Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40666
Docket No. MW-40107
10-3-NRAB-00003-070301
(07-3-301)

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 (Apac) to perform Maintenance of Way and Structures Department work (set bridge caps, drive piling and culvert work) at a bridge and culverts between Mile Posts 11.7 and 14.5 on June 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23 and 24, 2005 [System File C-05-C100-111/10-05-0255(MW) BNR].

(2) The Agreement was violated when the Carrier assigned outside forces (Apac) to perform Maintenance of Way and Structures Department work (drive piling, set bridge caps and decking and related bridge work) between Mile Posts 12 and 15 on June 27, 28, 29, 30, July 1, 5, 6 and 7, 2005 [System File C-05-C100-112/10-05-0258(MW)].

(3) The Agreement was violated when the Carrier assigned outside forces (Apac) to perform Maintenance of Way and Structures Department work (drive piling, form concrete, build retaining walls, set bridge decks, haul/pack dirt and related bridge work) between Mile Posts 12 and 15 on July 8 and continuing through July 30, 2005 [System File C-05-C100-123/10-05-0278(MW)].

(4) 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.

(5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Claimants M. Scott, D. Wood, L. Gilpin, K. Cassity, J. Harkendorff, T. Smith, J. Close, G. Barber, E. Chatterton and E. Stewart shall now each be compensated for one hundred four (104) hours at their respective straight time rates of pay and twenty-four (24) hours at their respective time and one-half rates of pay.

(6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Claimants M. Scott, D. Wood, L. Gilpin, K. Cassity, W. Coffman, G. Norman, D. Acton, Jr., J. Loos, E. Stewart, T. Smith, J. Close and G. Barber shall now each be compensated for eighty (80) hours at their respective straight time rates of pay and twelve (12) hours at their respective time and one-half rates of pay.

(7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Claimants M. Scott, D. Wood, L. Gilpin, K. Cassity, W. Coffman, G. Norman, D. Acton, Jr., J. Loos, E. Chatterton, E. Stewart, T. Smith, G. Barber, J. Close, L. Craig, R. Casady, S. Scheerer, E. Wambold, D. Smart, R. Carmona, R. Inglis and S. Wall shall now each be compensated for one hundred twenty-eight (128) hours at their respective straight time rates of pay and sixty-eight (68) 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.

Sometime prior to April 20, 2005, the Carrier contracted with Apac Construction to build a bridge, culverts and perform dirt and other work to create a new 2.7 mile second main line on the St. Joseph Subdivision from MP 11.7 to MP 14.5 between Waldron and Parkville, Missouri. On April 20, 2005, the Carrier sent the Organization notice that:

> "As information the Carrier is constructing approximately 2.7 miles of new second main line on the St. Joseph Subdivision between mile post 11.8 and 14.5. The Carrier intends to contract out the roadbed portion of this project, that work will include: approximately 2.7 miles of embankment between mile post 11.8 and 14.5, excavating approximately 12,000 cubic yards of existing sub grade material, placing approximately 15,000 cubic yard[s] of earthen material, approximately 16,000 cubic yards of sub-ballast, mixing of approximately 22,500 square yards of cement stabilized subgrade, and placement of approximately 100 tons of hot mix asphaltic concrete. Clearing and grubbing of approximately 8 acres, seeding of approximately 4 acres, placement and maintenance of approximately 11,000 feet of silt fence. The Contractor will also be responsible for new bridges and culvert extensions at the following: Bridge 12.1, a 54' (2-27' spans) double voided box beams on steel H piling; Culvert at 12.52 a double precast box culvert extension of approximately 36'; Bridge 12.75, a 57' (3-19' spans – 20" deep) slab

beams on steel H piling; Culvert at 13.02 extend existing 36" culvert 24'; Culvert at 13.04 extend double 30" CMP by 38'; Culvert at 13.17 a 36" RCP extended 35'; Culvert at 13.24 double 60" CMP extend 20': Culvert at 13.44 a 36" CMP extend 24'; Culvert at 13.66 a 36" RCP extend 14'; Bridge 13.7 a 138' (3 spans - 2 - 48' and 1 - 42') double voided box beam on steel H piling; Bridge 14.36 a 48' (3 - 16' spans - 16' deep) slab beams including superstructure replacement and foundation repairs. Along I-435 the contractor will install a retaining wall approximately 280' long under the existing 1-435 overpass."

Apec started initial work on the project described in the April 20 letter on May 31, 2005. The Organization filed multiple claims regarding various aspects of the entire project. The instant claims were dated July 29, August 18 and 31 and involved particular work actually performed at designated locations between June 8 and July 30. The first claim was dated July 29 and received by the Carrier on August 1, 2005. All claims alleged violation of Rules 1, 2, 3, 5, 29, 55 as well as the Note to Rule 55 and Appendix Y.

In addition to the parties' usual litany of thrusts and parries in subcontracting disputes, three issues resolve this matter and make it unnecessary to resolve other disagreements.

First is the threshold jurisdictional question of timeliness. Rule 42 provides, in relevant part: "All claims or grievances must be presented . . . within sixty (60) days from the date of the occurrence on which the claim or grievance is based."

The Carrier asserts the claims are more than 60 days old because the entire project began on May 31 and the first claim was not received until August 1, 2005. The Organization contends its claims did not ripen until June 8 and the first claim was submitted on July 29. Thus, the question is whether the "occurrence" happened on May 31 or June 8. [1]

[1]The parties disagree whether the limitation period ends when a claim is sent or when it is received. However, neither argues the significance of the difference in this dispute. Accordingly, the Board will not answer unasked questions about application of a "mailbox" Rule or whether Sunday, July 31 (a non-mail delivery day and presumably a day no

The claim is timely. For procedural jurisdictional purposes, the Organization defines the occurrence that is the subject of its claim. Rule 42 expressly speaks of "the date on which the claim or grievance is based." Moreover, until the particular disputed work actually begins, the Organization has very limited, if any, knowledge about the number of outside employees present, the precise tasks performed, the equipment used, the subcontracted hours expended or other information that may cause it to grieve or to articulate a claim in a manner potentially capable of proof. In short, it is counterproductive to require the Organization to grieve before there is a specific factual predicate for its claim.

Of course, if the Organization's alleged dates are inconsistent with material facts, the Board will apply the appropriate consequences in resolving the ultimate merits. But the analysis will depend on substantive merits and not the Board's jurisdiction to reach the merits.

Here, there is no dispute about, or claims for, any work between May 31 and June 8. This grievance raises discrete claims defined in time and location. Therefore, the alleged time frame satisfies Rule 42's 60-day requirements; and the Board has jurisdiction to proceed to the merits.

Second, the Carrier subcontracted with Apec before notifying the Organization of its intent to outsource the disputed work. As far as the record discloses, no emergency or other possible exigent excuse existed. The Note to Rule 55 requires that when the Carrier "plans" to subcontract, it must notify the Organization "as far in advance of the date of the contracting transaction as practicable and in any event not less than fifteen (15) days prior thereto" except in "emergency time requirements" situations.

The Note to Rule 55 refers to work "customarily" performed by the Organization three times. There is no reference whatsoever to "exclusively." Although there are Board decisions to the contrary, given the differences that preexisted the Note and the clarity and consistency of its language, better reasoned decisions properly conclude, as least insofar as advance notice is concerned, that "customarily" means routinely, historically, traditionally and/or presumptively and

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Carrier employee is present to process a claim) would be timely even accepting the Carrier's May 31 "occurrence" date as the start of the 60-day claim window.

something short of "exclusively," i.e., to the complete exclusion of all others at all times at all places and under all circumstances. Without question, much, if not all, of the work described in the Carrier's April 20 notice to the Organization, and the work contained in the Organization's claims, is customarily performed by BMWE-represented employees.

Moreover, the Note to Rule 55 and, also, Appendix Y contemplate good faith efforts to avoid subcontracting. In fact, Appendix Y reaffirms and underscores "that advance notice requirements be strictly adhered to . . ." and encourages good faith discussions to reconcile differences.

The Carrier effectively foreclosed any good faith on its part by contractually committing itself to the subcontractor before notifying the Organization of its intent to outsource. When the notice was sent, the subcontract was a fait accompli that added insurmountable disincentives to consider any Organization concerns in good faith. Thus, the Carrier undeniably and flagrantly breached the letter and spirit of the Note to Rule 55 and Appendix Y. The fundamental violation validates the Organization's substantive claims regardless of any other non-jurisdictional argument the Carrier might have raised if it originally provided proper notice.

Finally, on this record, there is no merit to the Carrier's assertion that monetary payment is inappropriate because the Claimants were fully employed or otherwise unavailable to perform the disputed work.[2] While there is Board precedent for the position, better reasoned and, perhaps, the majority of recent Board decisions reject the contention.

A right without a remedy is an illusion. A tangible corrective consequence is necessary, not as punishment, but as a disincentive for future bad faith violations of the Carrier's fundamental subcontracting promises. The Carrier's logic militates in favor of reducing its work force so everyone works full time, and then regularly outsourcing large portions of traditional work (with or without satisfying its written commitments to the Organization) without any cost or other meaningful adverse outcome. This is antithetical to, and irreconcilable with, the purpose and result

[2] With agreement of both parties, D. Wood was withdrawn as a Claimant based on his April 23, 2010, resignation.

intended in the Note to Rule 55 and Appendix Y. Those provisions mean to minimize subcontracting, not to encourage it.

Accordingly, the claim is partially 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 1st day of November 2010.