

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40795
Docket No. MW-40691
10-3-NRAB-00003-080439**

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

**(Brotherhood of Maintenance of Way Employees 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 to perform Maintenance of Way and Structures Department work (remodeling and related work) at the East Bound Yard Office Building in Cicero, Illinois, beginning on June 26, 2006 and continuing [System File C-06-C100-169/10-06-0296 (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 the aforesaid 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, the Claimants, B&B Foreman A. Bell, B&B Carpenters D. Snider and R. Steponik, Water Service Foreman J. McGill, Water Service Mechanic L. Baker and Group 2 Machine Operator B. Horn, Jr., shall now each be paid at their respective straight time rates of pay for an apportioned amount**

of the hours expended by the outside forces in the performance of the aforesaid work beginning June 26, 2006 and continuing.”

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 is one of two related to renovation work at the Carrier's Cicero, Illinois, facility. The first claim, which resulted in Third Division Award 40794, focused on renovations at the Roundhouse in Cicero. This claim, which was filed by letter dated August 14, 2006 (received by the Carrier on August 21, 2006) protests the contracting out of renovation work in the locker room at the East Bound Yard Office in Cicero. The two cases present many of the same issues.

In this case, the Organization objected to the Carrier's contracting out the locker room renovation at the East Bound Yard Office, which started on June 26, 2006. The Carrier sent notification of the proposed contracting to the Organization by letter dated September 21, 2005, in which it indicated its intent to contract similar renovations at the Roundhouse locker room and the East Bound locker room in Cicero, Illinois, and at the Corwith locker room in Corwith, Illinois. At the East Bound Yard Office, the work entailed painting both the men's and women's locker rooms, enlarging both locker rooms (including construction of a 24'8" x 32'6" addition to the men's locker room) installing new lockers, adding new plumbing fixtures and ADA-compliant showers in both locker rooms, and installing a new roofing system for the entire facility. According to the letter of notification, "The contractor possesses the special equipment, such as an off-track crane, and skilled forces necessary for

successful and timely completion of this work. The Carrier is not adequately equipped to perform this work, nor do Carrier forces possess the necessary skills or licenses.” During the contracting out conference and subsequent proceedings between the parties, the Carrier’s position was that Town of Cicero regulations required that it obtain a licensed general contractor to perform the work. The Carrier also objected that the work was not subject to Rule 55 because there was a mixed practice regarding renovation work.

According to the Organization, the work is of the type routinely and typically performed by the Carrier’s Bridge and Building (B&B) Department forces, and the record includes 70-plus pages of photographs and descriptions of similar work done by B&B employees, much of it in Cicero. The Carrier’s contention that it needed a licensed contractor to perform the work was rebutted by a memorandum from the Cicero Town Attorneys’ Office stating: “The Town of Cicero has no authority to require railroad laborers to be licensed and bonded provided they are doing work on railroad property. We are pre-empted by federal law.” A statement filed by one of the Claimants corroborated the memorandum: “We are safe to maintain and work on our own facilities. Businesses, stores, apartment complexes, malls and any big business in town is [sic] allowed to maintain its own property without its maintenance force being licensed.” The Claimant also noted that subsequent to the locker room renovation, the Carrier’s B&B and Water Service forces renovated Building 12 in Cicero, with all new plumbing, HVAC, walls, doors and windows, without Cicero licenses. Finally, the Organization contends, the Carrier’s contention that it needed specialized equipment was false: the work was done using ordinary equipment of the sort already owned by the Carrier and routinely operated by its forces.¹

The record also includes evidence submitted to the Organization by the Carrier in support of its mixed-practice argument, a lengthy chart documenting similar work that had been contracted out across the system. As for the question of licensing, the

¹ The Carrier’s letter of notification addressed three separate locker room renovation projects, at the Roundhouse and East Bound Yard Office in Cicero and at the Corwith facility. The Carrier acknowledged that it did not need specialized equipment for the East Bound Yard Office or Roundhouse jobs, only for the Corwith locker renovation. The notice letter specified specialized equipment for purposes of completeness, without separating the three jobs. The Board will not address the specialized equipment argument further, because it does not apply to this claim.

record also includes an e-mail response to the Town Attorneys' Office memorandum by one of the Carrier's Structures Engineers, indicating that a building project still needed to be permitted by the Town, which required licensed professionals:

"The city may not require railroad laborers to be licensed and bonded. This has nothing to do with our project. They do require the craft trades to be licensed with the city. We do not have to piece meal this project to get part of the work to railroad laborers. We needed a licensed General contractor and licensed craft tradesmen that could get this project permitted. We are not pre-empted for this type of work. That only applies to anything that would effect [sic] interstate commerce (the running of our trains). This remodel and addition of an existing building would not apply."

The threshold issue here is whether this case is subject to the Note to Rule 55. The Note to Rule 55 only limits contracting out of work "customarily performed" by the Carrier forces defined therein. While the parties may disagree about the exact meaning of "customarily performed," prior Awards have established that the Note to Rule 55 does not apply where there is a "mixed practice" of work being done by both Carrier forces and outside contractors. The Organization submitted evidence that B&B forces have performed a substantial amount of work similar to that done in the East Bound Yard Office locker room renovation, and there can be no serious doubt as to their capability to do the work. However, the Carrier also submitted evidence that outside contractors have performed a substantial amount of the same type of work. The Organization criticized the Carrier's evidence as out-of-date and geographically irrelevant, but the Carrier's chart contains at least 26 instances of construction and renovation work performed by outside contractors in Illinois during the seven years prior to its compilation (i.e., between 2000 and 2007). The Board finds the Carrier's evidence of a mixed practice persuasive. Accordingly, the Note to Rule 55 does not apply, and the claim must be denied.

The parties should note that even had the Note to Rule 55 applied, the conflict in facts regarding the need for licensing would have compelled a similar result.

The Carrier did not violate the parties' Agreement when it subcontracted the work at issue.

**Form 1
Page 5**

**Award No. 40795
Docket No. MW-40691
10-3-NRAB-00003-080439**

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.