Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40567
Docket No. MW-40448
10-3-NRAB-00003-080287

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
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(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 backhoe and dump trucks) in connection with the track rehabilitation of the 2-Line at the Havelock Wheel Shop at Havelock, Nebraska on August 15, 16, 17, 18, 21, 22, 23 and 24, 2006 [System File C-06-C100-190/10-06-0334(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, Claimant J. Francke shall now be compensated for sixty-four (64) hours at his respective straight time rates of pay and Claimants W. Stickney and M. Jakoubek shall now each be compensated for twenty-four (24) 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.

This claim was filed on 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. 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 40565 and 40566. While the facts of the individual claims are different, the issues presented by them are essentially the same.

The Carrier 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 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 original claim, on the eight days at issue, the contractor's operators operated a crawler backhoe and two dump trucks to perform routine track work in connection with removal of 2-Line at the Havelock Wheel Shop, which

entailed the replacement of all ties, rail and ballast. Specifically, the contractor's equipment and operators dug up old ballast and ties and hauled them to other locations in the Havelock Yard. The backhoe also moved continuous welded rail on several dates. According to documents in the record, the backhoe was a John Deere 270, which is smaller than the backhoes owned by BNSF and used by its forces.[1]

The Organization contends that the Note to Rule 55 pertains because the disputed work was routine track 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. Moreover, the Carrier improperly refused to consider renting or leasing the necessary equipment for use by its own forces.

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 and (4) it was entitled to contract out the work because it faced a "massive project at Havelock, requiring the use of many more pieces of earth-moving equipment and trucks than it had available" and its own forces were already fully engaged. Finally, the Claimant is not entitled to any compensation for missed work opportunities because he was fully employed and even worked overtime during the claim period.

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

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[1] According to a November 8, 2006 statement from R. Frerking.

[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

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, what equipment was used, and how many hours were involved on each date. 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. 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. As was discussed in more detail in Third Division Award 40565 the Board subscribes to the view that the language "customarily performed" should be given its normal, ordinary - one might say, its "customary" meaning - that is, "historically and traditionally."

The work performed by the contractor on the 2-Line at the Havelock Wheel Shop on August 15, 16, 17, 18, 21, 22, 23, and 24, 2006, was ordinary track work, primarily digging and hauling old ballast and ties, performed with ordinary equipment equivalent to that which Carrier forces use every day. It all occurred within the confines of the Yard. In contrast to the Carrier's contention that it needed special, larger equipment for the rehabilitation, the crawler backhoe used here was, according to the record, actually smaller than those the Carrier owns. It was the kind

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employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required. . . ."

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 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 in this case involved no specialized equipment. Instead, it was everyday track work, performed by Pavers' operators using an ordinary backhoe and dump trucks, working side-by-side with Carrier forces, who were entirely capable of doing the same work on existing Carrier equipment. With its emphasis on specialized equipment being used to assist Carrier forces, the notice implied that the contracting out would be limited in scope. Instead, the Carrier contracted a broad range of work customarily performed by bargaining unit employees, using the same type of equipment it already owns.

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 proposed

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

subcontracting gives rise to questions about the Carrier's good faith. Under similar circumstances, other Boards have ruled that a lack of notice warrants sustaining a claim.[4]

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 such a significant rationale 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 proposed subcontracting. 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 the 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 Claimants were fully employed, working full-time or on paid leave or vacation when the work at issue was done. Because the Claimants suffered no pecuniary loss, the Carrier contends that they are not entitled to any monetary relief.

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[4] See, discussion of Award No. 26770 (Vernon 1988) in MW-40445.

Again, there are competing lines of precedent that come down on both sides of the "compensation/no compensation debate" for Claimants who are either working or on paid leave. While it may seem unfair to compensate an individual who already received pay for the time claimed, it would be even more of a miscarriage of justice to permit an employer to violate the terms of the parties' agreement with impunity.[5] There are numerous prior Awards that support awarding monetary damages to employees 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 Claimant is 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.

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5 See the discussion in Third Division Award 40565 on this point.