that the work of constructing structures is specifically reserved to the employees. However, the inquiry doesn't end here. There is another relevant question, to wit, whether the specific type of structural construction in this case is "customarily performed by [the] employees...". This relates to the first sentence of the second paragraph of Rule 1(b). If it is scope-covered worked customarily performed by

employees, then the Carrier may only contract it out if one or more of the relevant criteria are shown to exist.

In this case the Carrier asserted on the property without rebuttal, as far as can be determined from this record, that the B&B employees had never accomplished a project of this magnitude before. This tends to suggest that under the unique facts of this case that construction projects of this type and scope have not been customarily performed by B&B forces. In addition, even if we got beyond this point, it seems this type of construction involved some equipment the Carrier didn't have.

In view of the foregoing the claim is denied.

AWARD

The claim is denied.

Gil Vernon, Chairman

D. D. Bartholomay
Employe Member

John Raz
Carrier Member

Dated: 4-30-90