Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40785
Docket No. MW-40512
10-3-NRAB-00003-080279

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(
(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 (Tompkins Trucking and Excavating) to perform Maintenance of Way and Structures Department work (undercut tracks) at the Galesburg Hump Yard Facility in Galesburg, Illinois on July 5, 6, 7, 24, 25, 27 and 31, 2006 [System File C-06-C100-191/10-06-0337 (MW) BNR].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper 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 D. Anders, D. Furrow, C. Turner, G. Sundquist, and J. Lipes shall now each be compensated for sixty-six (66) hours at their respective and appropriate 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.

The Organization's complaint in this case protests track undercutting work that was performed by an outside contractor, Tompkins Trucking, at the Galesburg, Illinois, Hump Yard on July 5, 6, 7, 24, 25, 27, and 31, 2006. According to the Organization, the contractor used two crawler hoes (with operators), one bobcat (with operator) one ground man and one foreman for eight hours each on July 5, 6, 7, and 31, and for 13 hours on July 24 and 25. The record presented to the Board includes statements from two Carrier employees who witnessed the work when it was done.

By letter dated February 6, 2006, the Carrier notified the Organization of its intent "to contract specialized equipment with operator to assist Carrier forces" at various locations, including the Galesburg Terminal. Specifically, the specialized equipment was an "off-track undercutter with a tie inserter head," which the Carrier alleged was not available for rent without an operator.

The Organization contends that the work at issue is routine track work covered by the Note to Rule 55 and Appendix Y and that the Carrier violated those provisions of the parties' Agreement in several ways. First, the notice was inadequate and improper because the work actually performed by the contractor exceeded the scope of the notice sent to the Organization: the notice stated that specialized equipment would be used "to assist Carrier forces." Instead, the work at issue was done entirely by contractor forces, performing routine track work and using normal equipment, without the participation of any Carrier forces. Second, the Carrier violated the Note to Rule 55 and Appendix Y because it could have leased the necessary equipment for Carrier forces to operate but failed to do so.

The Carrier put forth several defenses. First, it contends that the complaint was not timely filed. The Agreement requires that complaints must be filed within 60 days of the occurrence. The work in this case commenced on July 5, 2006. Sixty days after was September 3, 2006. However, the Carrier did not receive the complaint until September 5, 2006, two days after the time limit expired. Next, the Carrier contends that the Organization failed to establish that the work occurred as alleged. Moreover, the work does not fall under Rule 55, because it is not work that has been done exclusively by Carrier forces. Fourth, the work could be contracted out under Rule 55's exception for specialized equipment. The Organization has not adequately demonstrated that the equipment was actually available for lease without an operator. Finally, the Claimants were either fully employed or on vacation when the work was allegedly done, so they suffered no monetary loss and are not entitled to any compensation.

The Board turns first to the procedural issue of whether the claim was timely filed. Rule 42A states:

> "A. All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. . . ."

According to the Organization, the claim was "presented" when it was mailed, on August 31, 2006; according to the Carrier, the claim was "presented" when it was received, on September 5, 2006.

As is true with many other issues, given the duration of the parties' relationship, the Board has already considered the meaning of Rule 42A in previous cases. One of the most complete and articulate interpretations of "presented" is found in Third Division Award 24440.[1] Writing on behalf of the Board, Referee Ida Klauss stated:

> "On the threshold issue of timeliness, we conclude from a study of Rule 36 and a review of cited awards that the term 'presented,' as used in the rule, does not have a clear and unambiguous meaning.

[1] Award 24440 dates from 1983. At that time, what is now Rule 42A was Rule 36. The language of the two is exactly the same, however.

> The rule itself carries no definition, nor does it offer any helpful guidance as to what meaning the word was intended to have. Thus, the word 'presented' is not used consistently in this and other parts of the rule to describe how a claim is effectively initiated. . . .
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> Awards cited by the Carrier do not, in our opinion, resolve the ambiguity. They do not reflect a uniform view of what the term 'presented' means or reasonably should mean. . . .
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> For these reasons, we have considered it advisable to take a good fresh look at Rule 36 at this time.
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> The recognized purpose of a negotiated grievance or complaint procedure is to vindicate the rights achieved by the agreement. In the process, unsettling uncertainties about those rights are effectively resolved. Bearing in mind that purpose, we deem it to be sound labor-relations policy that doubts as to the precise boundaries of time limits which shut off access to those procedures should, in general, be resolved against forfeiture of the rights sought to be vindicated.
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> Guided by that policy and by common business practice, we conclude that a fair and reasonable reading of the rule is that a properly addressed claim is effectively 'presented' when delivered to the U.S. mails. (Williston on Contracts, Third Edition; Restatement of the Law, Contracts, 2d.) This holding is in no way intended to relax the time limits themselves.
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> We do not accept the Organization's view that the claim was effectively presented merely by the act of writing the letter stating the claim. It must be shown that the letter was placed in accepted channels of communication. . . ." (Emphasis added)

Following Award 24440's lead, a claim is "presented" under Rule 42A when it is mailed, but there must be some proof of the mailing. That proof is present in this case. The record includes a photocopy of the envelope in which the claim was mailed, along with a printout of the on-line tracking report. The postmark of August 31 can

be seen on the envelope in two places.[2] The claim was sent Express Mail, which is usually guaranteed to be delivered in one or two days, depending how far apart the mailing and delivery addresses are. Here, however, although the claim was mailed on August 31, it was not delivered until September 5. A look at a 2006 calendar offers a probable explanation. August 31 was a Thursday. Two days later, September 2, would have been Saturday, and it is entirely possible that no one was in the office to sign for and receive the claim. (Absent a signature release from the sender, Express Mail must be signed for upon delivery.) Moreover, it was Labor Day weekend and Monday was a federal holiday - which could easily explain why the claim was not finally delivered until Tuesday, September 5. The Organization did everything it could to ensure timely delivery of the claim within the parameters set forth in Rule 42A: it sent the claim by a tracked, guaranteed express delivery method that should have gotten the claim to the Carrier by September 2 or 3 at the latest. At this point in time, it is impossible for the Board to know if the delivery delay occurred at the U. S. Post Office or because no one was in the Carrier's office over the Labor Day weekend to sign for the delivery. But under either scenario, it would be grossly unfair for the Board to find that circumstances beyond the Organization's control could operate to bar the claim as untimely filed. The claim was timely filed, and the Board turns next to its merits.

The Organization has the burden of proof in contracting cases. The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of bargaining unit work. The threshold issue is whether the work under consideration is work "customarily performed" by bargaining unit employees. If it is, the Carrier may only contract out the work under certain exceptional circumstances: (1) the work requires "special skills, equipment, or material" (2) the work is such that the Carrier is "not adequately equipped to handle [it]" or (3) in cases of emergencies that "present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces."

The Organization has the initial burden of establishing that the work at issue is work "customarily performed" by bargaining unit employees. The Board has previously set forth the basis for its conclusion that the term "customarily performed" does not mean "exclusively performed throughout the entire system," but that it

[2] The photocopy has two pages, perhaps the back and the front of the envelope; the record is not entirely clear, but the postmarks are sufficient.

should be interpreted according to its ordinary usage, that is, meaning "historically and traditionally performed."[3]

The work in dispute here, track cutting, is routine track work, ordinarily performed by Carrier forces. In fact, in its February 6, 2006, notice, the Carrier suggested as much when it stated that it needed to contract for specialized equipment "to assist Carrier forces" in doing the work. Accordingly, the disputed work is subject to the Note to Rule 55.

The Carrier has also argued that there is insufficient evidence that the work occurred. This argument is not persuasive. First, the Carrier notified the Organization that it intended to contract out track undercutting work at the Galesburg Terminal, which is the work in dispute here. Moreover, the record includes statements from two of the Claimants about what work occurred, when and where. This is sufficient for the Carrier to have investigated and, if the work did not take place as alleged, to have presented evidence to that effect, as it has done in prior cases.[4] After the Organization has presented evidence sufficient to infer that the work occurred as claimed, the Carrier cannot expect a generic denial to be enough to rebut that evidence.

This brings us finally to the substance of the complaint. In its notice, the Carrier claimed a need for specialized equipment that it does not own, an off-track undercutter with a tie insertion head. Specialized equipment is one of the explicit exceptions recognized in the Note to Rule 55 under which the Carrier may properly contract out work normally done by its forces. The Organization raised two objections: (1) the Carrier could have leased the equipment so that its own forces could have done the work, and (2) the work performed by the contractor exceeded what was proposed in the notice and, in fact, much of it was done without any special equipment.

The lease argument is not persuasive. The record includes information on an RCE undercutter head mounted on a Deere 200clc crawler chassis, which the Organization shared with the Carrier during the conference held prior to the work being done. The brochure indicates "These products are available for Sale, Lease, and Rentals." More than an advertising brochure is needed for the Organization to establish the viability of a lease or rental option, such as the actual availability of

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[3] See Third Division Award 40563.
[4] See e.g., Third Division Award 40788 involving the same contractor.

equipment near the site of the work being done, the cost, and other information that the Carrier would ordinarily take into consideration in determining how best to accomplish the work.

The Organization's final argument is that the Carrier violated the notice provision in the Note to Rule 55, in that the February 6, 2006, notice did not inform the Organization of the real scope of the proposed contracting. The notice indicated that the contracting was being undertaken because the Carrier needed an off-track under-cutter "to assist Carrier forces" in undercutting track in various locations. The notice implied that the contracting would be limited to hiring one piece of specialized equipment that was needed to help the Carrier's forces to perform their work. That is not what happened in this case: a crew of five, using both crawler hoes and a bobcat, did all of the track work. There is no indication that a track under-cutter was used on the dates in question. The work that was done by the contractor exceeded that described in the notice, to include work customarily done by the Carrier's own forces, using the same type of equipment it already owns.

The purpose of the notice provision is to set the stage for the parties to engage in "a good faith attempt to reach an understanding."[5] That purpose is frustrated if the scope of the proposed contracting is not revealed in the notice. Under similar circumstances, other Boards have ruled that a lack of notice warrants sustaining a claim.[6]

In this case, the Carrier argues that it was entitled to contract the work because it required specialized equipment. The record, however, establishes that the equipment used on the dates in question was not specialized, and contractor forces were used to perform routine track work of the sort normally done by the Carrier's forces. The notice clearly implied that the contracting would be limited to specialized equipment that would be used "to assist Carrier forces." The work in dispute here is different from what was described in the notice. The work done by the contractor does not appear to fall under any of the other exceptions to the Note to Rule 55. Accordingly, to the extent that the work did not involve the use of an off-track under-cutter, the claim shall be sustained.

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[5] See also, Appendix Y on the parties' duty to act in good faith.
[6] See discussion of Third Division Award 26770 (Vernon 1988) in Third Division Award 40565.

The Carrier contends that because the Claimants were either fully employed or on vacation when the work at issue was done, they are not entitled to any monetary relief. For the reasons set forth previously by the Board in Third Division Award 40563, the Board will follow the numerous prior Awards that support awarding monetary damages to employees who were already working or on leave when the Carrier violated the Agreement. Accordingly, the Claimants are entitled to compensation as claimed, unless (in the words of Arbitrator Marx in Award 1, Public Law Board No. 4768) "the Carrier can demonstrate to the Organization that the requested number of hours' pay does not entirely conform to the amount of work performed by the outside contractor, and payment should be modified." Otherwise, the claim is sustained.

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 15th day of December 2010.