Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41162
Docket No. MW-40339
11-3-NRAB-00003-080138

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 (ILCO) to perform Maintenance of Way and Structures work (install way side curve lubricators) at locations on the Sandhills, Butte and Orin Subdivisions on dates beginning March 27 through June 14, 2006 and continuing [System File C-06-C100-144/10-06-0244(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 L. Benzel and R. Arnold shall now be compensated at their respective rates of pay for all hours expended by the outside forces in the performance of the aforesaid work beginning March 27, 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 arose in March 2006, when the Carrier hired Industrial Lubrication Company of Casper, Wyoming (ILCO) to install Portec wayside curve lubricators at various track locations on the Sandhills, Butte, and Orin Subdivisions, in lieu of using members of one of its own Curve Lubrication Gangs to install the new lubricators. At the time, the two Claimants were both regularly assigned to the PRN Curve Lubrication Gang working in and around Alliance, Nebraska. On February 6, 2006, the Carrier provided notice to the Organization that it had 14 new Portec wayside lubricators to be installed at various locations on the Butte, Sandhills, Orin, and Canyon Subdivisions, and that it intended to contract out the installation of the equipment. The Carrier noted that it had two employees "familiar with the installation of the Portec wayside lubricators," but explained that one of them was "unavailable because he is currently repairing existing lubricators on these sub-divisions. The other employee will be on-site during the installation process." The Organization requested a conference regarding the notice. Discussions were held on February 16, 2006, but the parties were unable to reach an understanding. The Carrier estimated that the work would begin on or about February 22, 2006; it actually started on March 27, 2006. As indicated in the Notice, the work was performed by two contractor employees with the assistance of the one available Carrier employee. The record includes documents establishing that the Organization mailed its claim to the Carrier on May 22 and it was received on May 26, 2006.

The Organization contends that the work performed by the outside contractor is typical Track Sub-department maintenance work that has been performed "for decades" by Maintenance of Way forces and the Carrier recognized that fact during the handling on the property. As such, the work is subject to the limits on contracting set forth in the

Note to Rule 55. The Carrier has not established any of the exceptions to the Note. No special equipment or skills were used or required by the contractor forces to accomplish the work. The Claimants are entitled to monetary compensation because they were available and fully qualified to perform the work during regular work hours, overtime or some combination thereof over the time period involved.

The Carrier's first defense is that the claim was not timely filed, because it was not received within the60-day period set forth in the Agreement for filing claims: March 27 to May 26, inclusive, is 61 days. The claim should be dismissed on that basis alone. Regarding the substance of the claim, the Organization failed to meet its burden of proving that the work in question was performed exclusively by BMWE-represented employees. It made an allegation without any proof. In fact, there is a history of lubrication work being done by both Carrier forces and outside contractors, as the Notice indicates: "Consistent with the prior installations. . . ." The work has been shared or common work. The determining factor in who does the work is dependent upon the territory of the railroad involved, because of mergers with other railroads in which BMWE Agreements with former lines have been retained at BNSF. On the territory involved in this dispute, the long-standing practice has been to use contractor employees to install new wayside lubrication machines, as was done in this case. Even if the Note to Rule 55 were found applicable, the Organization still could not prevail. This contracting out is permitted under the exception for when "the Carrier is not adequately equipped to handle the work." The meaning of "equipped" is not limited to actual equipment, but may include lack of manpower. In this case, one of the two Carrier employees who could perform the work was fully employed in making repairs to existing equipment, while the other worked supervising the two contractor employees as they installed the new lubricators. Due to not having employees available who possessed the special skills required, the Carrier was not adequately equipped to handle the work involved. All in all, the Organization failed to meet its burden of proof to establish a violation of the parties' Agreement. During the 21 months of handling this claim on the property, the Organization did not cite one single occasion where its employees had been used to install new wayside lubricators at any precise location on the entire BNSF. The Organization has made unsupported statements and assertions, with no credible evidence in support of its position. The statement from one of the Claimants is vague as to both location and whether the work was done in assisting contractor employees, as happened here. Where there is a factual dispute over an essential element of a claim, the Board must either dismiss the case or rule against the moving party. Finally, any damages sought by the Claimants are excessive. The Claimants would be due no monetary compensation, as both were fully employed during the entire claim period. In fact, one of the Claimants

worked the exact same hours as the contractors, because he was working with them. The Organization has failed to prove damages. The claim must be denied or dismissed.

The Organization contended that the Carrier did not meet its conference obligation. The record clearly establishes that the parties met in conference on February 16, 2006 to discuss the transaction involved here. Consequently, the Board denies that aspect of the Organization's claim.

The Board addresses next 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 Carrier, the claim was "presented" when it was received, on May 26, 2006. Calculating the time period to include March 27, the day ILCO began the first installation, the claim was received on the 61st day, which is outside the time limit for filing. The Organization contends that the claim was "presented" when it was mailed, on May 22, 2006, well within the sixty-day filing period.

The Board addressed questions of timely filing in numerous prior awards. This Board finds most persuasive those awards that have adopted what is known in classic contract analysis as "the mailbox rule": a claim is deemed "presented" when it is deposited in the U.S. mail (or nowadays, some other form of reliable delivery service. See, Third Division Award 24440. Where the Carrier has questions about timely submission, the Organization must submit proof that the claim was in fact sent in a timely fashion. Here, the record includes a photocopy of the envelope that the claim was sent in, showing that the claim was sent via certified mail and clearly bearing a postmark date of May 22, 2006. With this proof, the Board finds that the claim was timely filed.

The Board turns now to the substance of the claim, whether the Carrier violated the parties' Agreement when it contracted installation of the Portec wayside lubricators to ILCO.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of bargaining unit work. The Note to Rule 55 reads, in pertinent part:

> "By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. . . ."

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." See Third Division Award 40563.

The Organization has the initial burden of establishing that the work at issue is work "customarily performed" by bargaining unit employees. The Board 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.

As demonstrated by the fact that the Carrier has Curve Lubrication Gangs, track lubrication is routine track work. So, it appears, is installing wayside lubricators. A statement in the record from one of the Claimants establishes that he and the other Claimant have been installing lubricators for as long as 20 years. Indeed, the Carrier acknowledged in its Notice that the Claimants "were familiar with the installation of the Portec wayside lubricators." The record is sufficient to establish that the work is work "customarily performed by employes described herein" under the Note to Rule 55.

The Carrier, however, contends that there has been a mixed practice regarding installation of wayside track lubricators that takes the work out of coverage under the Note to Rule 55. The original Notice referenced this mixed practice, by introducing the

topic of contracting out the work with the language "Consistent with the prior installations. . . ." In its Submission, the Carrier argued:

> "Such work has historically been performed as 'shared' or 'common' work by both contractor and BMWE-represented employees. The determining factor, in most cases, as to who does the work is dependent upon the territory of the railroad involved. The BNSF, primarily through mergers, is made up of several former railroads. To a large extent, the BMWE schedule agreements from those former lines have been retained on the BNSF. Likewise, the use of contractor employees to perform certain types of work - including that here involved - has also been continued. On the territory involved in this dispute the long standing practice has been to use contractor employees in the installation of new wayside lubrication machines - the same as was done in this case!"

It is widely recognized that the initial burden of proof is on the Organization. However, once the Organization has established a prima facie case of coverage under the Note to Rule 55, the burden shifts to the Carrier to establish any defense.[1] In this case, the evidence is sufficient to establish a prima facie case of coverage under the Note to Rule 55, so the burden shifts to the Carrier to establish its defense, i.e., the existence of a mixed practice of installation by both outside contractors and its own employees. Unfortunately, the record developed on the property contains no such evidence. There is the brief phrase in the Notice noted above and the explanation offered by the Carrier in its brief, but no actual evidence in the record of a prior mixed practice. Assertions alone are not enough to establish facts. In the absence of any evidence, the Board has no basis on which to find that there was a mixed practice, and that defense must be rejected.

---

[1] This Board wants to distinguish Third Division Award 34226 cited by the Carrier. In that Award, the Board held that "there [was] no persuasive evidence that the work accrues solely to the covered employees." This suggests that that Board adhered to the "exclusive" standard for determining what work falls under the Note to Rule 55, an approach rejected by a number of other Boards, including this one, that give "customary" its traditional and historic meaning. The "exclusivity" holding alone was enough to deny the claim, but the Board went on to address the mixed practice defense that had been raised. The award suggested indirectly that the burden of proof remains with the Organization at all times when it stated ". . . there is no evidence in the record that refutes the Carrier's assertion that the contracting out of this type of work is a common practice. Accordingly, we find that the Claimant has not met the necessary burden of persuasion." Such an analysis ignores traditional interpretation of burdens of proof and how they shift once a prima facie case has been established. For that reason, this Board does not follow that prior holding.

This brings the Board to the next level of analysis: if the disputed work is covered by the Note to Rule 55, does it fall within any of the exceptions to the Note: (1) special skills/equipment/expertise (2) "when work is such that the Company is not adequately equipped to handle the work" or (3) existence of an emergency. The Carrier has not alleged either the first or third defenses, but has focused instead on "not adequately equipped to handle the work." The Carrier contends that this exception does not refer literally to physical equipment but includes a lack of manpower as well and that its use of a contractor to perform the work was permissible.

The exceptions to the Note to Rule 55 are Carrier defenses, and the Carrier has the burden of proof to establish their existence. It is not enough for the Carrier simply to invoke one of the exceptions, without more. It must establish sufficient evidence to warrant the Board's concluding that, in fact, there was an emergency, or the work required special skills that its employees did not have, or that it was "not adequately equipped" to handle the work.

Just what does the "not adequately equipped" exception mean? The phrase is not clear and unambiguous on its face, quite the opposite. There is no language in the Agreement that explains what the parties intended in using the words they did. The record is short on information about what the exception means and on prior Board interpretations. The Carrier here argues that the exception should not be limited strictly to physical equipment and that makes sense: the actual language of the Agreement is "when work is such that the Company is not adequately equipped to handle the work." (Emphasis added.) The language makes no reference to physical tools or machinery, which implies a broader interpretation: there is some aspect of the work in general that renders the Carrier unable to complete the it in the ordinary course of things, for whatever reason. To some extent, "not adequately equipped" appears to be something of a catchall exception. "Special skills, equipment, or materials" is fairly narrow in scope, as is the "emergency" exception. "Not adequately equipped" is sufficiently vague to give the parties some flexibility - a desirable thing - relative to contracting out what would otherwise be bargaining unit work. Some work may warrant contracting out even if it does not rise to the stricter standards of emergency or special skills and equipment. One has to be careful, however, that the exception does not swallow the rule. Just as the Organization must produce real evidence that the work in dispute has been customarily performed by members of the bargaining unit, so too the Carrier must produce real evidence that there is a legitimate reality behind its claim that "work is such that [it] is not adequately equipped to handle the work." What that proof entails will vary from one case to another.

The Carrier's rationale for contracting the work to ILCO in this case was that the two employees who were capable of doing the work were fully employed: one was already assigned elsewhere repairing existing lubricators, while the other would be (and was) assigned to work with the contractor employees on the job. The Carrier cited Third Division Award 36715 to support its position that because the Claimants were fully employed when the work in dispute was contracted out, the "not adequately equipped" exception applied. The Board in that case wrote: ". . . the record demonstrates that those Claimants who were available were fully employed throughout the claim period. Therefore, the Claimants were not available to operate the necessary equipment, rented or otherwise. And because of this full employment, the Carrier was '. . . not adequately equipped to handle the work . . .' as clearly set forth in the second paragraph of the Note to Rule 55." A closer reading of both the facts and the holding in the case demonstrate that it is readily distinguishable from this claim, however. In the notice in that case, the Carrier cited multiple reasons for contracting out the dirt work in dispute: (1) lack of equipment (2) lack of skill (3) prior mixed practice and (4) a need to get the work done "before freeze-up." (The location was in Minnesota and the time, late autumn.) In addition to its holding on "not adequately equipped," the Board further found that similar work had "on numerous occasions been performed in whole or in part by outside forces." Finally, the Board held: "The Carrier has convincingly demonstrated that the project now in dispute did involve 'special skills' and 'special equipment' not owned by the Carrier." Thus, there were multiple bases on which the Board ultimately denied the Organization's claim.

The case before the Board demonstrates why the parties negotiated in the Note to Rule 55 an opportunity to meet in conference prior to any contracting out. The conference is where the Carrier can explain its rationale more thoroughly (and perhaps more convincingly) and where the parties can explore options to avoid contracting out bargaining unit work. Here, the only reason cited by the Carrier for contracting out what was otherwise bargaining unit work was a lack of manpower. There is no evidence that any special equipment was involved, or that any special skills were needed, or that there was any particular rush to complete the work in a certain time frame.[2] Moreover, there is no evidence indicating why the Claimants' schedules could not have been arranged so as

[2] Compare this case to the facts in Award 36715, where the dirt work needed to be completed before the winter freeze. Those facts present a perfect example of work that is "such that the Company is not adequately equipped to handle" with its existing workforce. No special skills or equipment were required and the situation was not an emergency, but the need to do the work before temperatures dropped below freezing lent an urgency to the situation that is lacking in this case, and justified the Carrier's hiring additional manpower to complete the work on time.

to accommodate the work at issue. It is not enough for the Carrier merely to assert that there is a "lack of manpower"; it must articulate and demonstrate what the lack is. Otherwise, the Carrier could evade its obligations under the parties' Agreement just by scheduling its employees elsewhere whenever it wanted to contract out what would otherwise be bargaining unit work. In the end, the Carrier's rationale in this case, in the absence of any particular schedule constraints on getting the work done or the need for special skills or equipment, appears to be convenience more than anything else. Convenience is not one of the exceptions set forth in the Note to Rule 55. The Board finds that the Organization met its burden of proof and that the Carrier did not successfully rebut the Organization's prima facie case. Accordingly, the claim is sustained.

This brings the Board to the issue of remedy. The Organization seeks compensation for the Claimants equivalent to the hours spent by the two ILCO employees on the work. The Carrier contends that because the Claimants were fully employed 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 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.

The problem is that one of the Claimants already worked on the same job that he filed a claim on. It would be grossly unfair to pay him a second time for work he was already paid for. The job was accomplished in a certain number of hours by the two contractor employees, supervised by Claimant Benzel.[3] Presumably, three men working together can accomplish a job more quickly than if two were assigned. But two experienced track employees like the Claimants might not need 50% more time to do the work. The parties need to determine how long it would have taken the two Claimants working together to complete the disputed work. Claimant Arnold, who did not work on the project at all, is entitled to be paid half of those total hours. Claimant Benzel is entitled to be paid the difference between half of the total hours required for him and Claimant Arnold working alone to perform the work less the amount he was already paid for doing the work. By that calculation, he will be compensated only for the work that should have been assigned to him but was not and not given double compensation for work he already did on the project.

[3] Per the General Chairman's letter to the Carrier dated September 6, 2006, the two contractor employees had worked a total of 143.5 hours, with one more lubricator yet to be installed.

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 21st day of November 2011.