

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40503
Docket No. MW-39948
10-3-NRAB-00003-070103
(07-3-103)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon 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 (Cleary Building Corp.) to perform Maintenance of Way and Structures Department work (construction of a pole barn style building and related work) for storage and lockers between Buildings #800 and #810 at the Galesburg Yard in Galesburg, Illinois on September 9, 10, 11, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27 and 28, 2004 [System Files C-04-C100-128/10-05-0010 (MW), C-05-C100-4/10-05-0018 (MW) and C-05-C100-7/10-05-0025 (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. Stockdale and L. Tracy shall now each be

compensated for eighty (80) hours at their respective straight time rates of pay and Claimants J. Cable and D. Anders shall now each be compensated for one hundred twenty (120) hours at their respective straight time 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.

General Electric leased office space at the Galesburg Diesel Shop. This required extensive remodeling of existing space for General Electric, including, in part, setup of modular temporary buildings to relocate Carrier equipment previously occupying the newly leased space. The Carrier's June 1, 2004 notice to the Organization described the entire project as:

“ . . . all work necessary for the placement or erection of the buildings, foundation pad, plumbing and electrical service, outside decking, and the installation of roll up doors, and high roll-up doors. Additionally, it will include finishing the interior, such as partitioning space, wall board, ceiling, fixtures, outlets, painting, and other necessities to complete the buildings including doors and locks. The Contractor will also be responsible for moving walls, ceilings and floors as required, and replacing the walls, ceiling and floors, to include but not limited to the installation for doors, locks,

fixtures, carpets, furniture, cabinets, lockers, and other ancillary office accoutrements. The contractor will also be responsible for relocating two 500 gallon fuel tanks to include the dirt work necessary to establish containment and protection systems.”

The parties met following the notice, but were unable to reach a mutual understanding.

One building was a temporary modular pole barn housing storage and lockers located between Building Nos. 800 and 810. Building construction related to the entire project was subcontracted to Cleary Building Company which performed on-site pole barn work with five of its employees during 15 days in September 2004.

The Organization grieved. In three separate, non-duplicate claims combined during on-property processing, it seeks 80 hours’ straight time pay for each of two B&B Subdepartment Claimants and 120 hours’ straight time pay for each of two other B&B Subdepartment employees. It reasons: (1) building/structures construction is B&B work under Rules 1, 2, 5, 55 and the Note to Rule 55 and, in fact, has been historically, traditionally and customarily performed by B&B employees (2) Appendix Y contemplates notice and good faith discussions (3) the Carrier failed to justify contracting out and did not act in good faith at the conference following its notice (4) contrary to Carrier contentions, (a) pole barn construction and related work is within the scope of B&B work (Foreman and Carpenter) and encompassed by clear rules and past practice at Galesburg and elsewhere (b) there is no practice of subcontracting such work and (c) Carrier “exclusivity” and “fully employed” defenses are unproven and invalid (5) none of the exceptions allowing sub-contracting in the Note to Rule 55 apply; and (6) arbitral decisions support the Organization.

The Carrier defends, contending (1) it gave proper notice and acted in good faith (2) no Agreement language reserves the disputed work exclusively to Organization members (3) for 84 years, there has been no history of exclusive or customary performance of new construction work or remodeling by Organization members (4) it does not own the necessary equipment (5) Organization members do not perform the disputed work on system-wide basis and are incapable of handling

all aspects of it (6) it is not required to piecemeal small portions of a large project just to provide work to Organization members (7) many Claimants were off work or on vacation (8) claimed damages are excessive and unproven and (9) arbitration decisions support the Carrier.

Despite the the broad analysis by both parties, this dispute is limited. It involves erection of a particular temporary modular pole barn necessitated by a larger construction project for a lessee on the Carrier's Galesburg property where other aspects of the project are unchallenged.

The Carrier provided notice describing the entire project. It listed "all work necessary for the placement or erection of the buildings." The parties met but could not agree if the disputed work was within the scope of the Agreement and, therefore, must be assigned to Organization members. Failure to agree, without more, does not prove non-compliance with the good faith requirements in the Note to Rule 55. On this record, the outcome turns on the substantive merits related to the particular work.

The Organization shoulders the burden of proof. At least three reasons combine to defeat its claim.

First, Rules 1, 22, 5 and 55 are not so clear and unambiguous that they can be applied to these circumstances without reference to facts outside the naked words themselves. Therefore, the Organization's work jurisdiction cannot be grounded in language alone.

Second, documentation provided by the Carrier is strong evidence that comparable work has been subcontracted previously, including recent examples at the Galesburg location. This severely undercuts the Organization's contention that it customarily does the disputed work.

Finally, the disputed tasks were caused by and inextricably intertwined with the undisputed, ungrieved broader project constructed for the lessee's use. The structures were intended to temporarily accommodate Carrier poles and supplies previously housed in the leased area until they could be accommodated elsewhere.

The disputed work was limited in purpose and scope. It required sequencing and coordination with the larger, uncontested subcontracted project. Under such circumstances, it is outside the scope of the Agreement and need not be assigned to Organization members.

Accordingly, the claim is 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 June 2010.