Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40493
Docket No. MW-39625
10-3-NRAB-00003-060398
(06-3-398)

The Third Division consisted of the regular members and in addition Referee Daniel F. Brent 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 (Marion Roofing Company) to perform Maintenance of Way and Structures Department work (replace roof) on the Section House (a.k.a. the Coke or Cokeville Building) in Galesburg, Illinois on September 24, 25, 26, 27 and 28, 2004 [System Files C-05-C100-3/10-05-0017(MW) and C-05-C100-19/10-05-0039(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. Tracy, E. Hulstrom, G. Clay, J. Claussen, R. Gooden, H. Arnold, M. Anderson, M. Roschi, S. Claussen and R. Sickels shall now each be compensated for fifty (50) hours at their respective straight time rates of pay and

Claimant L. Stockdale shall now be compensated for forty (40) hours at his respective 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 Organization contends that the Carrier violated the Agreement by assigning Marion Roofing Company to replace a roof on the Section House, a.k.a. the Coke or Cokeville Building in Galesburg, Illinois, during the period of September 24 through 28, 2004. The Organization further alleges that the Carrier violated the Agreement by failing to provide the General Chairman with proper advance notice of its intent to contract out the disputed work or to make a good-faith effort to reduce the incidence of subcontracting. According to the Organization, the construction, repair, maintenance, and/or replacement of roofing on the Carrier's buildings, including tuck pointing, has customarily, historically and traditionally been assigned to and performed by Maintenance of Way Bridge and Buildings Sub-Department employees. The Organization contends that such work is contractually reserved to the Claimants in accordance with Rules 1, 2, 5, 6, 55, the Note to Rule 55, and Appendix Y of the Agreement.

The Carrier disputed the Organization's characterization of the work, contending that the sub-contractor had specialized skills and equipment to work with the specialized material necessary to install the structural tuck point roof to the cinderblock walls of the building. The Carrier further asserted that it could not obtain a warranty from the roofing manufacturer unless the roof was installed by employees of an authorized vendor. The Carrier defended the quality of its advance

notice to the Organization in which it raised the issue that only vendors' installers could install the roof and thus create a valid warranty.

According to the Organization, the Carrier's notice indicated that the decision to contract out the work had already been made. Therefore, the Organization asserted that given the lead time necessary to plan replacement of such a large roof and obtain the required approval, there was adequate time to confer with the Organization to avoid subcontracting. The Organization further asserted that the B & B Department had previously installed rubber roofs and thus had the chemical competence and equipment available to perform the disputed work.

Installation and repair of roofs fall within the scope of work customarily performed by the bargaining unit. The Note to Rule 55 states that:

> "The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employees in the Maintenance of Way and Structures Department: Employees included within the scope of this Agreement – in the Maintenance of Way and Structures Department, including employees in the former GN and SPNS Roadway Equipment Repair Shops and welding employees – perform work in connection with the construction and maintenance or repairs of and in connection with dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service. . . ."

Thus, the threshold criterion for applying the Note to Rule 55 is to prevent erosion of work customarily performed by the bargaining unit.

The record establishes that the Claimants were available, qualified and capable of performing the disputed roofing work and had performed the disputed work using the same roofing tools and equipment they used to perform the same type of rubber roof replacements at the Carrier's West Burlington Shops in 1990 and 1991; at the Prairie Du Chein Depot in 1999; and the Barstow, Illinois, Depot in 2000. The Carrier asserts the manufacturer of the roofing material would not certify a warranty unless the roof was installed by a certified vendor. However, the

evidentiary record in the instant case does not contain proof from the manufacturer that only qualified installers employed by an outside vendor could install the roofing material in a manner that would satisfy the warranty requirements. If such proof had existed, then the Carrier could have relied on the specialized expertise and specialized materials exception, as well as the advantages of obtaining a warranty from the roofing manufacturer, to support its decision to contract out the disputed work. Without such evidence in the record, however, the Carrier has not met its burden of persuasion to demonstrate persuasively that it satisfied the applicable criteria governing contracting out of work customarily performed by the bargaining unit. Therefore, the instant claim must be sustained.

Claimants L. Tracy, E. Hulstrom, G. Clay, J. Claussen, R. Gooden, H. Arnold, M. Anderson, M. Roschi, S. Claussen and R. Sickels shall each be compensated for 50 hours at their respective straight time rates of pay and Claimant L. Stockdale shall also be compensated for 40 hours at his applicable straight time rate of pay.

AWARD

Claim sustained.

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 June 2010.