

**PUBLIC LAW BOARD NO. 6538**

**BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYES )**

**and )**

**BNSF RAILWAY COMPANY )**

**AWARD NO. 8**

**CASE NO. 8**

**STATEMENT OF CLAIM:**

**"Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (remove and replace an existing fence) at the Midway TOFC Hub Center on the Midway Subdivision of the Minnesota Division beginning on October 6, 1997 and continuing (System File T-D-1474-B/MWB 98-03-11AP BNR).**
- (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/or (2) above, Foreman R. G. Pechmann, Assistant Foreman G. J. Wonsewicz, First Class Carpenter S. C. Archibald, Second Class Carpenter H. C. Rydberg and Truck Driver R. S. Spencer shall now each be compensated '...for an equal and proportionate share of all straight time and overtime hours worked by the contractor beginning on October 6, 1997 and continuing until the violation ceases.'"**

**FINDINGS:**

**Public Law Board No. 6538, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees 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.**

**In a letter dated August 26, 1997, Carrier provided the Organization with notice of its intent to utilize outside forces to construct a concrete barrier at the Midway Hub Intermodal Facility. The parties discussed this project on two**

separate occasions. Ultimately, the work was contracted out and the instant claim was filed.

The Organization contends that Carrier violated Rules 1, 2, 5, 6, 19, 20, 21, 29, 42, 55, 66 and 78 of the Agreement by assigning a contractor to perform work reserved to the Claimants and historically performed by B&B employees. The Organization asserts that Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of the Organization employees. It is further alleged that the work consisted of basic construction methods and skills already possessed by B&B employees. Claimants have performed work similar to or more complex than all aspects of this project, the Organization submits. In particular, it is emphasized that B & B forces have previously built fences and have constructed a sound abatement structure with H- beam construction similar to the project at the Midway Hub. To the extent that certain equipment was not available in Carrier's inventory, the Organization submits that Carrier could have rented the necessary equipment in an effort to comply with its good faith obligations. Because the Claimants were fully qualified and available to perform the work in question, the claim must be sustained in its entirety.

Carrier's denial of the claim is based on its contention that it possessed neither the specialized equipment nor the special skills necessary to handle all phases of the work through to completion within the time frame allotted for the project. Carrier further argues that Organization forces have not performed such work in the past nor does the Agreement reserve the work to BMW employees. Notwithstanding the Organization's contention that this was a relatively simple fence project which was within its customary expertise, Carrier argues that the disputed work involved a large concrete barrier wall erected to protect against intermodal trailer impact. This was a project that was simply beyond the scope of what Carrier forces could perform. Indeed, Carrier submits that it does not own the equipment necessary to perform a project of this scale. Finally, Carrier asserts that it acted in good faith. It discussed this project with the Organization. The mere fact that Carrier decided to subcontract the project does not establish bad faith.

The Board has carefully studied the record presented. The project at the Midway Hub did not involve a typical railroad fence. As the photos provided by the Organization suggest, this was an eighteen foot high concrete barrier wall, nearly one-quarter of a mile long. We are persuaded that its construction required specialized equipment and special expertise, just as the Carrier has argued. Although the Organization attests to performance of the kind of work claimed here, it is undisputed that this was the first such project of its kind and magnitude on Carrier property. The Organization offered evidence attempting to show Carrier employees have performed similar work and/or that the work was not as complex as the Carrier described it, but the fact remains that the Organization has not


demonstrated that the type of work involved here has been customarily performed by Carrier employees or expressly reserved by Agreement. Nor are we convinced that the evidence supports the claim that the work could have been assigned on an effective basis by piecemealing the project, particularly in the absence of evidence that portions of the work could have been performed by Carrier forces and separated out from the overall construction project. See, Third Division Award No. 35384; Public Law Board No. 4768, Award No. 14, and Public Law Board No. 4768, Award No. 22. In the latter case involving a similar fact pattern, the Board convincingly stated:

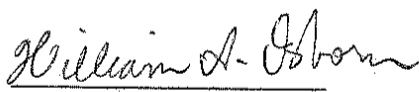
After reviewing all the circumstances, the Board concludes that this project was of a nature which would have prevented the use of Carrier equipment and forces on any practical basis. While there is no doubt that elements of the work are regularly performed by Carrier forces, this does not therefore determine that such major projects could have been undertaken other than by outside forces. More significantly, however, is that the Organization has failed to demonstrate that such projects are 'customarily performed' by Maintenance of Way forces. This is the necessary element for consideration of the application of the Note to Rule 55.


The Note to Rule 55 expressly permits the Carrier to use outside forces under the circumstances present in the instant case. The fact that the parties were unable to reach an understanding or agreement after discussions regarding the assignment of work for the project does not establish a lack of good faith on the part of the Carrier. Based on these factors, we must rule to deny the claim.

AWARD

Claim denied.

  
ANN S. KENIS, Neutral Member

  
Carrier Member  
William A. Osborn

  
Organization Member  
Roy C. Robinson

Dated this 24<sup>th</sup> day of July 2007.