PUBLIC LAW BOARD NO. 4431

Parties to the Dispute	BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES vs. BURLINGTON NORTHERN RAILROAD COMPANY	Case No. 11

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it assigned outside forces to perform track renewal work (install new concrete ties and rail) between Skykomish and Scenic, Washington from May 4, 1987 through June 4, 1987.

2. The Carrier violated the Agreement when it assigned outside forces to perform track renewal work (install new concrete ties and rail) between Riverview, Montana and Sandpoint, Idaho beginning June 8, 1987.

3. (a) As a consequence of Part (1) hereof, Group 1 Machine Operators J. D. Worley, E. F. Worley, D. G. Hall, N. N. Ludeman; Group 3 Machine Operators E. Encaracion, D. D. Snelson, H. H. Houle, M. L. Price, D. L. Roy; Section Foreman J. George; Assistant Foreman W. E. Cook; Seclonmen G. B. Vandiest, A. E. Brown, L. Jones, D. L. Brown and Rank B Traveling Mechanics W. W. Willert and L. E. Root shall each be allowed eight (8) hours straight time and four (4) hours overtime for twenty-four (24) work days at their respective rates of pay.

(b) As a consequence of Part (2) hereof, Group 1 Machine Operators J. D. Worley, E. F. Worley, D. G. Hall, N. N. Ludeman; Group

3 Machine Operators K. A. Grimmett, P. Vasquez, C. G. Kulm, D. O. Peterson, M. D. Shield; Section Foreman A. G. Christ; Assistant Foreman G. D. Grimmett; Sectionmen D. I. Zeller, R. J. Heilman, G. R. Weller, G. S. Sumihiro and Rank B Traveling Mechanics D. M. Butler and H. N. Samples shall each be allowed eight (8) hours straight time and four (4) hours overtime for each day worked by the Contractor from June 8, 1987 at their respective rates of pay.

BACKGROUND OF THE CASE

In January 1987, Carrier notified the four BMWE General Chairmen on its property that it intended to enter into an agreement with Tamper Corporation, West Columbia, South Carolina, for the installation of concrete ties on the railroad. The work would be accomplished by Tamper utilizing a new state of the art track laying machine, the P811-S. The four General Chairmen responded and discussions began to ascertain why Carrier's personnel could not perform the work and why Carrier's equipment could not be used. The discussions were protracted and a final agreement was not reached until September 1987.

Three of the four General Chairmen signed the agreement and it was approved by the BMWE Vice President. General Chairman K. P. Knutsen did not sign and when further negotiations failed to bring about an agreement with him, discussions ceased. General Chairman Knutsen has consequently filed the instant claim account the P811-S worked in the territory represented by him.

POSITIONS OF THE PARTIES

The Organization

The Organization contends that Carrier violated Rules 1, 5, and 55 and paragraphs 1 and 2 of the Note to Rule 55 when it contracted with Tamper Company to install concrete ties and rail using the P811-S machine. In support of its position, it presented a number of arguments:

(1) The Rules cited all address the right of BMWE employes with seniority in the territory to perform the maintenance and construction of track work, the very heart of the work performed by M&W employes. The Organization argues that Carrier did not have authorization under the Note to Rule 55 to proceed with the work without utilization of Carrier employes.

(2) Carrier has the men and equipment to perform the work in question and it had no need to contract with an outside Company for machinery. If it did, Carrier employes were capable of running the machines and doing the work.

(3) Carrier did not meet the good-faith requirements of the Note to Rule 55. Carrier had clearly begun talking to Tamper about use of a machine long before it notified the Organization that it intended to contract out the tie and rail work.

The Carrier

(1) The Carrier contends that it did not violate any Rules of the Agreement when it contracted with Tamper and, in fact, the Rules cited by the Organization as supporting its position support Carrier's position.

(2) The P811-S is special equipment that is not possessed by Carrier and it could not buy or lease one. Under the Note to Rule 55, contracting for the use of such equipment is authorized.

(3) The Organization's accusation that Carrier did not discuss the issue in good faith fails on its face. Three of the four General Chairmen involved in the discussion signed an agreement that gave their men work in support of the Tamper machine. That the fourth General Chairman did not agree does not constitute bad faith bargaining.

Finally, the Carrier argues that in spite of the merits of the case, even if the Board finds against the Carrier, the Claimants have no monetary payment due them, since during the period of the claim, they were all fully employed.

DISCUSSION AND FINDINGS

This Board has reviewed the extensive record of this case and has concluded that Carrier did not violate the Collective Bargaining Agreement when it contracted with the Tamper Corporation for the operation of the P811-S over its right of way.

The Organization's argument that Carrier violated various rules of the Agreement was not persuasive or for the most part on point. The gravamen of this case is whether Carrier had the right to contract for a special piece of machinery to operate over its tracks to perform tasks that had formerly been performed with Carrier machines and with Carrier personnel. The answer to that question is yes. The Note to Rule 55 cited by both parties as supportive of their positions in this case reads in pertinent part as follows:

> NOTE to Rule 55: The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employes in the Maintenance of Way and Structures Department:
>
> 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 when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization 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 (emphasis added).

There is no question, based on this record, that the work of construction, maintenance, or repair of track is work that is normally and customarily performed by M&W employes. The Note to Rule 55 cites examples of when that work can be contracted out. One of the allowable situations is when special equipment not owned by the Company is ~~involved~~ required B.H.E. MMT. That is the case here and that is the basis on which Carrier proceeded to have the work done without agreement of the General Chairman.

Petitioner's argument that because Carrier had installed concrete ties with ordinary equipment and its own men in the past restricts Carrier to performing the work in the same way in the future is not persuasive. In the past, Carrier has installed concrete ties with its own equipment and forces. It had trouble with the products, the process was slow, and it was expensive to perform the work in that manner. When a new machine was developed to perform the work, Carrier had a right to contract for its use under the Agreement. If this was not the case now as well as in the past, Carrier would still be installing ties and rails by hand. This is a completely unreasonable result, one not contemplated by responsible representatives of either Labor or Management.

Finally, the Organization's contention that Carrier did not bargain in good faith over the number of Carrier people that would be used with Tamper people is again not persuasive. A review of the record

reveals that Carrier came to agreement with three General Chairmen and made many attempts to come to terms with the fourth. This record does not support the statement that Carrier did not bargain in good faith.

In summary, the Board has concluded that Carrier properly notified the General Chairman of its intent to subcontract installation of concrete ties. It bargained in good faith over the impact of the subcontract and it operated within the confines of the Agreement throughout. The Carrier did not violate the Agreement by entering into a subcontract with Tamper Corporation to install concrete ties by using the P811-S track-laying machine.

AWARD

The claim is denied.

R. E. Dennis, Neutral Member

Maxine Timberman, Carrier Member

B. G. Glover, Employe Member (dissenting)

March 3, 1989
Date of Approval

EMPLOYE'S DISSENT TO CASE #11 OF
PUBLIC LAW BOARD 4431

In reaching its decision, the majority states in its findings:

> "There is no question, based on this record, that the work of construction, maintenance, or repair of track is work that is normally and customarily performed by M&W employes."

The Board goes on to deny the claim based on "special equipment not owned by the Company is required"..."when a new machine was developed to perform the work, Carrier had a right to contract for its use under the agreement."

We submit that this Award is in error because of the Board's determination that the work is work normally and customarily performed by M&W employes, yet allowed it to be contracted based on the development of new machinery. Whether such work is performed by hand or with the aid of new machinery is immaterial. The character of the work involved is the central concern. It is a well established principle that the agreement applies to the character of the work and not merely the method of performing it. Apropos here is Third Division Award 13189 which held:

> "Once it is ascertained that a certain kind of work belongs to a class or craft of employes under the provisions of an agreement, either specifically or impliedly, that work belongs to such class or craft, regardless of the method or equipment used to perform the work. The agreement applies to the character of the work and not merely to the method of performing it."

This Board is also in error to suggest"

> "If this was not the case now as well as in the past, carrier would still be installing ties and rails by hand."

The method of performing work has progressed over time. Track ties, in the past, were tamped by hand with the means of a shovel. A new machine was developed, a gasoline powered vibrator tamper. This development has continued and today this work of tamping ties is performed by a highly sophisticated electromatic tamping machine. However, in each case when the work is such that it is normally and customarily performed by M&W employes, the bargaining unit has been brought along with the introduction of new machinery. This Board has erred to find otherwise.

It is clear that the reasoning applied to Case #11 of Public Law Board 4431 is faulty. Therefore, I dissent.

Bruce H. Glover

B. G. Glover, Employe member