Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40782
Docket No. MW-40410
10-3-NRAB-00003-080214

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

(Brotherhood of Maintenance of Way Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Hulcher) to perform Maintenance of Way and Structures Department work (load and haul dirt) from the 23rd Street Yards at Denver, Colorado, on March 14 and 15, 2006 [System File C-06-C100-96/10-06-0151(MW) BNR].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance notice of its intent to contract out said work 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, Claimants M. Baker, R. Wardwell, K. Abeyta, T. Sherman, J. Perez and C. Subia shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay."

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 claim was filed on March 19, 2006, to protest the Carrier's use of a contractor to haul dirt out of the 23rd Street Yard in Denver, Colorado (specifically, the Brush Sub-Division, Line Segment 901) on March 14 and 15, 2006. Six of the contractor's employees worked eight hours each day. The Organization contends that the work should never have been contracted out and that the Carrier failed to issue proper notice of the contracting under the Note to Rule 55.

The Carrier responds that the dirt in question was contaminated soil that had to be removed by OSHA-trained operators and that it has traditionally contracted out such work. Moreover, even though the Carrier does not need to provide notice to contract out work that is not customarily performed by its forces, the work in question was part of a larger project (replacing certain water lines in the Denver Yard) and it provided proper notice that it would contract out the entire project by letter dated April 16, 2004.

Hauling dirt is indisputably routine bargaining unit work, which would ordinarily be subject to the Note to Rule 55. However, prior Awards between the parties have established the Carrier's right to contract out the removal of contaminated soil, which must be handled and hauled by individuals who have special training. See, Third Division Awards 34213, 39913 and 40213.

Accordingly, the threshold issue in this case is whether the dirt that was moved was contaminated. The record before the Board includes an e-mail dated April 14, 2006, from the Manager of the Carrier's Environmental and Hazardous Department, enclosing a copy of the soil testing, that states: ". . . Sample Results were 6,200 PPM (Part Per Million) this is contaminated soil. Jim is right BNSF M of W employees are not trained to handle contaminated soil (requires 40 hour Haz. Ops training under OSHA). . . . The soil was from the installation of a water line in the yard and a letter of intent was issued (B&B job)." According to the report, the sampling and analysis were done in July 2005, at a site identified as "Soil Stockpile 711 W 31st Ave." This evidence lends credence to the Carrier's position that the soil was contaminated and, therefore, fell outside the parameters of the Note to Rule 55.

The record also included statements from Carrier employees who had previously worked with the dirt pile at issue. According to their statements, dated July 26, 2007, the soil sample submitted by the Carrier was for a different location – 31st Avenue, rather than 23rd Avenue. According to the statements, the dirt had been removed from the south end of the Roundhouse where the B&B crew was putting in a cement pad, and was not related to the water line replacement project.

This case demonstrates how burdens of proof are met and shifted and why the parties have an obligation to provide information in a timely manner. The Organization has the burden of proof to establish its claim; the Note to Rule 55 does not apply unless the Organization establishes that the work at issue is work "customarily performed" by bargaining unit employees. Ordinarily, moving dirt is routine M of W work, and Rule 55 would apply. Once the Organization has met its initial burden of proof, the burden shifts to the Carrier to provide persuasive evidence that the dirt in question is not ordinary soil, but contaminated soil - the removal of which is not work "customarily performed" by M of W forces. In this case, the Carrier submitted a soil test indicating that the soil in the sample was contaminated. Such evidence shifts the burden of proof back to the Organization, to prove that the work at issue should still be subject to Rule 55. In turn, the Organization provided evidence, in the form of statements from employees who had worked with the dirt pile, that the sample tested in the report submitted by the Carrier was from a different location and a different project altogether.

Such evidence could undermine the evidentiary usefulness of the soil test, i.e., if the soil tested was from a different location and an uncontaminated project, it could not establish that the dirt in dispute was contaminated. At that point, the burden would shift yet again, back to the Carrier, to establish in the record that the Board should credit the soil test evidence nonetheless. The Carrier could do that in a variety of ways (1) by demonstrating that the two locations were in fact the same or (2) that the dirt from the Roundhouse was contaminated (3) by establishing that dirt from the 31st Street soil stockpile had been moved to the 23rd Street soil stockpile, thereby contaminating that pile or (4) that the Roundhouse work was in fact part of the water line replacement project, just to name a few.

But the Carrier was prevented from responding to the statements due to the fact that they were not submitted until months after the parties' claims conference, which was held on May 16, 2007. The statements were not written until July 26, 2007, and not submitted to the Carrier until October 16, 2007. They were attached to the Organization's letter confirming that the claims conference had occurred some five months earlier.

The timing is important. The Organization filed the original claim in March 2006. In a letter dated May 1, 2006, the Carrier raised the issue of soil contamination. By letter dated May 16, 2006, the Organization requested a copy of the soil test, which the Carrier forwarded as an attachment to its July 10, 2006, response. The parties did not meet until May 16, 2007 (ten months later) to confer about the claim. Any additional information that the Organization had should have been submitted no later than the date of the conference, in order to give the parties a fair opportunity to consider all the facts and discuss the case in its entirety during the claims conference. There is no indication in the record why the employees' statements were not taken for more than one year from when the Organization received the copy of the soil test that it had requested (July 10, 2006, to July 26, 2007). The Organization was on notice that contamination was an issue beginning in July 2006, but did not respond with its own evidence until months after the claims conference. In fact, the employee statements were not even generated until more than two months after the claims conference had occurred. The timing, along with the fact that the Carrier did not have an opportunity

to address the issues raised in the employee statements, undercuts the weight that the Board is willing to give to the statements.[1]

In the end, after considering all of the evidence in the record, the Board concludes that, with the soil test, the Carrier met its burden to establish that the soil at issue was contaminated. The evidence submitted by the Organization in response was insufficient to rebut the Carrier's evidence. Prior Awards have established that the removal of contaminated soil is not work "customarily performed" by Carrier forces, so Rule 55 does not apply. The Carrier may contract out such work and is not required to provide notice. Accordingly, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2010.

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[1] Moreover, the statements are inconsistent with one another. In the first statement, the employee stated that the work of digging out the south end of the Roundhouse for the B&B crew to pour a concrete pad occurred in late November or December 2004, while the second employee stated that it was occurring in March 2006. That is too large a time difference to be written off as inconsequential.

LABOR MEMBER'S DISSENT
TO
AWARD 40782, DOCKET MW-40410
(Referee Knapp)

I cannot agree with the reasoning of the Majority in denying the claim based on the premise that the Carrier did not have time to properly address issues raised during the on-property handling of the dispute. The Organization complied with all agreed to time limit provisions of the Agreement and we believe the Majority erred when it held:

> "The timing is important. The Organization filed the original claim in March 2006. In a letter dated May 1, 2006, the Carrier raised the issue of soil contamination. By letter dated May 16, 2006, the Organization requested a copy of the soil test, which the Carrier forwarded as an attachment to its response, dated July 10, 2006. The parties did not meet until May 16, 2007 - ten months later - to confer about the claim. Any additional information that the Organization had should have been submitted no later than the date of the conference, in order to give the parties a fair opportunity to consider all the facts and discuss the case in its entirety during the claims conference. * * * The timing, along with the fact that the Carrier did not have an opportunity to address the issues raised in the employee statements, undercuts the weight that the Board is willing to give to the statements.[1]" (Footnote omitted)

The claimed work involved loading and hauling dirt stockpiled at the 23rd Street yards. The soil test results submitted by the Carrier were for the soil stockpiled at 711 W 31st Avenue and, therefore, irrelevant to the instant dispute. It was only during the claim conference that the Carrier attempted to connect the claimed work to the contaminated soil at 711 W 31st Avenue and to an April 16, 2004 contracting notice. Confronted by this assertion for the first time at the May 16, 2007 claim conference, the Organization sought proof to support its original claim. This proof came in the form of two (2) signed statements dated July 26, 2007 which clearly establish that the claimed work involved loading and hauling dirt stockpiled at the 23rd Street yards and not loading and hauling dirt from the soil stockpiled at 711 W 31st Avenue. This evidence was presented to the Carrier by letter dated October 16, 2007. The Organization's Notice of Intent is dated December 27, 2007. Hence, the Carrier had 72 days to address the issues raised by the employes' statements and simply chose not to do so.

The evidence was submitted timely in accordance with the practice on the property, the clear and unambiguous provisions of Rule 42 of the Agreement and the Railway Labor Act (RLA) Section 2, First and Second.

The parties to this dispute routinely agree to time limit extensions to further discuss claims as evidenced by the fact that the appellate denial is dated July 10, 2006 yet, the final claim conference was not conducted until May 16, 2007 with no exception taken by either party.

Moreover, the evidence was timely provided in accordance with Rule 42 of the Agreement, which provides:

> "C. The requirements outlined in Sections A and B of this rule pertaining to appeal by the employe and decision by the Company, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Company to handle such disputes. All claims or grievances involved in a decision by the highest designated officer shall be barred unless, within nine (9) months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3, Second, of the Railway Labor Act. It is understood, however, that the parties may by agreement in any particular case extend the nine (9) months' period herein referred to.
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> F. This Agreement is not intended to deny the right of the employes to use any other lawful action for the settlement of claims or grievances provided such action is instituted within nine (9) months of the date of the decision of the highest designated officer of the Company."

Hence, under the plain and unambiguous language of Rule 42, the record is not closed until that nine month time limit expires (including agreed to time limit extensions) or the case is listed with the NRAB, whichever comes first. During that nine month period or any agreed to time limit extension thereof, such as here, the case is subject to settlement and the record remains open for that very purpose. There is no other interpretation which is consistent with the letter of the rule or the clear and obvious intent of the parties when they provided for the nine month time period including agreed to time limit extensions.

The Majority's decision flies in the face of the Railway Labor Act (RLA). Section 2, First and Second of the RLA which provides as follows:

> "'First. <u>It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to</u> make and maintain agreements concerning rates of pay, rules, and working conditions, and to <u>settle all disputes, whether arising out of the application of such agreements or otherwise</u>, in order to
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> "'avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

> Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.' (Underscoring added)" (Emphasis in original)

The plain fact is that the Carrier and the Union have a legal obligation to exert every reasonable effort to settle disputes arising out of the application of agreements or otherwise. Hence, the parties are not only entitled to present additional argument and evidence during the nine month period, they are obligated to do so in an attempt to resolve their disputes. Artificially closing case records following the claim conference would clearly frustrate the intent of the RLA.

The BMWED's interpretation of the Agreement and the RLA are certainly not novel. To the contrary, these issues have arisen in the past and the BMWED's position has been clearly, repeatedly and consistently upheld by the NRAB. In this connection, see Third Division Award 24757 and Fourth Division Award 3331 which held:

> AWARD 24757: (Third)
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> "The Carrier also contends that the Board should not consider any allegations made by the Organization on the property after the highest designated official had declined the claim on June 6, 1980. The Organization and Carrier had a conference on August 1, 1980. In a letter dated August 11, 1980 to the Carrier's Manager of Personnel, the Local Chairman listed the dates and exact hours for which it claims the Carrier paid the higher incumbent rate to four named employes. The letter also asked for verification from the Carrier controlled employe timeslips. The August 14, 1980 response from the Manager of Personnel covers a number of issues, including an assertion that the August 1st discussion was outside the handling of the claim in the usual manner. However, nowhere in that letter or in the record does the Carrier ever deny that the named employes were paid the higher rate on the days and hours listed as having been worked. The Organization's intention to file an ex parte submission with the NRAB is dated January 15, 1981.
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> In Award 20773 Referee J. Sickles held that:
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> > "'Any document presented on the property prior to the date of the Notice of Intention to file an Ex Parte Submission ... is properly considered by this Board.'

Award 22762 cites Award 20773 with approval, and Referee Scheinman added:

> 'It is obvious, therefore, that the material presented to Carrier by Petitioner on October 3, 1978 is properly a part of this case. Carrier's election to ignore it - or at least not to respond thereto - was done at its own peril.'

The conclusion is that the material in the August 11, 1980 letter and the absence of a factual rebuttal by Carrier are part of the record before this Board." (Underscoring added)

AWARD 3331: (Fourth)

"It is noted that the parties have shown some concern with regard to procedure in the handling of this dispute on the property. The Carrier has objected to a letter from the Organization dated March 22, 1975 which was in response to Carrier letter dated March 12, 1975 which letter purposed to confirm the discussion of the dispute in conference on March 6, 1975. The Carrier has stated that Petitioner is estopped from such additional correspondence since the claim had been handled to its prescribed conclusion on the property, under the Railway Labor Act and in accordance with the Agreement. Petitioner disagrees. We note that the Letter of Intent to the Fourth Division, N.R.A.B. was dated June 30, 1975. Under the statute the parties are charged with the responsibility of attempting to resolve disputes on the property whenever possible; such efforts may not be considered concluded until the matter has been referred to the N.R.A.B. or other appropriate Board. Therefore, the Organization was within its rights in responding to Carrier's letter prior to the date of the Letter of Intent, and the material therein may be considered in the resolution of this dispute, as also may the Carrier's letter of April 18, 1975." (Underscoring added)

Third Division Awards 18120, 20773, 22762, 30789, 31996 and Fourth Division Award 3611 held to a like effect.

The Majority's decision to undercut the weight of the employes' statements based on a fabricated timeliness premise is contrary to the negotiated rule and undermines the very fabric of the RLA.

Not only did the Majority error in undercutting the weight to be given the two (2) employe statements, it misinterpreted the content of the statements. It is true that the first employe statement concerned digging out the south end of the roundhouse for the B&B crew to pour a concrete pad in November of 2004. However, the second statement did not contend that

said work was done in March of 2006 but rather the second employe stated that in March of 2006 he began moving the dirt pile at the location where the B&B poured the concrete pad prior to the contractor being assigned the work. These statements are not inconsistent with each other, they are supportive of each other. One employe created the dirt pile at the location specified in the claim and two years later the other employe began removing the dirt pile at the same location. The Carrier was provided these statements 72 days prior to the closing of the record and took no exception to this evidence.

Particularly disturbing here is the fact that the Carrier never took issue with the timeliness of the presentation of the employe statements, nor did it refute the facts presented in said statements. Although the Majority apparently considered all evidence and arguments presented by the parties, it did not give proper weight to the Employe statements which were timely provided. Therefore, I dissent.

Respectfully submitted,

Timothy W. Kreke
Labor Member