Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40564
Docket No. MW-40403
10-3-NRAB-00003-080208

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Pavers, Inc.) to perform Maintenance of Way and Structures work (operate excavator to replace a switch) at Firth, Nebraska on June 20 and 21, 2006 [System File C-06-C100-170/10-06-0297(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 the aforesaid 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, Claimant J. Francke shall now be paid for fourteen (14) 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.

On March 17, 2006, the Carrier sent notice to the Organization regarding its plan ". . . to contract for specialized equipment with operators to assist Carrier forces with switch renewals at various locations on the Ravenna, St. Joseph, and Sioux City Sub-Divisions. . . . The Carrier does not have equipment sufficient in size or adequate forces available to complete this work in the allotted timeframe. These switch renewals are located on high-traffic lines that service not only Carriers' freight but Amtrak and foreign roads. . . ." The Organization responded by letter dated March 24, stating that ". . . the Carrier forces do possess all the skills necessary to perform this work and the BNSF possesses all the necessary machinery and equipment to accomplish this work. Any equipment that BNSF feels they need in addition to what they currently own can very easily be rented or leased with Carrier forces operating." The Organization asked to schedule a contracting out conference, which took place between the Director of Labor Relations and the Vice-Chairman of the Organization on April 5, 2006. No resolution of the problem occurred.

By letter dated April 5, 2006, the Carrier amended its earlier notice to add three more line segments. The Organization again requested a contracting out conference, by letter dated April 12, 2006. The specific work challenged in this complaint relates to the line segments specified in the original notice.

On June 20 and 21, 2006, Pavers, Inc. used an excavator operated by one of its employees to remove and replace a switch at Mile Post 17 in Firth, Nebraska. On August 4, 2006, the Organization filed a claim on behalf of one of its Group 2 Operators for a lost work opportunity.

The Organization contends that the Carrier violated the Agreement when it failed to provide adequate notice; when it failed to engage in good faith bargaining to avoid contracting out; and when it used an outside contractor to perform routine non-emergency work using a common, ordinary excavator and outside operator to perform

the work. According to the Organization, no special or unusual equipment was used by Pavers. Moreover, the Carrier did not act in good faith: the Organization provided the Carrier with information about equipment that can be leased and operated by Carrier forces, there are employees qualified to operate the equipment, and the Carrier continues to contract out bargaining unit work.

For its part, the Carrier contends that (1) the Organization has not proved the claim as cited, that is, that there is a failure of evidence (2) that the Organization has not proven that the work was exclusively reserved to its members system-wide and (3) that it had the right to contract the work under the "special equipment" provision in the Note to Rule 55.

The Carrier contends first that the Organization has not submitted sufficient evidence to support its contention that contracting occurred. A review of the original claim establishes that the Organization was very specific about the disputed work: what it entailed, when and where it occurred, what equipment was involved and how long it took. The complaint alleged facts sufficient not only to put the Carrier on notice, but also for it to be able to research its own records in order to respond. It is the Carrier, not the Organization, that has the formal bookkeeping records of what work was done on its premises and when. There is no indication in the record that the Carrier disputed that the work occurred when, where, and as claimed by the Organization. That being the case, the record before the Board is sufficient for the Board to conclude that the Organization met its burden to establish that the work took place as alleged.

This brings us to the analysis of the actual subcontracting itself. The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of bargaining unit work. 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."

Under this language, the Organization has the initial burden of establishing that the work at issue is work "customarily performed" by bargaining unit employees. On the meaning of "customarily performed," the parties submitted opposing precedent from prior Awards: one line of Awards holding that "customarily performed" means

"exclusively performed throughout the entire system," and another holding that "customarily performed" means "historically and traditionally performed." After reviewing and considering the Awards submitted, the Board is of the opinion that the better interpretation is that "customarily" has its ordinary meaning, that is, "historically and traditionally." For one thing, it is a basic principle of contract interpretation that language should be given its ordinary meaning, in the absence of any indication from the parties that they intended some different meaning. Dictionary definitions of "customary" include "in accordance with custom, usual" (Concise Oxford English Dictionary) and "based on or established by custom; commonly practiced, used or observed. Synonyms: see usual." (Webster's Dictionary) The reasoning set forth in Public Law Board No. 4402, Award 20 (Benn, 1991) is persuasive, particularly in noting that "Had these sophisticated negotiators intended that these disputes were to be governed by the exclusivity doctrine, they could have easily said so." As the Board pointed out in that case, the word "exclusive" is used extensively throughout the industry. The parties' failure to use it in the Note to Rule 55, using "customarily" instead, "supports the conclusion that the parties did not intend to apply the exclusivity principle to contracting out issues."

If the work at issue is work "customarily performed" by the bargaining unit, the Note to Rule 55 sets forth three limited circumstances under which the Carrier may contract it out:

> "[S]uch 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."

If the Carrier plans to contract out work on one of these bases, the Note requires the Carrier to notify the Organization "as far in advance of the date on the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases." The Organization may request a conference to discuss possibilities for avoiding the proposed contracting out, pursuant to the Note to Rule 55 and Appendix Y.

Against that contractual backdrop, the first issue to be determined is whether the work in dispute here, switch replacement, is work "customarily performed" by

bargaining unit employees, as that term ("customarily performed") has been interpreted by the Board. It is: it is ordinary, routine track work regularly done by bargaining unit employees in connection with the maintenance or repair of structures or facilities located on the right-of-way. This brings it under the Note to Rule 55.

The next issue is whether the Carrier gave the Organization adequate notice under the terms of the Note to Rule 55. Adequate notice requires that the Carrier identify both the work to be contracted out and the reasons for having an outside contractor, rather than its own forces, perform the work. Those reasons have to fall under one of the three categories identified in the Note to Rule 55. Here, the Carrier's March 17, 2006 letter specified "Line Segment 3000 - St. Joe Sub: MP 187.0 #20" as a location where it intended to make use of contract equipment with an operator. Mile Post 187.0 is the switch at Firth, Nebraska, where the switch removal and replacement occurred on June 20 and 21, 2006. The notice stated ". . . the Carrier does not have equipment sufficient in size or adequate forces available to complete the work in the allotted timeframe." While the notice did not specify the exact size of the crawler excavator that would be needed, the issue was sufficiently identified and could be discussed during a contracting out conference. The Board concludes that the notice given by the Carrier met the requirements of the Note to Rule 55.

The Carrier asserted the need for "special equipment" as part of its rationale for contracting out the work. The record includes an e-mail dated August 31, 2006 from a local Roadmaster that supports that assertion: the largest excavator owned by the Company has a lift capacity of 29,900 lbs., while the Switch Panels for the jobs weigh between 14,500 and 31,000 lbs.[1] The Carrier has the right to determine its own equipment needs; it seems to have decided that its need to use such a large piece of equipment does not warrant the cost of ownership and that it will rent one as needed.

Thus, the equipment needed to do the work would seem to fall under the "special equipment" provision. However, the Organization contends that the Carrier operated in bad faith when it rented the excavator with an operator instead of an excavator that could be operated by its own employees. But there is no solid evidence (as opposed to assertions) that BNSF employees in general, or the Claimant in particular, are in fact qualified to operate such a large machine. They do not do so in their daily work at BNSF, which suggests that their experience is either limited or occurred at some point in the past, in

[1] The Organization asserted that BNSF has excavators of that size, but there was no proof of that fact.

which case it may be out of date. Extensive experience on one excavator or one size excavator does not automatically qualify one to operate a different machine or different size machine. In the absence of actual knowledge that its employees are currently qualified to operate the size of excavator required, the Carrier does not have to rent one without an operator: the potential danger to persons and property of having an unqualified individual operating heavy equipment of this size does not warrant the risk.

The Board concludes that the Carrier met its burden of establishing that special equipment was needed to remove and replace the MP 187 switch at Firth and that it was in compliance with the Note to Rule 55 when it contracted out the work in dispute.

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.