Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40565
Docket No. MW-40445
10-3-NRAB-00003-080273

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Pavers, Inc.) to perform Maintenance of Way and Structures Department work (operate backhoe, semi-truck and dump trucks) in connection with the track removal and rebuilding of the 1-Line at the Havelock Wheel Shop at Havelock, Nebraska on July 24, 25, 26 and 31, 2006 [System File C-06-C100-189/10-06-0333(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. Hetherington and J. Francke shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay, Claimants W. Stickney and M. Jakoubek shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and Claimant D.

Ficke shall now be compensated for eight (8) 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.

This claim was filed September 8, 2006, after the Carrier used an outside contractor to perform certain work associated with the renovation and rehabilitation of the Havelock Wheel Shop.[1] The Carrier had sent a letter to the Organization dated March 16, 2006, regarding the "Havelock Yard Shop Track Rehab," in which BNSF announced its plans to contract out some of the work associated with rehabbing the "shop tracks" due to a need for specialized equipment that the Carrier did not have:

> "The Carrier's track hoe is not capable of lifting the switches from the gondola for setting them into place in the track structure. The Carrier will contract for specialized equipment, such as larger crawler hoes and front-end loaders, to assist Carrier forces with this project. . . . The contractor possesses the necessary specialized equipment and forces necessary to successfully complete this work."

The project was scheduled to start at the end of March and take about six months. According to the Organization, on the dates in question, the contractor's forces performed routine maintenance of way work, using ordinary equipment no

[1] This is one of three related claims from the same shop, all dating to the period from July 24 to August 24, 2006. The other two claims resulted in Third Division Awards 40566 and 40567.

different than the Carrier's equipment: crawler-backhoes, dump trucks, and a semi-truck:

> "I feel that this claim should be paid as presented because this work performed by the contractor was not work that hasn't been performed by the claimants in the past. The back-hoes used were a John Deere 330 and 270 which [are] similar to the back-hoes owned by the BNSF, the flat bed semi is the same as the semi operated by Mr. Ficke and the dump trucks were just that 'dump trucks.' The contracting out notice states that the carrier's back-hoe is not capable of lifting switches, there was no switch lifting work claimed. The contractor's back-hoes dug out dirt and ties and handled 8 track panels and pieces of rail. (Letter dated November 8, 2006, from Local Chairman to BMWE General Chairman.)"

In the claim, the Organization specified the exact dates, work, and hours involved. The Organization contends that the Note to Rule 55 pertains because the disputed work was routine track and track maintenance work of the type "customarily performed" by Maintenance of Way forces. Further, the Organization claims that it did not receive proper notice under the Note to Rule 55 and that the contracting out was improper because the contractor did not use specialized equipment, as specified in the notice.

The Carrier contends that (1) the Organization has not proven the facts of its case (2) the Organization has not established that the disputed work was "customarily performed" by bargaining unit forces (3) it gave proper notice (4) it was entitled to contract out the work because it needed specialized equipment: its track hoe was not capable of lifting the new switches that were going to be installed and (5) the Claimants are not entitled to any compensation for missed work opportunities because they were either fully employed or on paid leave when the work took place.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of work. The threshold issue is whether the work under consideration is work "customarily performed" by bargaining unit employees. A finding that work is "customarily performed" by bargaining unit employees triggers an obligation on the part of the Carrier to notify the Organization of the proposed contracting out in enough time for the parties to meet and discuss the possibilities for getting the work done in-house. The parties "shall make a good faith attempt to

reach an understanding concerning said contracting." Furthermore, the Note to Rule 55 establishes that the Carrier may only contract out work "customarily performed" by bargaining unit employees under certain limited circumstances: (1) the work requires "special skills, equipment, or material"[2] (2) work is such that the Carrier is "not adequately equipped to handle the work" or (3) in cases of emergencies that "present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces."

In this case, 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 on each of the individual dates specified: what the work entailed, where it occurred, and how many hours were involved. In terms of a more formal evidentiary burden, it is the Carrier, not the Organization, that has the business records of what work was done on its premises and when. 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 and to raise a dispute if the facts alleged by the Organization are incorrect. There is no indication in the record that the Carrier disputed that the work occurred as claimed by the Organization. That being the case, the record before the Board is sufficient for it to conclude that the Organization met its burden to establish that the work took place as alleged.

Establishing that the work occurred is not enough for the Organization to prevail, however. Under the Note to Rule 55, the threshold issue is whether the work under consideration is work "customarily performed" by bargaining unit employees. 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 lines of precedent from prior Awards: one line 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 the one that gives "customarily" its most common meaning,

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[2] Specifically, the "special circumstances" language of the Note to Rule 55 states: ". . . such 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. . . ."

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 interpretation. 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 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 PLB in that case pointed out, the word "exclusive" is used extensively throughout the industry. The parties' failure to use it in the Note to Rule 55, using "customarily" in preference, "supports the conclusion that the parties did not intend to apply the exclusivity principle to contracting out issues." The Board concurs.

The work performed by the contractor on the 1-Line at the Havelock Wheel Shop on July 24, 25, 26, and 31, 2006, was ordinary track work, all of which occurred in the Yard: removing and hauling away old track panels; digging and hauling old ballast and ties; and grading, tie placement, rail placement, and alignment. It was the kind of work that Maintenance of Way employees routinely perform on a daily basis. Accordingly, the work falls within the "customarily performed" coverage of the Note to Rule 55, and the Organization has met its initial burden of proof.

Once coverage is established, the Carrier is restricted from contracting out the work unless it meets one of three criteria set forth in the Note to Rule 55. In addition, if the Carrier plans to contract out covered work on the basis of one of the criteria, it must notify the Organization of its plans to do so. The Organization can request a meeting "to discuss matters relating to the said contracting transaction," during which the parties "shall make a good faith attempt to reach an understanding concerning said contracting." Here, the Carrier sent a letter dated March 15, 2006, in which it described the parameters of the Havelock Yard Shop Track Rehab and announced its intent to contract some of the work. The notice stated that "the Carrier will contract for specialized equipment . . . to assist Carrier forces" - specifically a larger track hoe - because its own equipment was "not capable of lifting switches from the gondola or setting them into place in the track structure." The tenor of the letter is that the contracting is necessary because of the Carrier's need for specialized equipment to assist its own forces in doing their work.

The Organization contends that the notice was not proper under the Note to Rule 55, in that it did not adequately inform the Organization of the real scope of the proposed contracting. Comparing the notice that was sent and the work that was done, the Organization's point is well taken. The notice emphasizes the need for specialized equipment to lift switches. Yet the work that was done involved neither specialized equipment nor switches. Instead, it was much broader in scope, and much more intrusive into the work customarily performed by bargaining unit employees. The purpose of the notice provision is to set the stage for the parties to engage in "a good faith attempt to reach an understanding."[3] That purpose is frustrated if the scope of the proposed contracting is not revealed in the notice, and, frankly, failure adequately to notify the Organization of the scope of the proposed subcontracting gives rise to questions about the Carrier's good faith. In a similar case involving the same Organization but a different carrier, i.e., Third Division Award 26770, the Board concluded that the Carrier's failure to issue an adequate notice warranted sustaining the Organization's claim:

> "What is most noteworthy about this case, as evidenced by the correspondence on the property, is (1) the fact the Carrier sought, in its notice, to justify the subcontracting based on the use of special equipment, and (2) the fact the Organization asserts it observed the contractor cutting brush without the use of specialized equipment.
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> This accusation is quite serious. Significantly, it forms a basis to question the Carrier's good faith, a very important element in these matters in light of the December 11, 1981, letter from the National Railway Labor Conference to the BMWE International President. . . .
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> Basically, in the face of this assertion the burden shifted to the Carrier to demonstrate as a threshold matter that it was operating with the requisite degree of good faith.
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> It is the opinion of the Board that the Carrier has failed in this burden. The record is void of any satisfactory explanation which counters the Organization assertions . . . and is a compelling basis on which to sustain the claim."

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[3] See also, Appendix Y on the parties' duty to act in good faith.

In this case, the Carrier's position is that the project required specialized equipment and that the project was so large, it was not adequately equipped to complete it without outside help. This response focuses on the reasons for the contracting out and avoids the issue of the adequacy of the notice. Throughout the proceedings on the property, the Carrier never gave the Organization a satisfactory explanation why the notice only mentioned specialized equipment if there was an additional reason for the subcontracting, that it was inadequately equipped to complete the project. The point is not a trivial one: if the notice provision is to have any meaning - if it is to fulfill its purpose in initiating good faith discussions aimed at reaching a resolution regarding the proposed subcontracting - the Carrier must give adequate notice of its intentions. Where, as here, the Carrier asserts that the sheer magnitude of the project is what necessitated outside contracting, it is hard to understand how it could have overlooked that reason when it issued the notice.

The fact that the notice was partially correct - it appears that specialized equipment was needed some of the time - does not change the fact that the notice was fundamentally flawed. Subcontracting specialized equipment to perform limited work is one thing; subcontracting large quantities of regular bargaining unit work because the Carrier asserts it is "inadequately equipped" to do it is another thing altogether. The purpose of the notice is to encourage the parties to engage in meaningful discussion about the contracting. That cannot occur if the reason for, and here, the scope of, the subcontracting remains unknown to the Organization. It makes a sham of the conference and good faith obligations attendant upon the parties under the contracting out process established in the Note to Rule 55. Prior on-property Awards involving lack of notice have also sustained claims when notice was inadequate (Public Law Board No. 4768, Award 1; Third Division Awards 38010 and 38011). The Board will follow their precedent.

The Organization filed this complaint on behalf of five named Claimants, all of whom were either working full-time or on paid leave or vacation when the work at issue was done. Because they suffered no monetary loss as a result of the subcontracting, the Carrier contends that none of them is entitled to any monetary relief. Again, there are competing lines of precedent that come down on both sides of the "compensation/no compensation debate" for the Claimants who are either working or on paid leave. Neither of the parties' positions is entirely satisfactory: the Claimants were already fully employed or receiving paid time off when the work was done, so paying them for any violation amounts to double pay. At the same time, the

Carrier's position - that no one is entitled to any compensation - is even more unsatisfactory. It is not only that the individual Claimants have lost a work opportunity. Perhaps more important to the process of collective bargaining, if there were no penalty associated with a contractual violation, the Carrier would be free to violate the Agreement with impunity, knowing that there was no real cost associated with any violation. Such an outcome would make a mockery of the parties' undertakings in their Agreement, and for that reason must be rejected. There are numerous prior Awards that support awarding monetary damages to employes who were already working or on leave when the Carrier violated the Agreement. (See, particularly, Third Division Award 19899, which traces the development of these principles over time.) The Board finds the reasoning of these precedents compelling and will follow them. The Claimants are entitled to compensation as claimed, unless (in the words of Arbitrator Marx in Public Law Board No. 4768, Award 1) "the Carrier can demonstrate to the Organization that the requested number of hours' pay does not entirely conform to the amount of work performed by the outside contractor, and payment should be modified." Otherwise, the claim is fully sustained.

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.