Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40558
Docket No. MW-39945
10-3-NRAB-00003-070082
(07-3-82)

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(
(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 (Lootens) to perform Maintenance of Way and Structures Department work (dirt work along right of way and dig out roadbed) in the vicinity of Mile Post 72.55, Line Segment 1 on the Mendota Subdivision near Earlville, Illinois on October 16 and 17, 2004 [System File C-05-C100-28/10-05-0058 (MW) BNR].

(2) The Agreement was violated when the Carrier assigned outside forces (Hulcher) to perform Maintenance of Way and Structures Department work (replace crossing diamond) in the vicinity of Mile Post 72.55, Line Segment 1 on the Mendota Subdivision near Earlville, Illinois on October 16 and 17, 2004 [System File C-05-C100-30/10-05-0060 (MW)].

(3) 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 the work referred to in Part (1) or Part (2) above 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.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants M. Lowe and G. Thompson shall now each

be compensated for thirteen and one-half (13.5) hours at their respective time and one-half rates of pay.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants M. Piper, R. Penaflor, D. Kimball, D. Younggren, R. Reed, D. Anders, D. Furrow, R. Freeman, J. Rios, G. Sheldon, S. Garcia and L. Nava shall now each be compensated for twelve (12) hours at their respective time and one-half 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.

On August 25, 2004, the Carrier provided written notice to the Organization that:

"The Carrier will contract out heavy equipment with operators to assist Carrier forces in various projects on the Chicago and Mendota Subdivisions. . . . On the Mendota subdivision the Carrier will replace 2 crossing diamonds at mile post 72.6. As the Carrier does not have the heavy equipment necessary to load, unload, remove and install these turnouts, track panels and diamonds, the contractor may provide equipment consisting of, but not limited to, track hoes, side booms, front-end loaders, to remove the turnouts and lift the track panels into place required. As in the case in these types of projects, Carrier forces will do most of the work, being assisted by contract heavy equipment."

The parties discussed the notice on August 25, but did not reach a mutual understanding.

The work on the Mendota Subdivision at Mile Post 72.6 was contracted out on October 16 and 17, 2004, to some 14 various subcontractors. The disputed work involved removal of existing track diamonds, track road bed preparation and placement of new diamonds. One contractor (Lootens) prepared dirt along the right-of-way and dug out a roadbed for the diamond placement. Another contractor (Hulcher) removed the existing crossing diamonds and put down new diamonds using its own heavy equipment to hook and move them.

The Organization claims the work performed by Lootens and Hulcher forces. It seeks 13.5 hours at the time and one-half rate for each of two Claimants and 12 hours at the time and one-half rate for each of 12 other employees. Now citing Rules 1, 2, 5, 55, the Note to Rule 55 and Appendix Y, it argues: (1) the August 25, 2004 notice was fatally vague and shows bad faith by reflecting an inflexible intention and failing to precisely describe the disputed work (2) the Agreement expressly reserves the disputed work to Carrier employees (3) the work is within the skills of Carrier employees who have routinely and customarily performed it (4) custom, not exclusivity, is the appropriate test in subcontracting disputes (5) the Carrier did not prove any specified exception allowed in the Note to Rule 55 (6) the Carrier could rent or lease any necessary equipment for use by its employees and, in fact, possesses certain heavy equipment such as tractors, backhoes, loaders, speed swings and burro cranes (7) the Claimants are due compensation regardless of their employment status on the relevant dates and (8) arbitral Awards support the Organization.

The Carrier denies the Board's jurisdiction because (even though it asserts a notice was not required) the Organization failed to admit receipt of the August 25 notice and good faith discussions and falsely and prejudicially denied proper notice, thereby misleading the Board and prejudicing the Carrier. It also argues: (1) Neither Rule 55 nor Appendix Y reserves the disputed work to BMWE-represented employees (2) no evidence shows Carrier employees customarily replace large track diamonds (3) the Carrier is not required to piecemeal work (4) Carrier employees replaced tracks on the diamond (5) subcontractor equipment was special, not owned, or available for rent/lease, to the Carrier (6) the work was beyond MOW skills (7) even if contractors used no special equipment or skills, Carrier employees do not customarily, historically or exclusively perform dirt work, asphalt work, or use special heavy equipment to place diamonds in a crossing (8) the Carrier routinely uses contractors to do the roadbed work and BMWE-represented employees do not historically remove, lift or replace crossing diamonds with heavy

equipment, there being a mixed practice for such tasks (9) no proof exists concerning the number of contractor hours involved or whether any Claimants lost any wages and (10) arbitral Awards support the Carrier.

There is no merit to the Carrier's contention that the Board lacks, or should decline, jurisdiction because the Organization's position regarding the August 25 notice is so prejudicial that it poisons review of its entire claim. The Organization does not deny receipt of the notice or discussions about it. Rather, as it frequently does in its subcontracting claims, it challenges the notice's timing, contents, and overall good faith. For reasons detailed below, these attacks lack merit, but they are not beyond the Organization's wide discretion to frame and assert its complaints and alleged violations.

Likewise, the Organization's objections to the August 25 notice lack substance. The contested work is adequately described. It was discussed. There is no evidence the experienced representatives were materially misled or lacked a fundamental understanding of the contested work. Disagreement, alone, is not bad faith and no other evidence supports a finding of deceit, improper purpose, or material insufficiency.

Track work is not contested here. This disagreement involves work before and/or after track work. There are two distinct, disputed functions (1) dirt/roadbed preparation and (2) lifting and placement of diamonds. Each function was subcontracted separately to two different, unrelated contractors with no showing that the presence of one necessitated use of the other. Accordingly, each must be assessed on its own merits.

As a consequence, the Carrier's "piecemeal" defense is inapplicable because the Organization does not seek to split discrete tasks from an otherwise legitimate single subcontract. Rather, it claims each subcontract was improper in its entirety. On this record, the Organization's claim regarding the Lootens' subcontract for dirt work is valid. Its claim regarding Hultcher's lifting and placement of diamonds is not.

This dispute, like those in dozens, if not hundreds, of on-property and industry sub-contracting disputes decided over decades, reflects a fundamental disagreement whether particular work must be "exclusively" or "customarily" performed by BMWE-represented employees before a claim has merit. In its various forms the issue permeates every stage of analysis. The parties' positions and Board decisions are so irreconcilably diverse in concept and outcome that the deep split of authority, as a practical matter, virtually eliminates precedent as a meaningful guide.

The Board adopts the "customary" criterion for at least three interrelated reasons. First, the Note to Rule 55 repeatedly references work categories "customarily performed." Nowhere is "exclusivity" mentioned. Given the history of prior disagreements, it is very unlikely the parties' experienced negotiators arrived at this articulation by accident and without an intended meaning fundamentally consistent with the Organization's reading.

Second, the less demanding "customarily" test is consistent with the spirit of Appendix Y to reduce subcontracting and increase the use of BMWE-represented forces. Finally, "exclusivity" creates proof problems that make it almost impossible for the Organization ever to make a prima facie case. Without evidence to the contrary, it is illogical to assume the Organization would have agreed to a standard that would result in its defeat for initially failing to provide information almost always in the Carrier's possession. In many cases the exact extent and degree of "customary" and/or the adequacy of the Organization's evidence will be decisive, but this is not one of them.

Rule language, customary practice and common sense normally reserves simple dirt/roadbed preparation to BMWE-represented employees. Nothing indicates the Lootens' work was extraordinary, special, or unique. The Organization's documentation showed that equipment for such work was readily obtainable and within the expected every-day operational skills of the Claimant.

The Carrier's Award citations contain distinguishable facts and, otherwise, are unpersuasive. Public Law Board No. 4768, Award 22 dealt with excavation, grading removal, hauling, placing, and compacting granular backfill material and access to disposal sites unavailable to the Carrier. Public Law Board No. 4768, Award 71 considered dirt work, culvert construction, and construction of two railroad bridges as part of seven miles of major, new track. The complete job apparently went to a single subcontractor. The claim was denied based on special skill and special equipment exceptions in the Note to Rule 55. Third Division Award 34041 considered 3396 cubic yards of excavation, 952 square yards of lime stabilization and .4 acres of seeding. It denied the claim without considering Rule 1 and it relied on the "exclusivity" rather than the "customary" subcontracting standard.

On the other hand, it is uncertain that the Carrier possessed or easily could obtain equipment used by Hulcher for diamond removal and replacement. Documentation submitted by the Organization does not clearly show necessary rental equipment was available for use by BMWE-represented employees. Nor is it evident that the equipment is so common that its availability can be presumed. Consequently, the Carrier's assertion

that special equipment was necessary for the particular job triggers an express exception in the Note to Rule 55.

Accordingly, the claim is denied in part and sustained in part.

The Claimants under the Hulcher subcontract shall receive nothing. The two Claimants for the Lootens' subcontract each shall be paid 13.5 hours at their respective straight time rates. Payment is proper because better reasoned recent decisions reject the Carrier's adequacy of proof defense. The straight time rate is appropriate because there is no showing the disputed work would have been performed on overtime if correctly assigned.

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 29th day of June 2010.