

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40791
Docket No. MW-40565
10-3-NRAB-00003-080348**

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

**(Brotherhood of Maintenance of Way Employes 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 (Balfour Beatty Rail Maintenance, Inc.) to perform Maintenance of Way and Structures Department work (clean yard and bowl tracks) at Lincoln, Nebraska beginning on June 29 and continuing through July 28, 2006 [System File C-06-C100-182/10-06-0325 (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, Claimant S. Hrenchir shall now be compensated for one hundred sixty-eight (168) hours at the Group 2 Machine Operator’s straight time rate 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 claim in this case was filed by the Organization by letter dated August 18, 2006, and was received by the Carrier on August 22, 2006. The Organization protests the contracting out of track cleaning work that was conducted between June 29 and July 28, 2006, in Lincoln, Nebraska. The Carrier contracted with Balfour Beatty Rail Maintenance to use its Group 2 Yard Cleaner to clean yard and bowl tracks at the Lincoln facility. According to the Organization, the contractor's operator worked eight straight time hours every day for 21 days. The Organization contends that the Carrier violated the Note to Rule 55 and Appendix Y because track cleaning is work that is customarily performed by bargaining unit employees; the work in dispute did not involve any of the exceptions to Rule 55 that would permit contracting out; and the Carrier failed to provide proper notice as required by Rule 55. Specifically, the notice failed to specify that contractor forces would operate the yard cleaners and implied that the contract technician would be present in a maintenance and advisory capacity only, not operating the cleaner.

According to the Carrier, the Organization failed to prove that the work in dispute has been performed exclusively by Carrier forces. Moreover, the Claimant is not a proper Claimant, because he was assigned elsewhere and under Rule 19 could not have been assigned to operate the yard cleaner; only vacancies 30 days or more are required to be bulletined, and the work here lasted fewer than 30 days.

By letter dated December 19, 2005, the Carrier notified the Organization of its intent to contract out yard cleaning throughout the BNSF system:

“As information the Carrier plans to continue the ongoing program of contracting the use of yard cleaners and vacuum trucks on the BNSF system in 2006.

Three yard cleaners will be provided in 2006 and each will include a contractor’s technician to assist with the operation and maintenance of the machine. Two vacuum trucks will be used this year. Each vacuum truck will have one contract technician and one contract operator/driver.

This year we plan to have four yard cleaners working a total of 590 days.... We plan to use these yard cleaners and vacuum trucks over the entire Burlington Northern Santa Fe system.

*** * ***

This letter is intended to inform you of our trackwork programs, and keep you and your membership abreast of our plans to accomplish this work, in the spirit of open dialogue between BNSF and the BMW. . . .”

By letter dated January 16, 2006, the Carrier forwarded to the Organization a tentative schedule for its “ongoing program of contracting the use of yard cleaners and vacuum trucks on the BNSF system in 2006.” As for the “ongoing program,” it appears that the Carrier had contracted out yard cleaning system-wide beginning in 2003. On the 2006 schedule, Lincoln, Nebraska, was scheduled for June 27-July 3, with four days of actual cleaning and one day of travel. As it turned out, the yard cleaner was present in the Lincoln area from June 29 to July 26. A close look at the contractor’s daily records shows that very little yard cleaning was actually done: the cleaner was on stand-by most of the time and only performed cleaning on five days.

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 should be interpreted according to its ordinary usage, that is, meaning "historically and traditionally performed." (See Third Division Award 40563.)

The record here establishes that the Carrier does not own any yard cleaners and that it had had a program of contracting out the work system-wide for several years prior to the filing of the instant claim. Whatever may have been the practice in the past, at the time this claim was filed, there was at best a mixed practice with respect to who performed yard cleaning throughout the system. Accordingly, Rule 55 does not apply, and the claim must be 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.