PUBLIC LAW BOARD NO. 6538

Carrier File No. 97-11-21AB
Organization File No. C-97-C100-80

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	**AWARD NO. 1**
And	)	**CASE NO. 1**
	)	
BURLINGTON NORTHERN 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 (Lunda Construction) to perform Maintenance of Way and Structures Department Work (drive piling, build cosway [sic] and replace existing bridge) at Bridge No. 4490 on the St. Joseph Subdivision in the vicinity of Table Rock, Nebraska beginning July 8, 1997 through September 11, 1997.

(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, each Claimant * listed below shall now be compensated at their respective straight time, time and one-half and double time rates of pay for the hours worked by the outside forces as follows:

*** S. P. Conradt**	**261 straight**	**182 overtime**	**6 double**
M. J. Peterson	**261 straight**	**170 overtime**	**6 double**
J. H. Waggoner	**253 straight**	**180 overtime**	**6 double**
J. L. Morgan	**189 straight**	**148 overtime**	**6 double**
R. D. Wall	**85 straight**	**70 overtime**	**6 double**
D.R. Harrison	**69 straight**	**62 overtime**	**6 double**
D. T. Acton Jr.	**5 straight**	**40 overtime**	**6 double**
S. E. Zimbelman		**40 overtime**	**6 double**
T. J. Schultz		**40 overtime**	**6 double"**

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.

On May 12, 1997, Carrier provided the General Chairman with advance notice that Carrier would be contracting out certain aspects of the replacement of a bridge near Humbolt, Nebraska. In the notice, Carrier stated that the contracting was necessary because the contractor possessed special equipment and skills to perform the work.

Following receipt of the Carrier's notice, the Organization requested a conference to discuss the project. At the conference, the Organization contended that the work could be performed with Carrier-owned equipment or equipment that could be leased and that Carrier forces had the skills and expertise to perform all aspects of the project. Carrier took the position that the work had to be performed with equipment not owned by the Carrier and that Carrier forces were not experienced in operating the equipment required.

Contractor forces began working at the bridge on July 8, 1997 and worked at the site sporadically until September 11, 1997. The Organization subsequently presented two claims. The first was presented on August 11, 1997. The second, a continuation of the first claim, was presented on September 12, 1997. Both claims were denied by the Carrier and are now properly before the Board.

Based on our review of the record, we reject the contention of the Organization that Carrier should have assigned the work to BMWE forces under the Note to Rule 55 and other Agreement Rules. The weight of the evidence established that those aspects of the project complained of by the Organization were of a nature which effectively prevented the use of Carrier forces and equipment on any practical basis. For example, the Organization did not persuasively refute the evidence proffered by the Carrier which shows that Carrier does not own a 165-ton Crawler Crane with the capacity of that operated by the contractor. To the extent the Organization argued that cranes were "readily available," the Carrier pointed out that the cranes were approximately 500 miles from where the work was performed. In addition, the Organization failed to identify any employees who had experience in operating the off track cranes used for this project.

Similarly, the pile driving equipment used in this project was distinctly different from Carrier's pile driving equipment, which is designed to operate only from the Carrier's tracks. In this instance, the evidence showed that a special pile driver was needed to work around the bridge structure. Equally important, the

Organization did not successfully establish that Carrier forces were experienced in operating such equipment.

Considering the above factors, we find that Note to Rule 55 specifically covers this situation. It states:

> **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 exit which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. . . .**

The Board concludes that the machinery and equipment used by the contractors can properly be deemed "special equipment not owned by the Company" set forth in the Note to Rule 55. We further find that, by using an outside contractor in these circumstances, where the machines were of specialized capacities, where Carrier forces were not experienced in operating such equipment, and where as a practical matter the equipment was not available for lease, Carrier acted in good faith and did not violate the terms of the December 11, 1981 letter which requires "the use of . . . maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

AWARD

Claim denied.

ANN S. KENIS, Neutral Member

Carrier Member
William A. Osborn

Organization Member
Roy C. Robinson

Dated April 10, 2003.

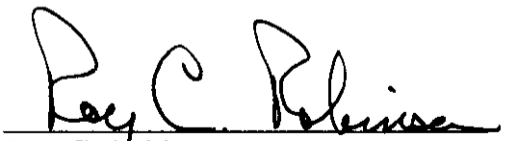
LABOR MEMBER'S DISSENT
TO
AWARD 1 OF PUBLIC LAW BOARD NO. 6538
(Referee Kenis)

One school of thought adhered to by certain railroad industry advocates is that writing dissents is an exercise in futility because they are neither read nor considered by subsequent arbitrators. This advocate does not belong to that school. For to accept the theory that dissents are meaningless is to accept by implication that reason does not prevail in railroad industry arbitration. Despite all the faults built into this system, the Organization is not ready to conclude that reason has become meaningless. Therefore, the Organization Member has no alternative but to file this dissent.

This dissent centers on the Majority's focus solely on the machinery used in the building of a bridge at Mile Post 44.90 on the St. Joseph Subdivision. Although notice was given and conference was held, the main issue discussed was the Carrier's assertion that special equipment was needed to perform the work. While there was much discussion during the on-property handling of this dispute concerning the Carrier's alleged lack of equipment, one would think that such was all that the claim entailed. That is certainly not the case in this matter. A review of the General Chairman's August 30, 1999 letter of appeal reveals:

> "I also must point out there was a period of time in these claims where there were more contractors employees working on this project than you had advised would be there during the contracting out conference. Again, the total lack of good-faith by the BNSF is very apparent and can not be ignored." (Employes' Exhibit "A-18")

Indeed, a review of the "Statement of Claim" lists nine (9) employes as Claimants in this case. Clearly, more than that was needed to operate the four (4) pieces of machinery the Carrier contracted for to perform the work involved here. Moreover, the General Chairman's statement, quoted above, was never refuted by the Carrier during the handling of this dispute on the property. Inasmuch as such is the case, I dissent.



Roy C. Robinson
Employe Member