Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40559
Docket No. MW-39980
10-3-NRAB-00003-070188
(07-3-188)

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 (Railway Equipment Services) to perform Maintenance of Way and Structures Department work (cut brush along right of way) between Mile Posts 1 and 60 on the Des Moines Subdivision on August 2 through 7, 2004, August 9 through August 14, 2004 and August 16 through 21, 2004 [System Files C-04-C100-111/10-04-0312(MW), C-04-C100-112/10-04-0313(MW) and C-04-C100-113/10-04-0314(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 R. Beeler, W. Richmond, P. Dinneen and T. Scully shall now each be compensated for one hundred twenty

(120) hours at their respective straight time rates of pay and sixty (60) hours at their respective time and one-half rates of pay, Claimants J. Welch and A. Judge shall now each be compensated for eighty (80) hours at their respective straight time rates of pay and for forty (40) hours at their respective time and one-half rates of pay and Claimants C. Bohrman and J. Bossard shall now each be compensated for forty (40) hours at their respective straight time rates of pay and for twenty (20) 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.

Three separately filed claims identical in all material respects except for the identity of the Claimants have been combined, without objection, into a single proceeding before the Board.

The Carrier received July 7, 2004 Federal Railroad Administration ("FRA") reports that vegetation touched the sides of rolling stock very close to FRA limits along both sides of about 63 miles of the Des Moines Sub-Division track. On Friday, July 16, the Carrier wrote a letter to the Organization received on Monday, July 19. It read:

"As information, the Carrier intends to contract out the removal of assorted trees and brush from grade crossings from the Carrier's

right-of-way at MP 0.0 to MP 63.2 on the Main Line of the Des Moines Sub-Division. The work will include, but is not limited to the felling of trees, shredding, stump removal, disposal of debris, mowing and felling of brush. This work must be accomplished in a timely manner due to FRA notifications. Carrier does not possess the special equipment required to perform all aspects of this work, nor are the Carrier's forces skilled in the art of felling trees or the other associated work. The contractor possesses the special equipment and skilled workforce necessary to perform this work.

It is anticipated that this work will begin approximately July 30, 2004 and take approximately 30 days to complete."

The parties held a telephone conference on July 22. They did not reach a mutual understanding.

The Carrier contracted with Railway Equipment Service to cut vegetation (including trees up to sixteen inches in diameter) away from the track. The work occurred on various dates between August 2 and 21, 2004, using three on-track self-propelled machines with a 30-35 foot reach and special cutting heads capable of cutting trees more than two feet in diameter. The subcontractor used two operators (a total of six) each working ten hour/days, including a Saturday. No cutting or stump removal was done by workers on the ground.

The Claimants are Machine Operators holding seniority in the area where the disputed work occurred. Some were on vacation or other voluntary forms of leave during all or part of the period of their respective claims.

The Organization grieved, alleging violations of Rules 1, 2, 5, 55, the Note to Rule 55 and Appendix Y. It contends (1) brush cutting along the right-of-way is common track maintenance reserved to Mechanics by Rules 1, 2, 5, 55 and the Note to Rule 55 and it is historically, traditionally and customarily performed by them (2) the Carrier did not make a good faith effort to eliminate subcontracting because it only went through the motions after an irrevocable, previous decision (3) the Note to Rule 55 contains only three exceptions that permit subcontracting and the Carrier's

evidence supports none of them (4) no special equipment was identified, but even if the Carrier lacked proper equipment, it easily could have rented or leased it for use by BMWE-represented employees (5) 155 employee statements prove the disputed work has been routinely performed by BMWE-represented employees who have skill to do it (6) the claim properly seeks pay for named Claimants on specific dates for lost work opportunities.

The Carrier responds (1) there is no proof of failure to provide the Organization notice (2) contrary to the Organization, more than brush cutting was done because the work involved tree felling and trimming, stump grinding and brush removal over a substantial length of track and required specialized, more efficient equipment (3) the work was done to satisfy FRA concerns and to provide satisfactory service to customers (4) the Agreement does not specifically reserve the disputed work to Organization members and, therefore, is not within its scope (5) brush cutting previously has been subcontracted and/or performed by Signal Department employees (6) work requiring special equipment not owned by the Carrier may be contracted under Rule 55 (7) the Agreement and practice do not require the Carrier to piecemeal tree cutting work when Carrier employees have not performed the work customarily to the exclusion of all others (8) there is no proof the Claimants were damaged because all were fully employed, voluntarily unavailable or otherwise suffered no provable loss making the requested relief excessive and punitive (9) prior arbitration Awards support the Carrier's position.

The Organization's allegations of insufficient notice lack merit. The Carrier's notice more than adequately stated its contemplated intentions. No persuasive evidence proves it engaged in bad faith discussions. The Carrier's opposition to the Organization's requests alone, even if mistaken, does not establish bad faith. Likewise, a General Chairman's "impression" about the effective date of a contested subcontract must be supported by convincing facts.

The Note to Rule 55 provides that in non-emergency situations the Carrier must notify the Organization in writing of subcontracting as far in advance of "the contracting transaction" as practicable and "in any event not less than fifteen (15) days prior thereto." Based on its literal language, the 15 days may begin when a Carrier's notice is sent. However, it is unnecessary to decide the precise starting

point because even if the Organization's receipt of the notice or the parties' actual discussion tolled the period here, 15 days or more elapsed before the subcontracted work began on August 2. Moreover, although the Note to Rule 55 states that the Organization must be notified "prior to" subcontracted work and Appendix Y supports strict construction of the notice requirements, this record does not establish the bad faith the Organization attributes to the Carrier. No convincing proof exists that the Carrier meant to undercut the Organization or that the Organization, in fact, suffered any material prejudice to its ultimate position.

On the merits, the parties raised the profusion of issues and sub-issues common to their long history of subcontracting disputes. No point is served now by sorting among the bramble of disputed principles, fine distinctions and irreconcilable decisions raised by them. Even assuming, without deciding, that the Organization prevails on all its other theories and claims, it cannot overcome an express exception that permits this particular subcontract.

Specifically, the Note to Rule 55 contains narrow exceptions to broad general prohibitions against subcontracts. In part, the exceptions include work involving special skills not possessed by Carrier employes, special equipment not owned by the Carrier, or work the Carrier is not adequately equipped to handle.

This contested work includes significantly more than simple brush cutting. Special equipment not owned by the Carrier trimmed, cut and/or removed substantial numbers of trees over a long distance requiring multiple days and many work hours. There is no evidence existing Carrier equipment could achieve the contracted device's special high reach or multi-tasking tree removal abilities or that Carrier employees readily possessed the skills and/or knowledge to operate it. Time and potential governmental penalties militated in favor of speedy completion. The tree cutting operation was so interrelated to brush cutting that segregating the tasks would have created unnecessary redundancy and additional expense.

The Organization correctly notes that Appendix Y obliges the Carrier to attempt to procure rental equipment in good faith to be operated by its employees. In some situations, the Carrier shoulders the burden of proving it took reasonable efforts that were unsuccessful for some acceptable reason. For example, Third

Division Award 26072 found a Rule violation when the Carrier did not demonstrate an effort to obtain generally available standard equipment (e.g., compressors, drills and concrete grout machines) that are readily available in the marketplace.

Here, however, the contracted equipment appears unique and not readily available or rented without its outside operating crew. Under these circumstances, easy procurement of the equipment cannot be presumed. Therefore, the Organization, at least, must make enough of a minimum showing that an unstaffed equipment rental was possible to shift the burden to the Carrier to explain why it was not accomplished.

This dispute differs from Third Division Awards 38010 and 38011. In each, the Carrier provided no notice whatsoever, and it was unclear to what extent, if any, special equipment was needed to accomplish the particular tree cutting projects. Indeed, the Awards support the Carrier. Both held that cutting tree limbs on the Carrier's right-of-way "could be contracted out if special equipment was needed." They sustained claims because lack of any notice prevented the bilateral, good faith discussions required by Appendix Y. However, in the current dispute, notice was provided, discussions held and special equipment used.

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 29th day of June 2010.