NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6594

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 2
and	)
	) Award No. 2
BMSF RAILWAY COMPANY	)

Martin H. Malin, Chairman & Neutral Member
R. C. Robinson, Employee Member
W. A. Osborn, Carrier Member

Hearing Date: June 21, 2004

STATEMENT OF CLAIM:

1. The Carrier violated Article XV of the September 26, 1996 National Agreement when it contracted out the work of operating a lowboy tractor-trailer to transport Carrier owned roadway equipment (Tamper BNX54-00336) from Dilworth to Barstow from February 23 through 28, 1998 and failed to afford furloughed employe D. B. Suonvieri the level of protection which New York Dock provides for a dismissed employe (System File NYD-144/MWB 98-06-18AG BNR).

2. As a consequence of the aforesaid violation, Mr. D. B. Suonvieri shall be afforded the level of protection which New York Dock provides for a dismissed employe beginning February 23, 1998 and continuing through February 28, 1998.

FINDINGS:

Public Law Board No. 6594, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

As with the claim before the Board in Case No. 1, Award No. 1, the instant claim arises under Article XV, Section 1 of the September 26, 1995, National Agreement. For purposes of brevity, we will not reproduce the analysis and interpretation of Article XV, Section 1 from Award No. 1. Rather, we hereby incorporate it by reference.

In accordance with Award No. 1, we find that the Organization proved that Carrier

engaged in increased subcontracting. We further find that merely because Claimant's furlough occurred prior to the contracting at issue, this does not per se mean that the Organization cannot prove that Claimant's furloughed status was the direct result of the increased subcontracting. Rather, the Organization has carried its burden of proof if it can prove that Claimant could have performed the work in question had it not be contracted out.

During handling on the property, Carrier responded that "the laws in California are such that the lowboy trailers assigned in this area do not meet the standards set to operate in that state. The trailer is not in compliance with the axle span needed (it is too long) and the trailer cannot be modified to meet these standards. The contractor was in compliance with the laws set forth in California and was able to move the machinery in a timely manner."

However, to say that Carrier did not own a trailer that complied with California law is not to say that Carrier did not have access to such a trailer. There is no evidence in the record, for example, that Carrier could not have rented such a trailer or otherwise avoided increased contracting. There is no dispute that Claimant was qualified to perform the work in question. We conclude that the Organization has proven that Claimant's furloughed status was the direct result of the increased contracting.

AWARD

Claim sustained.

ORDER

The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto

Martin H. Malin, Chairman

William A. Osborn

W. A. Osborn (DISSENT TO FOLLOW.)
Carrier Member

R. C. Robinson
Employee Member

Dated at Chicago, Illinois, September 30, 2009