Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36983
Docket No. MW-36035
04-3-00-3-142

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Burlington Northern and Santa Fe Railway Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated Article XV of the September 26, 1996 National Agreement when it contracted out the work of transporting roadway work equipment between Dilworth, Minnesota and Barstow, California beginning February 20 through 25, 1998 and failed to afford furloughed employe R. D. Pakarinen the level of protection which New York Dock provides for a dismissed employe (System File NYD-143/MWB 98-06-18AF BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. D. Pakarinen shall be afforded the level of protection which New York Dock provides for a dismissed employe beginning February 20 through 25, 1998."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This is a claim for protective benefits under Article XV of the 1996 National Agreement. The Organization asserts that the Claimant is entitled to those benefits as a result of the Carrier's contracting out the transportation of roadway work equipment during the period February 20 - 25, 1998 which the Claimant could have performed.

Before discussing the specifics of the present claim, certain background information concerning Article XV and the Organization's information requests must be addressed.

Following the recommendations of PEB 229, the parties adopted a new subcontracting provision for the 1996 National Agreement:

"ARTICLE XV - SUBCONTRACTING

Section 1

The amount of subcontracting on a carrier, measured by the ratio of adjusted engineering department purchased services (such services reduced by costs not related to contracting) to the total engineering department budget for the five-year period 1992-1996, will not be increased without employee protective consequences. In the event that subcontracting increases beyond that level, any employee covered by this Agreement who is furloughed as a direct result of such increased subcontracting shall be provided New York Dock level protection for a dismissed employee, subject to the responsibilities associated with such protection.

Section 2

Existing rules concerning contracting out applicable to employees covered by this Agreement will remain in full effect."

By letter dated January 24, 1997, the Organization wrote the Carrier:

"In order to accommodate the implementation of Article XV, would you kindly provide the undersigned General Chairmen with the following information for Burlington Northern territories encompassed by BMWE Seniority Districts 1-24 governed by the collective bargaining agreement dated September 1, 1982:

1. The engineering department purchased services for each year from 1992 through 1996.

2. The adjusted engineering department purchased services (such services reduced by costs not related to contracting) for each year from 1992 through 1996.

3. The total engineering department budget for each year from 1992 through 1996.

4. The amount of subcontracting, as measured by the ratio of adjusted engineering department purchased services (such services reduced by costs not related to contracting) to the total engineering department budget for the five-year period 1992-1996.

5. Relative to the above items 1-4, please indicate the amounts of adjustment and/or reduction in these numbers which result from subtracting the amounts expended for contracted out work to rebuild the Stampede Pass Line."

By letter dated March 17, 1997, the Carrier wrote the Organization:

"Article XV provides for employee protective consequences under certain prescribed circumstances if there is an increase in the amount of subcontracting on a carrier 'measured by the ratio of adjusted engineering department purchased services (such services

reduced by costs not related to contracting) to the total engineering department budget for the five-year period 1992-1996.'

All of the data establishing the above described ratio comes directly from our annual report, the so-called R-1 Report, as filed with the Interstate Commerce Commission (and its successor the Surface Transportation Board) for each of the years 1992 through 1996. The information to be included in the R-1 for 1996, which is not due until March 31, 1997, is still being collected and analyzed. Accordingly, we are unable to respond to your request at this time."

By letter dated April 4, 1997, the Organization reminded the Carrier that the March 31, 1997 filing deadline for the 1996 R-1 Report had passed and stated, ". . . we are requesting you provide the information that we requested in our January 24, 1997 letter since the 1996 R-1 is completed and the information is now available."

By letter dated August 6, 1997, the Organization again referred to its information request of January 24, 1997 and stated that the requested information had not yet been provided. The Organization amended its previous information request by adding the following:

"In addition to the five-year base period data requested above, current monthly data is essential to complete the implementation of Article XV. You have not been providing this monthly data for 1997. In this connection, we request that you also provide the following information:

1. The monthly engineering department purchased services for each month from January through July, 1997.

2. The adjusted monthly engineering department purchased services (such services reduced by costs not related to contracting) for each month from January through July, 1997.

3. The total monthly engineering department budget for each month from January through July, 1997.

4. The monthly amount of subcontracting, as measured by the ratio of adjusted monthly engineering department purchased services (such services reduced by costs not related to contracting) to the total monthly engineering department budget for each month from January through July, 1997."

By letter dated September 30, 1997, the Carrier responded that ". . . we note that Article XV places no obligation on the carrier to provide any information to the organization in connection with implementation of that provision" but ". . . as a courtesy and in the interest of working cooperatively with you to facilitate the appropriate implementation of Article XV, we will provide the above-cited information you have requested." The Carrier then referred to exhibits the Carriers submitted to PEB 229 and advised the Organization that it had made a request from the National Railway Labor Conference (NRLC) to provide it with the following information:

"1. The engineering department's purchased services for each year from 1992 through 1996, as reported on the applicable R-1 reports;

2. The 'adjusted' engineering department's purchases [sic] services for each year from 1992 through 1996, such adjustments to be made in accordance with the methodology used in the carriers' Ex. 13 to PEB 229;

3. The total engineering budget for each year from 1992 through 1996, as reported on the applicable R-1 Reports; and

4. The ratio of adjusted engineering department purchased services to the total engineering budget for the period 1992-1996."

The Carrier, by letter dated September 30, 1997, provided the Organization with a copy of the NRLC's September 24, 1997 response to the Carrier's request for information ". . . which addresses the publicly reported information you have requested." The Carrier also rejected providing the monthly information requested by the Organization because as the Carrier interpreted Article XV, only an ". . .

annual comparison [is required] since the benchmark ratio is based on five years of data that is reported only on an annual basis."

The September 24, 1997 letter to Carrier from the NRLC Director Economic Research C. L. Kearns given by the Carrier to the Organization states, in pertinent part, that "[t]he source of the data is Schedule 410 of the R-1 Annual Reports . . . [and d]ata for the Burlington Northern Railroad and the Atchison Topeka & Santa Fe Railway Co. have been combined for the years 1992-1995" and provides the following information:

	Way & Structures Purchase Services	"Adjusted" Purchased Services	Total W&S Freight Service Expense	Adj. Purch. Serv. as % of Total W&S Frt. Serv. Expense
1992	$145,160	$125,052	$1,193,142	10.5%
1993	$156,159	$117,266	$1,146,400	10.2%
1994	$175,974	$135,175	$1,152,626	11.7%
1995	$194,627	$124,483	$1,339,738	9.3%
1996	$124,287	$105,254	$1,107,036	9.5%
Total	$796,207	$607,230	$5,938,942	10.2%

By letter dated June 29, 1999, the Carrier again addressed the Organization's information requests and advised the Organization:

> "As a courtesy in response to the Organization's request, by letter dated September 30, 1997, BNSF did provide you 'engineering ratio' data covering the Article XV Base Period 1992-1996. BNSF did not report the data for calendar year 1997, because the Organization never requested it. As explained in our September, 1997 letter, the ratio calculations are made by the National Railway Labor Conference from data contained in R-1 Reports filed with the Surface Transportation Board (formerly the Interstate Commerce Commission). These calculations are done in exactly the same manner as was employed in the carriers' presentation to PEB 229 on this matter. As you were informed by John M. Starkovich's letter dated March 17, 1997, until the R-1 information is filed and finalized with the STB, and made available to the NRLC, the necessary calculations cannot be made. The NRLC has informed us that the calendar year 1998 data, as it pertains to BNSF, is now

> available to the NRLC, it is in the process of making such calculations. Accordingly, we anticipate providing the BNSF calendar year 1998 data to the Organization, in similar format as provided in our September, 1997 letter, within the next 30 days.
>
> The Carrier is not required to publish monthly reports on contracting, as you allege. . . ."

Turning to the specifics of the claim in this matter, the Claimant had been on furlough since January 1998. During the period February 20 - 25, 1998, the Carrier utilized Bestway Machinery Transport to operate a lowboy tractor-trailer to transport the Carrier's roadway equipment from Dilworth, Minnesota, to Barstow, California, at a time when the Claimant was on furlough. The Organization asserts that under Article XV, the Claimant is entitled to an allowance equal to the New York Dock level of protection for a dismissed employee.

In denying the claim, in its letter of August 12, 1998, the Carrier advised the Organization "[a]s to your assertion that Article XV of the 1996 National Agreement was violated, you have offered no evidence in support of your claim" and further stated that under Article XV ". . . you have not proven that either condition exists in this case." The Carrier took the position that because the Claimant was on furlough in January 1998 and because the disputed contracted work was performed between February 20 - 25, 1998, the Claimant could not have been on furlough because of the contracting out of the work. The Carrier also denied that the Organization is entitled to have the "engineering ratio" computed on a monthly basis.

In its letter of May 18, 1999, the Organization referred to the Carrier's assertion that the Organization had not carried its burden of proof:

> ". . . The Organization's 'proof' can be contingent solely upon the information as the Carrier provides the Organization. The Carrier has refused to provide any documentation relative to the amount of engineering department purchased services for the base period, 1992 through 1996. The Carrier has refused to provide any documentation relative to the amount of engineering department purchased services for calendar year 1998. In fact, the Carrier refuses to provide any documentation. . . .

During conference, the Organization stated that New York Dock benefits were premised upon payment of monthly benefits. The Organization requested whether or not, the Carrier would provide engineering department purchased services, and its corresponding ration [sic] to the base period on a monthly basis. The Carrier's representatives response was 'no', the ratio established by Article XV was a [sic] an annual ratio. The Organization responded by stating that the employes would not know if they have been affected until a year or more after they have been dismissed, as that term is used under New York Dock. The Organization also fails to recognize any relevant language in Article XV that would establish such an 'annual' ratio."

By letter dated June 29, 1999, the Carrier responded:

"There are at least two notable weaknesses in the Organization's case with respect to the claim involved in the instant dispute. The employee protective consequences provided for in Article XV are applicable only if (a) for the year in question (here, calendar year 1998), the amount of subcontracting on BNSF, measured by the ratio of adjusted Engineering Department purchased services (such services reduced by costs not related to contracting) to the total Engineering Department budget, actually increased beyond the level of that same ratio for the base period 1992-1996; and (b) the Claimant was furloughed as a direct result of such increased subcontracting. You have utterly failed to provide supporting evidence with respect to either of these requirements."

In this industry, subcontracting disputes are a flashpoint - and for obvious reasons. The employees, at times while on furlough, see work they have performed being performed by strangers to their Agreements. The Organizations see their base of actively working members eroding as the Carriers contract out scope covered work. On the other hand, the Carriers need work performed, often expeditiously, which their existing forces may not, for manpower, availability of necessary equipment, or qualifications reasons, be able to perform in accord with the Carriers' needs. Further, the Carriers rely upon their inherent rights to run their railroads consistent with their managerial prerogatives and best business

judgments, not to mention past practices of using subcontractors to perform work. The result is an extraordinary amount of litigation which the Board, Public Law Boards and Special Boards of Adjustment must resolve. The end product is not always helpful to the Carriers and Organizations as guides to charting their future courses of conduct under existing contract language governing subcontracting. Nor is that end product always helpful to the dispute resolution process itself which seeks to give stability to the parties. See e.g., Third Division Award 32862:

> "Complete uniformity of decision did not exist as this Board developed its approach to the hundreds of cases presented to this Board arising from the parties' contracting disputes. Review of those decisions shows some inconsistencies - by this Board and sometimes even by individual referees sitting with the Board.
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> * * *
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> From the handling of the hundreds of claims presented to this Board between the parties on the issue of contracting work, we are also cognizant that the notice, objection by the Organization and conference procedure often is a pro forma exercise which ends up in a literal battle of word processors and copy machines as the parties posture themselves on the issues and put together the voluminous records in these cases. Our function is not to make certain that the process is a meaningful one - that is the obligation of the parties. Our function is to enforce the language the parties agreed upon. . . ."

Article XV of the 1996 National Agreement offers a way of potentially reducing the chaos of subcontracting disputes resulting from language in prior Agreements. In Article XV, the parties agreed, consistent with recommendations of PEB 229, that based upon a ratio of adjusted Engineering Department purchased services to the total Engineering Department budget for the period 1992 - 1996, "[t]he amount of subcontracting on a carrier . . . will not be increased without employee protective consequences."

In this particular case, the Organization argues that the Claimant is entitled to those protective benefits as a result of the Carrier's subcontracting certain work. The Carrier disagrees for a number of reasons. However, for our purposes, one of

the Carrier's reasons is determinative for presently resolving a critical aspect of this dispute.

The Carrier argues that the conditions required by Article XV for payment of the protective benefits to the Claimant have not been demonstrated by the Organization. Specifically, as stated in the Carrier's June 29, 1999 letter, after referring to the need of the Organization to demonstrate ". . . for . . . calendar year 1998 . . . the amount of subcontracting on BNSF, measured by the ratio of adjusted Engineering Department purchased services . . . to the total Engineering Department budget, actually increased beyond the level of the same ratio for the base period 1992-1996 . . .", the Carrier states that the Organization ". . . utterly failed to provide supporting evidence" to substantiate its claim.

But this record shows that since January 1997, the Organization requested specific information from the Carrier which would establish the ratios called for in Article XV and all the Carrier produced is a summary of information on an annual basis prepared by the NRLC taken from the R-1 Annual Reports. As stated in its May 18, 1999 letter, the Organization protested the Carrier's refusal ". . . to provide any documentation relative to the amount of engineering department purchased services for the base period, 1992 through 1996" and also sought such information based on "a monthly basis", which the Carrier refused to produce.

The above shows that for the ratios required by Article XV, the Carrier supplied the Organization with summary information on an annual basis taken from the R-1 Reports; refused to supply any documentation supporting those summaries; refused to supply information relative to the ratios computed on a monthly basis; and took the position that the Organization had not met its burden of proof that the ratios specified in Article XV were exceeded because the Organization ". . . utterly failed to provide supporting evidence." The Carrier cannot provide summaries, refuse to provide the Organization with access to the underlying documentation which formed those summaries, and then argue that the Organization failed to provide "supporting evidence" that the ratios were exceeded. The Organization cannot provide that "supporting evidence" because the Carrier is in possession of the "supporting evidence" and the Carrier refused to allow the Organization to see that "supporting evidence."

It has been held that failure to produce evidence relied upon by a carrier in defense of a claim could result in the drawing of negative inferences and even sustaining of the claim. See Third Division Award 18447:

> "We reaffirm the principle that Carrier is not required by agreement or otherwise to make available its records to a collective bargaining agent bent on a fishing expedition looking for information from which it might develop claims. But, after a claim has been filed, which contains in its content the procedurally indispensable substance, Carrier acts at its peril if it fails or refuses to adduce its records which contain material and relevant evidence. . . ."

See also, Third Division Award 31879:

> "Carrier is not privileged to avoid payment of bonuses it agreed to pay on the basis that its 'average operating ratio' exceeded 90.1% unless it timely supplies the Organization with correct data that its 'average operating ratio' actually exceeded 90.1%. Carrier did not provide this information to Organization, accordingly, the claim must be allowed as presented."

Further, see Public Law Board No. 4454, Award 27 (supplemental) where the Carrier therein refused to submit to a joint check of its records as ordered by that Board when that carrier relied upon its records concerning frequencies of crew hauling and refused to disclose those records to the organization as requested [footnotes omitted]:

> "This Board has no enforcement power. We cannot compel the Carrier to submit to the joint check. Indeed, the agreement establishing this Board recognizes that we can only 'request' the production of additional evidence. However, not being able to require a party to act does not leave us unable to resolve disputes when we deem that further information is necessary and that information is not forthcoming. We can draw inferences based upon the refusal of a party to produce evidence. It is well-accepted that failure to produce such records can lead to an inference that had

those records been produced, the records would not have supported the position of the party refusing to disclose the records.

Under the circumstances of this case, the Carrier's refusal to submit to a joint check of its records leaves us no choice but to draw an inference adverse to the Carrier's position in this matter. The Organization has attempted to persuade us concerning the merits of its claim through the use of a numerical analysis based upon information it gathered. The Carrier has attempted to refute the Organization's showing by reliance upon information from its records. In light of the approach taken by the parties, this Board determined that the best source for the information would be from the Carrier's records and therefore, in accord with our discretion and further in accord with our authority, a joint check of those records was decided upon as the appropriate vehicle for best assisting in ascertaining the facts and the relative strengths and weaknesses of the parties' positions. The Carrier's refusal to submit to that joint check leaves us no choice but to conclude that had the Carrier produced those records, then the contents of those records would have been inconsistent with the Carrier's position in this case."

Contrary to the Carrier's assertions, the Board has broad discretion and jurisdiction, particularly with respect to the formulation of remedies and actions we can require the parties to take so that we can decide disputes which come before us. The Carrier is relying upon summary information to support its position in this case and, at the same time, it refused the Organization's requests to view the source information for those summaries. Although we have the discretion to do so, because we believe that the Carrier acted in good faith and because we are advised that this is the first dispute under this language to reach this level, we shall not presently sustain the claim on its merits because the Carrier did not provide the requested information. We have no reason to doubt the accuracy of the summary information provided. However, because the basis for that information has been challenged and the Carrier has not disclosed the underlying information used to formulate the summaries, we have nothing before us which supports the accuracy of that summary information. But, where the Carrier takes the position that the Organization has not provided "supporting evidence" for its claim as it did in this case and that "supporting evidence" is totally within the Carrier's control and may

well dispose of the entire dispute, basic concepts of fairness require that the Organization be allowed to examine that source information. We shall, therefore, require the Carrier to make available to the Organization the source documentation used to prepare the summaries relied upon by the Carrier. Should the Carrier fail to make that source information available, we will sustain the claim.

There is a dispute also concerning disclosure of information used by the Carrier in determining the various ratios for periods after the 1992 - 1996 base period specified in Article XV. The Organization requested to see the Carrier's "monthly data" concerning periods after that base period, which the Carrier refused to produce. See the Organization's letter of August 6, 1997 (where the monthly data request was made) and compare the Carrier's September 30, 1997 response (where the Carrier rejects that request asserting that only an "annual comparison" is required).

We find that the Organization is entitled to inspect the Carrier's records concerning the relevant information for periods of less than an annual reporting period. Article XV specifies the base period of 1992 - 1996 for determining the appropriate ratios. However, Article XV is silent with respect to the periods to be examined "[i]n the event that subcontracting increases beyond that level" [of the base period]. Under the Carrier's interpretation that it need only disclose information on an annual basis, furloughed employees and the Organization may have to wait up to one year until the Carrier provides its annual information when it files the R-1 Report for the employees and the Organization to know whether the employees are entitled to benefits under Article XV. Yet, although not specifically required by Article XV, the New York Dock benefits "for a [New York Dock] dismissed employee" referred to in Article XV are monthly benefits. Article I(6)(a) of New York Dock provides that "[a] dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period. . . ." [Emphasis added.] We do not know if the Carrier keeps such records on a "monthly" basis or on some other periodic basis of less than one year. However, if the Carrier does have such records relevant to determining the ratios on less than an annual basis, we find the Organization is entitled to inspect those records as well.

We also note that the Organization contended that the Carrier had not provided information concerning certain projects (e.g., the Stampede Pass). Given that we have required the Carrier to disclose the source documents for its annual

summaries, the Organization should be able to ascertain what projects were included or excluded from the Carrier's annual summaries. We, therefore, presently find that aspect of the dispute moot.

This matter is now remanded to the parties to take action consistent with the terms of this Award. We decide no other issues aside from those discussed concerning the providing of information. Specifically, we express no opinion on whether the Claimant was ". . . furloughed as a direct result of such increased subcontracting. . . ." Indeed, if there was no "increased subcontracting" as contemplated by Article XV, because this claim seeks protective benefits for the Claimant, then the question of whether the Claimant is entitled to those benefits is moot. Nor do we express an opinion on whether the ratios provided by the Carrier are accurate. Similarly, we do not express an opinion on whether the subcontracting was justified because the Carrier's equipment was inadequate. We have only decided that because the Carrier relied upon its records as a defense to the claim, refused to allow the Organization to see the source documents for its summaries that it relied upon and then took the position that the Organization had not provided supporting evidence to substantiate the claim, that the Carrier is now obligated to allow the Organization to inspect the source documents used by the Carrier in formulating the summaries that the Carrier used in defending this claim.

We recognize that problems may arise concerning the method of disclosure of information, who is entitled to see the information, protections for the Carrier's business records and the like. We shall leave those questions to be resolved by the parties in the first instance as they implement the terms of this Award. The Board shall retain jurisdiction over disputes, if any, which may arise as a result of this Award.

This is no small, simple discovery dispute. Given the national scope of Article XV, the chaos that resulted from prior subcontracting disputes, and in an effort to provide stability and guidance to the parties in this most volatile area, it is imperative that the parties to this dispute - indeed, all parties to the National Agreement - know the precise numbers and methodologies to be used in determining the ratios in Article XV so that they can determine whether those ratios were exceeded in individual cases. The parties' knowledge of that information to a certainty will prevent future challenges to the basis for the Article XV ratios.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 12th day of May 2004.