Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way Employees	)	
	)	
vs	)	**Case 33/Award 33**
	)	
Burlington Northern Santa Fe	)	

Statement of Claim

1. The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures work (dismantle and dispose the Hump Tower, Signal Building, Way Car Track Building, Overpass Bridge, Hump Crest Building and Hump Scale) in the Murray Yard in North Kansas City, Missouri beginning on February 3, 1998 and continuing for thirty (30) days.

2. The Agreement was further violated when the Carrier failed to make a good-faith effort to reach an understanding concerning said contracting or make a good - faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces, as required by Rule 55 and Appendix Y.

3. As a consequence of the violations referred to in Parts (1) and (2) above, the Claimants listed below shall now each be compensated for thirty (30) days' pay at their respective straight time rates of pay for the aforesaid work performed by the outside contractor forces.

J. D. Fort	713562-7	M.C. Scott	728199-1
D.R. Wood	739798-7	E. L. Wolfe	735780-9
E. G. Webb	712392-0	K.R. Cassity	306828-5
D.R. Courtney	350826-4	G.E. Norman	736866-5
W. J. Kelley	736606-5	J. R. Harrelson	741356-0
L. A. Hercules	422812-8	D. K. Lawson	420283-4
J. K. Loos	425566-7	L. J. Hayes	720602-2
R. L. Shiflett	743275-0		

Background

On September 14, 1997 the Carrier advised the Organization that some major work was going to be done at its Murray Yard facility in Kansas City, Missouri and that it was going to bring in contractors who possessed "...the necessary special skills and equipment and who are adequately equipped...to perform..." some of the work at the yard.

The work contemplated included "...demolition of the old hump, sale in place of certain materials, construction of new trackage, grading, environmental remediation and removal of 22 tracks and other related work...".

According to the Carrier the members of the craft would share the work with the contractor.

The 10 man gang in place at the yard would be increased to 22 and the members of the craft would perform the following work: "...switch tear outs, dismantle and load rail not sold as-is where-is, and perform new track construction including ballasting and surfacing..."

The contractors, in turn, would perform the following work: "...demolition of the old hump and hump tower building including removal of material. Some of the dirt will be contaminated and some of the dirt will also be saved for later use in the project. Distribution of reclaimed ties onto new grade. All grading and drainable construction. Moving relocated switches from old location to new location".

Shortly after receipt of this letter the general chairman of the union wrote to the

Carrier that "...in reading your distribution of (proposed) work I cannot see anything in the list that requires the work to be performed by contractors. All work outlined is basic, core BMWE work..."[1] The general chairman asked for a conference on this matter. A phone conference took place on October 7, 1997 at which time the union learned that the contractor was going to do some other work besides that outlined in the earlier September 14, 1997 letter. This additional work included demolition of some buildings which included the hump crest building, the signal building, and the pin puller shed. Further, several light towers were to be removed at the yard, a roadway underpass was to be "...done away with...", and piping for air lines were to be laid. All of the drainage work connected with the project was also to be done by outside contractors. Although the union states that it could not get a definitive answer on this it appeared, from what the Carrier's officers told them, that a wrecking ball was to be used for the demolition of the buildings. But, according to the union, no one knew for sure.

The union states that the main reason given to it in this early phone conference for using an outside contractor to help with the Murray yard project was to get the work done in a timely manner because of lack of M of W manpower. The union states that the latter problem would not have existed had the Carrier not so drastically reduced B&B forces in the recent past. According to the union proper forecasting of manpower to do the project

---

[1]Organization Exhibit A-2.

would have foreclosed the need for an outside contractor.

In this conference the union made the following points with respect to various aspects of the work to be done at Murray yard.

First of all, machinery needed to do the demolition work was available in the area for lease and B&B operators could run all of the machinery needed.

Secondly, any debris resulting from the work at the yard could be hauled away by B&B forces.

Thirdly, B&B forces had all the skills needed to demolish the old hump. The Carrier advised the union that the reason for using the contractor centered on time limitations, not skills. The Carrier owns all the equipment needed to do this part of the project.

Fourthly, handling and removing or relocating ties could be done by B&B forces. This is what they do all the time. The only reason given by the Carrier for a contractor to do this work, rather than B&B forces, is that they would be there anyway and it would be "...quicker for them to do..." this work.

Fifthly, relocating switches was within the purview of the equipment owned by the Carrier and the skills of B&B forces.

Grading work could be done by B&B forces with no problem. It was a small part of the whole job but within the capability of B&B skills.

If there was a contamination issue to be dealt with the union agreed that an outside

contractor could be hired to perform such tests and then the dirt could be separated as needed but that this could all could have been done by B&B forces. But the test results of soil contamination had not been done as of the date of this first conference. According to the union it was promised that those test results would be forwarded to it when they had been performed.

The union thus concluded that: "...the work involved in this case (is) work customarily performed by Maintenance of Way employees..." The Carrier has not provided evidence of need to use outside contractors to do any of the work.

In a follow-up the union stated that it was advised that leasing of a wrecking ball would be problematical for the demolition of one of the three story buildings in Murray yard and in view of that it was agreeable to having a contractor to the demolition albeit B&B forces ought to be used to "...perform the remainder of the work in question...".[2]

Absent settlement by the parties of issues over the contracting issues a claim was filed by the union on March 8, 1998 as outlined in the Statement of Claim. It was filed by the local chairman of the union's lodge 800. The claim was denied by the manager of maintenance support for the following reasons which he states in a letter dated April 23, 1998 to the local chairman.

First of all, "...work of the nature and magnitude (of the Murray Yards

---

[2]This turned out to be a non-issue in this case because the contractor tore this building down piecemeal by cutting girders with torches, ripping out bricks and mortar, and by using chains with back hoes and bulldozers to dismantle the building. Further, a demolition permit was needed in the state of Missouri to tear down buildings which the union, admittedly, did not possess and which it acknowledged.

Reconstruction Project) has customarily been performed by contract in the past".

Secondly, the "...Carrier does not possess the specialized equipment or skills and is not adequately equipped to handle all phases of the new construction work through to completion within the time periods allotted for the work...".

Thirdly, the claim is vague: dates, hours worked, number of contractors working or type of work done by contractors are not specified.

Thirdly, in the state of Missouri there is a license needed for demolition. Such license is possessed by neither the Carrier nor the B&B gang working for the Carrier.

Fourthly, the Claimants were fully employed during the period of the claim and did not suffer a loss of compensation.

Absent settlement of the claim on property it was brought to arbitration before this tribunal.

Discussion

The record in this case is quite extensive albeit a certain amount of it represents repetition of the issues outlined in the foregoing,

A review of the contract provisions at stake in this case shows that under Rule 1 Scope, members of the craft work on the maintenance of track, on structures associated with the operation of the railroad which includes bridges and buildings, and by implication railroad yards, and that members of the craft operate equipment needed to do all of the above. Under Rule 5 the agreement becomes more specific and it outlines work

to be done by various members of the craft by seniority district and by job classification. This includes classification of truck driver and machine operators. They operate a vast variety of machines including all different sizes of bulldozers, rubber tired and crawler type, front end loaders and so on. This rule provides the members of the craft jurisdiction over "...the dismantling of tracks, structure or facilities on the right of way and used in the operation of the company in the performance of common carrier service..."

This Carrier, by and through its former railroads now merged to make up the BNSF, and through its negotiating arm of which it is a coalition member, and the union party to this case, both recognized that there were occasions that could arise wherein the Carrier would need to call in contractors to supplement work done by members of the B&B craft, on certain projects, if certain conditions were met. The parties laid out their good faith intentions on this matter over 25 years ago from the present writing in a Note to Rule 55 of the labor agreement which represented mutual understanding on these matters. Some basic requirements that had to be met before the Carrier was permitted to subcontract are the following, (1) Advance notice had to be provided by the Carrier about its intention to want to contract. (2) The Carrier and the union's representatives would attempt to come to a good faith understanding concerning the scope of the subcontracting. (3) An emergency existed. (4) That only work would be contracted which was beyond the special skills of B&B forces. (5) Special equipment was needed for a project that was not possessed by the Carrier.

Findings

Proper notice of contacting the union was given by the Carrier on September 14, 1997 when it advised the general chairman of the BMWE of its intentions. There was obviously no subsequently agreed upon set of understandings about the scope of what would be subject to contract. If there would have been, this case would probably never have surfaced.

What the union did agree to, once information on what the Carrier had in mind became clear, was that it would not object to the use of a contractor to demolish a three story building at Murray Yard because the lease of a wrecking ball did not appear to have been practical. According to the Carrier, the state of Missouri also required a licensed contractor to do this demolition. Although the parties expend some ink on this issue, and unless the Board is missing something in this case, the request to have the contractor do the demolition, the impracticality of leasing a wrecking ball, and the union's assent to permit the Carrier to do this, are all congruent.

It is also apparent that the members of the craft did not have the skills to do the soil testing. There is no disagreement between the parties over this matter.

But a review of the rest of the work proposed, and apparently done, by contractors at Murray Yard fails to persuade the Board that it was done in accordance with the scope rule of the agreement, the descriptions of work to be done by members of the craft, or the Note and sidebar letter of 1981.

First of all, the record shows that a certain amount of the equipment needed to do the extensive project at Murray Yard was already owned by the Carrier. The union says this was the case. The Carrier does not deny this. Further, equipment that was not owned by the Carrier could have been leased. The Carrier argues that the union did not tell it where this equipment could be leased. In the Board's view this is a non sequitur. Unions are not charged with telling management how to run its business. Except for the wrecking ball, there is no information that the equipment needed was not available and the sidebar letter of 1981 places obligations on the Carrier to lease what it does not have for use for the members of the craft when circumstances warrant. The work at Murray yard clearly appeared to be one of those circumstances. There is no evidence that members of the craft did not know how to operate any piece of equipment that might have been needed to have done the work at Murray Yard that either was on premises and/or which could have been leased, the special circumstances dealing with the wrecking ball aside.

It is true that some of the soil at the yard obviously would have or did fail EPA guidelines for safety. The union was cognizant of that. But it is unclear why the Carrier could not have brought in a testing company, which possessed skills clearly not within the purview of any of the members of the craft, to have done the testing with the craft members partialling the good from the bad soil and then moving it where it had to be moved. If there is more to this issue, it is unclear to the Board what it might be.

The Carrier states that "...work of the nature and magnitude (of the Murray Yards Reconstruction Project) has customarily been performed by contract in the past..." Maybe so. But the Board can find no specific evidence in the record to support this.

There is no doubt that the project at Murray Yard was one of considerable magnitude which was being done in conjunction with a reconfiguration associated with another nearby yard at Kansas City. The Carrier spends some time educating the Board about these larger plans in its Submission. But this fact in and of itself provides the Carrier with no contracting rights. On the contrary, the sidebar letter of 1981 states unambiguously that "...carriers assure (the union) that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable..."

The union observes that the Carrier argues that it needed a contractor in this case to do much, if not all, of the work customarily done by members of the craft because of downsizing moves. The Carrier responds that it needed the help of contractors in order to meet its time lines for finishing the project. Or as it says: it "...is not adequately equipped to handle all phases of the new construction work through to completion *within the time periods allotted* for the work..." (Emphasis added) Thus the Carrier agrees with the Organization. There are not enough members of the craft to complete the work within the time-frame projected. About all that can be said about this is that the time-frame projected was apparently unrealistic in view of personnel on board. Both sides admit this. They just

do so in different ways.

The sidebar letter of 1981 states explicitly that Carriers should strive to avoid these types of circumstances whereby under staffing would drive the need to subcontract. If there is "y" amount of work to be done in a certain defined period of time, and the need for "x" personnel to do it, and the Carrier creates a situation of "x-1" it obviously has to find assistance somewhere else to accomplish "y". But the sidebar letter of 1981 states that the Carriers agree to strive to keep "x" and "y" in sync. In the instant case that obviously did not happen. If the sidebar letter of 1981 puts emphases on furloughed employees, as the Carrier argues in citing arbitral precedent, the Board here would not disagree. The contracting out of work on the project at the Murray yard customarily done by members of this craft emerged in the first place because, according to argument by the Organization which is not disputed by the Carrier, there was a lack of personnel. The facts of this case but confirm this. This Board has no authority to tell any employer to hire employees. But when it is apprised of the result of hiring policies which lead to potential violation of labor agreement understandings it does have authority to address such issues. This is what it is doing in this case. No more and no less.

The provisions of the Berg/Hopkins 1981 letter is on target with this case. To further argue that the Organization's reliance on this letter in the instant case is improper because it filed a claim on behalf of employees on board --- over loss of work opportunity --- rather than on behalf of those who are furloughed, is misplaced. There is arbitral

precedent that reverts to such technicalities as life-line. This Board is aware of that. But such precedent bypasses both the spirit and intent of the 1981 sidebar letter.

The Carrier argues that the claim ought to be denied in this case because it is vague. Specifics such as dates, hours worked, number of contractors working or type of work used by contractors are not specified. With respect to the merits of the claim, it is the view of the Board that this argument by the Carrier is academic. The claim filed in March of 1998 was based on the notice provided to the union in September of 1997 of the Carrier's intent to contract out work. The contracted work was being done as the claim was written and while the Carrier was carrying out its intentions. The Carrier had and has all pertinent information related to the claim. It knew exactly what the claim was about. There was nothing vague about the ramifications of the Carrier's original notice of September 14, 1997.

Argument by the Carrier that the Claimants were fully employed during the period of the claim and did not suffer a loss of compensation --- and therefore ought to be denied any remedy as requested in the claim --- has been reviewed by the Board. Aside from the fact that the Carrier has already argued that the dates involved in the claim were unknown, which logically leads the Board to puzzle over why it would now argue that the Claimants were fully employed during those same unknown dates, this argument has been dealt with many times by arbitral tribunals, too numerous to cite here, which have held that Carriers are to be held responsible for violating labor agreement provisions if such

represents loss of work opportunity irrespective of whether the employees named as Claimants were employed at the time of the violation(s) or not. There is other arbitral precedent, cited by the Carrier, which holds otherwise. This is a minority position in the industry. Without addressing the long settled issues related to damages and so on the neutral member of this Board, along with many others in the industry, are of the view that contract violations not accompanied by penalties but open the doors to both disrespect for contract provisions and the parties' mutually framed covenants, and that this could encourages potential license to engage in violations with impunity.

Upon the record as a whole the Board concludes that the union has sufficiently met its burden of proof in this case as moving party. The work done by the contractors at Murray yard in this case, with the exceptions noted that deal with demolition and soil testing, was work customarily done by members of this craft.[3] The Carrier violated the labor agreement provisions cited, including the Note and sidebar of 1981.

The remedy sought in a case such as this ought to be realistically related to the amount of work actually contracted which represented the loss of work opportunity for

---

[3]There is no need, in this case, to address the distinctions between "exclusive" versus "customary" jurisdiction over work. This case is not about exclusive jurisdiction.

the members of the craft. To try and figure out what that is, given the state of the record in this case, presents a considerable challenge.

When the Carrier sent the notice to the union on September 14, 1997 it outlined work that it proposed would be done by contractors. As part of the record here the Board has stated what that work would be, in detail, earlier in this Award. After the first phone conference between Carrier and union representatives in early October of 1997 the union states, also cited earlier in this Award, that the Carrier advised the union that contractors were to do yet some additional work on the Murray yard project. The Carrier never denied this. Work was started, and in March of 1998 when the claim was filed, the union requested remedy of 30 days at straight-time for the 15 employees which the Carrier correctly adds up to equal requested payment for 3,600 hours' work.

In July of 1998, while processing the claim on property, the Carrier argues that remedy in this case ought not be more than 300 hours because that is all of the time that was spent by outside forces "...demolishing the buildings and removing the debris..." Further, according to the Carrier, the instant case "...involves the use of contractors to dismantle, demolish, and haul the debris of the buildings from the yard..."

But what happened to all of the work first addressed by the Carrier in the original letter to the union in September of 1997? Was this work done? The Board is not told albeit the Carrier knows from its records whether it was done or not. The record of this case is silent on this matter. And what happened to the additional work to be done by

contractors according to the union, which the Carrier never denies, after its conference with the Carrier in October of 1997? Again, the Board is not told albeit records on these matters also certainly exist. The Carrier states or does not deny that it was its plan to use contractors to do all of this work.

The union calculates that all of this contract work proposed, and apparently done, amounted to 30 days work for each of the Claimants to this case. The union never states how it arrived at this number albeit the Board can but reasonably conclude that it did so from observing contractors do what the Carrier stated to the union that they were going to do in its September 14, 1997 letter. Why would the Carrier state that a contractor would do such and such work if there was no intention on the Carrier's part to carry this out?

But why does the Carrier address only the demolition and closely related work when arguing its position in this case on remedy? Was it not agreed by the union that demolition was the one of the areas of work it was abandoning in its concerns about loss of work opportunity because of the difficulty of leasing a wrecking ball, and which the Carrier argued in either case was off limits for both it and the union because of Missouri's licensing requirements for demolition work? The Carrier argues that it took the contractors only 300 hours to demolish the buildings and remove debris. Could be. But these are not considerations that are on point with the claim filed. The work it took 300 hours to apparently complete is not disputed by the union .Whatever number of hours it took contractors to demolish buildings at Murray yard is irrelevant to this case.

In view of the record before it the Board has the choice between choosing the remedy requested, and that proposed by the Carrier which is unrelated to the claim.

The remedy requested by the union is not based on any records provided to this Board. The Carrier is correct about that. There are no names of contractors; there is no information on what these contractors actually did; there are no dates, and so on. There is only information on what the Carrier stated that it intended to do with contractors and the scope of those stated intentions.

Obviously the Carrier's records document what was done. But there is no information in the file here that the union requested such records, or that the Carrier shared them with the union. And no records have been shared with this Board.

It is not known if all of the work done in violation of the contractual provisions amounted to 3600 hours. But it amounted to something. The Board has no alternative in this case but to fashion a remedy that it finds reasonable in view of the evidence of record as outlined in the foregoing. It will do so.

Ruling

Each of the Claimants to this case, whose names are stated in the Statement of Claim, will be compensated for fifteen (15) days pro rata at the rate in effect of pay in effect at the time the claim was filed. A representative from the union and a representative from the Carrier shall meet and mutually agree on what the total compensation shall be for each of the Claimants. No other remedy shall be associated

with this ruling.

Award

The claim is sustained on merits only in accordance with the Ruling. Implementation of this Award shall be within thirty (30) days of its date. The Board holds jurisdiction over this Award until it is implemented.

Edward L. Suntrup, Neutral Member

William A. Osborn, Carrier Member Dissent to follow

Roy C. Robinson, Employee Member

Date: Sept. 4, 2007

Carrier Members' Dissent
to Award 33 of Public Law Board 6204
(Referee Suntrup)

Seldom has an Award of this Board rested so obviously upon nothing but the personal views of its members. This Award is replete with illustrations of the Majority choosing to willingly disassociate itself from arbitral precedent, its own statutorily-created responsibility, and the facts and issues of this case. And as such, I do not know of any guidance this Award could possibly provide to future arbitration.

For example, the Organization set out its Statement of Claim, in part, as follows:

> 1. The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures work (**dismantle and dispose** the Hump Tower, Signal Building, Way Car Track Building, Overpass Bridge; Hump Crest Building and Hump Scale) in the Murray Yard in North Kansas City, Missouri beginning on February 3, 1998 and continuing for thirty (30) days. (Emphasis added.)

Then, the Majority asks the following question:

> But why does the Carrier address only the **demolition** and closely related work when arguing its position in this case on remedy? (Emphasis added.)

Here, the Majority admits that it is blatantly ignoring the very issue it has been called upon to arbitrate. Unfortunately, this was only the precursor of the depths the Majority went to craft such an aberrant Award.

Examples of the Majority also abandoning established procedures and precedent are summarized in the following discussion:

From the very beginning of this dispute, and throughout, the Carrier has insisted that contractors have historically performed structures demolition work and that such work was not reserved to the Organization's members. And while in this case the Organization did not deny that contractors have previously performed such work, they alleged that the work was reserved to them. However, the Organization offered no proof to support that allegation.

It is a fundamental principle that the Organization has the burden of proving every material element of its claim. Arbitral precedent is quite clear on this point. For example, Third Division Award 36208 (Kenis) states:

> **The burden of proof lies with the Organization to establish the elements of its claim. It has not done so here, and therefore the claim must be denied.**

So, logically the Majority should have dismissed this claim for failure of proof. *See* Third Division Awards 32351, 32596, 37480, and 38007.

But surprisingly, without any contractual or evidentiary basis, the Majority simply presumes that such work is reserved to the Organization's members. And then following this aberrant departure from precedent, the Majority fashions out of whole cloth a new burden of proof – one that is impossible to satisfy. For instance, the Carrier had explained that there was no more equipment that it could lease for its employees to operate (had it had any additional employees to operate it), and the Organization had not shown otherwise. But instead of dismissing this claim as it should, the Majority simply closed its eyes to the voluminous precedent on this subject and pronounced that the Organization's failure to prove its case was a "non sequitur."

This is absurd as well as impractical. If other equipment were reasonably available, the Organization could have identified vendors for the record; indeed, the Organization purportedly has done so in the past. So what was the Carrier to do? According to the Majority, it would have to prove that every vendor in the country had been contacted and had replied in the negative? This is a burden that no Board has ever seen fit to place on the Carrier. Unfortunately, this pronounced lack of rationality is not isolated in just the Majority's attempt to shift the burden of proof away from the Organization.

Having pulled out of thin air the presumption that the work belonged to the Organization's members, the Majority then proceeded to fashion a remedy, which it unashamedly calls a "penalty." From its Findings, it appears that the Majority's penalty against the Carrier rests on the Majority's rather fuzzily-reasoned reliance on the December 11, 1981 Hopkins letter to Berge. Unfortunately, the Majority seems to read into the 1981 letter far more than any Board has ever been willing to infer from it.

The Majority's attempt to link the 1981 letter to the Carrier's hiring practices is both unprecedented and unsupported by any authority. Indeed, the National Railroad Board of Adjustment has previously held in Third Division Award 29938 that the 1968 contracting language, on which the 1981 letter is based, does not require the Carrier to

increase its hiring. The Majority's implication that the 1981 letter was intended keep workload and hiring levels "in sync" is conspicuously bereft of any evidence or negotiations history to support any premise that such was ever intended. Such a premise again represents the Majority's personal notion of equity and is completely outside of the Labor Agreement.

What is incomprehensible is why the Majority raised the hiring-practices issue in the first place. The Organization never articulated such a charge during the claim handling on the property, nor did it focus on such an issue in its Submission. Rather, the Organization's position was that the Carrier already had the necessary manpower, in the Claimants, but simply chose contractors instead (*see p. 23 of the Organization's Submission*). The only evidentiary context of adequate manpower in the claims-handling record is in the Carrier's undisputed pleading that it lacked enough personnel to handle a project of such magnitude.

It is true that there are fewer employees in the railroad industry than there were a generation ago, just as there are fewer numbers in most of the older, labor-intensive industries in America. This decrease is due to many causes, such as technological changes in how the work is accomplished and the natural ebb and flow in the business cycles of the railroad industry. But that is not evidence of any lack of a carrier's good faith, nor does it show any violation of the 1981 letter.

Neither BNSF nor other railroads hire people speculatively, in order to handle the occasional project, especially one of exceptional magnitude such as this. That would be imprudent and impractical since it takes a significant investment of time and money to train people in the specialized skills of railroading, and to qualify them under government regulations. It is simply unfeasible to hire for just a special project.

Undisputed is the fact that the Claimants were fully employed elsewhere (there were no employees in furlough at the time who could have performed the work), so that shortage constituted an exception (unavailability of forces making the Carrier "inadequately equipped to handle the work") under the Note to Rule 55, entitling the Carrier to contract out for the supplemental personnel sufficient to cover the manpower shortfall. That exception has been expressly recognized by other boards of adjustment.

Indeed, the Majority's dicta on the Carrier's hiring practices are at odds with the position of the National Railroad Board of Adjustment. On this very property, the Third Division of the NRAB has recognized that Appendix Y cannot be a basis for attacking the Carrier's "good faith," just because it lacks adequate manpower. *See*, for instance, Third Division Award 36715 (Eischen).

This "understaffing" theory has also been heard and rejected by the NRAB in Third Division Award 37008 (Newman). In that case the Organization contended that the Carrier violated the language and intent of the December 11, 1981 letter (Appendix Y) by allegedly systematically reducing its workforce by over 50% to the point where there was insufficient manpower to perform admittedly scope-covered work, and then contracting out such work based upon a shortage of manpower. Also, the Organization asserted that the Carrier failed in its good faith obligation under the 1981 letter to reduce the incidence of subcontracting and utilize BMWE-represented employees to perform scope-covered work. The Organization further argued that the Carrier was obliged to hire enough personnel to supplement is workforce in order perform the work without using contractors. But the Board rejected the Organization's position and denied the claim. *See also* Third Division Award 33640 (O'Brien).

That this work was of large magnitude is not in dispute—the Majority itself admits that fact on page 10 of the Award. Thus, it stands to reason that projects of large magnitude may sometimes strain manpower availability to the point that supplementation of project forces with contractor workers may be required. But again, the Majority airily professes that the size of the project "provides the Carrier with no contracting rights." To the contrary, arbitral precedent holds that magnitude of the work can indeed entitle the carrier to contract out work. For example, in Third Division Award 37947 (Parker), the Board acknowledged:

> **Arbitral precedent between the parties has established that projects such as that involved in the instant case are of sufficient magnitude to meet the Note to Rule 55's requirements. Public Law Board No. 4768, Award 14 and 71.**

Even before that Award was issued, the Organization itself recognized the relevance of the issue of "magnitude." As grounds for opposing the contracting of the disputed work in another BNSF case, Third Division Award 36744 (Eischen), the Organization unsuccessfully argued that "this project is not of such magnitude to support an argument for the use of contractors."

The Majority's opinion that the Carrier's arbitral authority that no damages accrue where all the Claimants were fully employed "is a minority position in the industry" is also incorrect. Traditionally, "penalty" damages, such as the Majority awarded here, are assessed only where there is some egregious, and usually repeated pattern, of deliberate wrongdoing by the Carrier; but that is not the case in this instance—nor did the Majority find it to be.

The Majority avers that "the Carrier agrees with the Organization" that the Carrier needed a contractor "because of downsizing moves." That is patently wrong, and I challenge the Majority to show me anywhere in the record where the Carrier made any such concession. This error follows from the Majority's presumption that the Carrier's not having enough personnel to timely complete a particular large project, as well as perform the usual core duties involved in maintaining the railroad and protecting the public, is somehow indicative of violation of the Labor Agreement—but it is not, for the reasons already indicated.

BNSF also takes umbrage at the Majority's gratuitous remark that the time-frame scheduled by the Carrier for project completion was "apparently unrealistic," in view of the shortage of then available Maintenance of Way personnel. Such dicta apparently stems from the Majority's presumption that the Carrier has the luxury of postponing important project work until it hires and trains enough (albeit temporary) employees of its own to assign to each project as the need may arise. One wonders whether the public and Congress would tolerate the delay in services or risks to safety that such a strait-jacketed policy would inevitably cause. In any event, it is difficult to fathom how the Majority could hold such an opinion without first assuming that the Carrier has no right to contract out work at all—an assumption manifestly contrary to the express terms of the Labor Agreement.

Obviously, by this Award's logic, every dispute can be decided not on the merits of the case, not on the evidence established on the record, not on arbitral precedent, nor even on the claim as presented, but on the individual biases of the majority. That is a stupefying proposition.

I respectfully, but vigorously, dissent.

William A. Osborn

William A. Osborn
Carrier Member

LABOR MEMBER'S RESPONSE
TO CARRIER MEMBER'S DISSENT
TO
AWARD 33 OF PUBLIC LAW BOARD No. 6204
REFEREE SUNTRUP

It has been said more than once by various labor relations practitioners that a dissent is not worth the paper it is written on nor the postage to transmit it to the parties. This advocate does not always take stock in that opinion, however, in this case it fits for obvious reasons. Not the least of these reasons is the fact that this dissent comes some nearly nine (9) months to the day of Referee Suntrup's untimely passing. Because of that alone the Carrier's Dissent clearly would not qualify for a "Profiles in Courage" commendation.

Award 33 of Public Law Board (PLB) No. 6204 was signed by the parties on September 4, 2007 wherein the Carrier member indicated that a dissent would follow. Although the Agreement establishing this Public Law Board does not contain a time limit in which one of the parties may file a dissent, it does have language concerning other pertinent time considerations. Paragraph 10 states that if an interpretation was requested by either party it must be made within thirty (30) days following the issuance of the Award. Paragraph 11 states that if an Award is favorable to the Union, the Carrier is required to comply within thirty (30) days. Paragraph 12 provides a cancellation clause wherein either party may cancel the Agreement with a thirty (30) day written notice. Nowhere in the Agreement does it designate a date for a dissent to be filed. However, Paragraph 3 provides for a mechanism for selection and replacement of the neutral member. Because the parties had agreed to Referee Suntrup at the time the Agreement was drafted, his name appeared in the original document. However, upon Referee Suntrup's untimely demise, neither party acted to replace him in accordance with Paragraph 3. Because of the passage of time, Referee Suntrup's demise and the parties inaction regarding a replacement, this Board no longer exists. Because the Board no longer exists the Carrier's dissent is a nullity.

Insofar as the dissent itself is concerned, it is a transparent effort to blunt the precedential value of the well-reasoned opinion and Award of the Majority. The Carrier Member has misstated the facts of record, the arbitral precedent and the plain terms of the collective bargaining Agreement in a mean-spirited, cowardly diatribe masquerading as a dissent. If future readers accept the inexorable logic that the precedential value of an Award is proportionate to the clarity of reasoning in the Award, then Referee Suntrup's Award will carry powerful precedential value. The fact is, that this was a straightforward contract interpretation case and there was nothing unique about the facts of the case or the principles employed in deciding the case that would undermine the precedential value of this carefully reasoned Award. Indeed, with respect to the principles employed in deciding the key issue, Appendix "Y" of the Agreement, Award 33 of PLB No. 6204 is entirely consistent not only with prior precedent on this property, but similar Awards on other carriers throughout North America. Likewise, the remedy is consistent with literally hundreds of Aawards concerning the improper siphoning of work from the bargaining unit.

Labor Member's Response To
Carrier Member's Dissent
Award 33 Of Public Law Board No. 6204

Contrary to the Carrier Member's assertions, the Carrier did not operate with the necessary "good faith" as is outlined in the Note to Rule 55 and Appendix "Y" (the December 11, 1981 Letter of Agreement). Rather, the Carrier contracted with a third party to provide work that had customarily and historically been performed by the Carrier's own forces under the terms of the collective bargaining Agreement. What the Carrier Member can not seem to grasp is that management prerogatives are limited by the collective bargaining Agreement. In fact, the very purpose of collective bargaining agreements is to limit management prerogatives and, in this case, the Agreement limited the Carrier's right to obtain dismantling work from anyone other than its Maintenance of Way forces. As the Neutral Member correctly pointed out:

> "Upon the record as a whole the Board concludes that the union has sufficiently met its burden of proof in this case as a moving party. The work done by the contractors at Murray yard in this case, with the exceptions noted that deal with demolition and soil testing, was work customarily done by members of this craft.[3] The Carrier violated the labor agreement provisions cited, including the Note and sidebar of 1981.
>
> ---
>
> [3]There is no need, in this case, to address the distinctions between 'exclusive' versus 'customary' jurisdiction over work. This case is not about exclusive jurisdiction."

In apparent recognition that the arbitrator's reasoning could not be fairly challenged, the Carrier Member turned his sights on the arbitrator himself and charged that the Neutral Member "pulled out of thin air" that the work was reserved to Maintenance of Way employes. Of course, this charge is untrue. One only needs to look to the clear and unambiguous language of the Agreement to see that "dismantling" is mentioned as work that is reserved to Maintenance of Way employes in Rule 55.

Finally, in a headlong rush to malign the Neutral Member's reasoning, the Carrier Member next makes numerous citations of Awards in support of the arguments found in its dissent. The problem with the Carrier's citation of Awards 29938, 32351, 32596, 33640, 36208, 36715, 36744, 37480, 37947 and 38007 is that if Referee Suntrup was still alive to read it he would have noticed that it would have been the first time the Carrier cited those Awards in support of its position in this case. Yes indeed, the Carrier is merely rearguing its case within its dissent and hoping that no one would notice. I guess that is why it took the Carrier more than nine (9) months to slur Referee Suntrup after he had passed away and more than fourteen (14) months after the Carrier

signed the Award. Again, the screed proffered by the Carrier is thinly camouflaged as a dissent but does nothing to affect this Award's precedential value. Instead it exposes its author as cowardly and opportunistic.

Respectfully submitted,

Roy C. Robinson
Labor Member