Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40770
Docket No. MW-40151
10-3-NRAB-00003-070396
(07-3-396)

The Third Division consisted of the regular members and in addition Referee Patrick Halter 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 to perform Maintenance of Way and Structures Department work (form/pour concrete piers and pads and related work for fall protection system) at the Havelock Shops in Lincoln, Nebraska on August 31, September 1, 2 and 5, 2005 [System File C-06-C100-8/10-06-0017(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. Reimers and T. Nichelson shall now each be compensated for twenty-eight (28) hours at their respective straight time rates of pay and Claimants G. Ellis and M. Maloney 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.

The Organization states that the practice is to assign Carrier forces to perform ordinary bridge or building concrete and building construction (form and pour concrete piers, pads and related work) using Carrier equipment or similar equipment obtained by rent or lease.

According to the Organization, Carrier forces are fully qualified for the claimed work, that is, site layout, excavation, rebar installation, anchor bolt installation, form work, concrete placement, form removal and site cleanup. The claim is not for erection of upright steel beams or the installation of the cable for the attachment of the safety lines.

It further contends that this work is customarily and historically performed by the Carrier's forces given Rule 1 – Scope, Rule 2 - Seniority Rights and Sub-Department Limits, Rule 5 - Seniority Rosters and Rule 55 - Classification of Work, which is covered by the scope of the Agreement reserving the work to maintenance-of-way employees. Rule 55 is a reservation of work Rule. (See Third Division Awards 19924, 20338, 20412, 20633, 21534 and Award 34 of Public Law Board No. 2206.)

The Organization is not required to prove that Carrier forces exclusively perform this work because the exclusivity test does not apply in contracting disputes. Rather, Carrier employees have a contractual right to be assigned to and

perform work encompassed within the scope of the Agreement before the Carrier resorts to employ forces from outside the Agreement.

Commitments in the Note to Rule 55 and Appendix Y - carried forward from the 1982 and 2002 Agreements - are applicable to the Carrier. Notice and conference provisions are threshold requirements that obligate the Carrier to initially make a good-faith attempt not to contract out scope covered work but, rather, consider maintenance-of-way forces with whom it first contracted for the performance of this work. (See Third Division Awards 29912, 29979, 30182 and 31599.)

The Note to Rule 55 and Appendix Y were violated when the Carrier failed to issue proper notice. Failure to give notice effectively precludes any good-faith attempt to reach an understanding and failure to comply with the notice provisions requires a sustaining award. The notice issued on February 25, 2005, is improper because the Carrier's pro forma compliance with the Note to Rule 55 and Appendix Y do not satisfy its burden of engaging in a good-faith attempt to resolve the dispute in conference.

In this regard, at the conclusion of the parties' telephone conference on March 30, 2005, the Organization understood that the Carrier would not move forward with contracting until such time as the parties resumed and concluded good-faith discussions on this matter. Rather than concluding discussions, the Carrier strung out the Organization and contracted. By tying the Organization's hand the Carrier subverted the good-faith process. This deprived the Claimants of (1) the opportunity to perform this scope-covered work and (2) the monetary benefits associated therewith.

With or without notice, the burden of proving that the exceptions in the Note to Rule 55 apply resides with the Carrier. It acknowledged that the work was performed on the claim dates by outside forces. There were no special skills required that Carrier forces do not possess, no special equipment required that the Carrier does not own or could not rent or lease, and no special materials that only a supplier could install. There was no attempt to rent or lease equipment for use by Carrier forces.

The Carrier asserts that it can contract when using Carrier forces would result in a "piecemeal" of the project, but "piecemeal" is not a criterion under the Note to Rule 55 or Appendix Y. In short, ". . . the question here is not whether division of the work is required but simply whether one or more aspect of the work . . . should have been assigned to Carrier forces." (See Award 25 of Public Law Board No. 4768.) The claim complies with Rule 42A, for it identified the nature of the disputed work, dates and location.

The Claimants are entitled to receive compensation even if fully employed on the claim dates and full employment is not a deterrent to an award of damages. (See Third Division Awards 19758, 19924, 20892, 21808, 22374, and 36156, as well as Award 57 of Public Law Board No. 2206 and Award 1 of Public Law Board No. 4768.) The claim should be sustained in its entirety.

According to the Carrier, the claim must be dismissed because it does not comply with Rule 42A. The Organization must present a claim with sufficient information for a proper filing under Rule 42A. The initial claim and appeal are deficient because they did not reference a work location.

Additionally, the Carrier contends the claim must be denied because the work is not reserved to BMWE-represented employees. Because Rule 1 is general in scope, the Organization must prove an exclusive past practice with regard to performance of this work, which it failed to do. (See Award 13 of Public Law Board No. 4104.) Rule 2 is not applicable; seniority rights are only applicable when determining which of several bidding employees is assigned a position. Precedent on this property shows that Rule 55 is classification of work Rule; it does not reserve work exclusively to employees of a given class or serve as a Scope Rule. (See Third Division Award 33938 and Award 67 of Public Law Board No. 3460.) The Organization failed to show system-wide exclusive assignment of this work so it does not fall under the scope of the Agreement. (See Third Division Awards 34212, 34213, 34217, and 34226.) Employee statements prove, at most, a mixed practice, which defeats the Organization's argument that it customarily performs the work. (See Third Division Awards 29007, 29751, 30067, 30205, 30267, 31170, 31274, 31276, and 33938.)

Because Rules 1, 2 and 55 do not reserve this work to BMWE-represented employees, they have no claim to it. Nevertheless, proper advance notice was issued on February 25, 2005:

"Subject: Fall Protection System Installations

The Carrier's Mechanical Department is responsible for the safe operation of the locomotive and car repair and servicing areas across the system. Over the past several years it has been installing new, and up-grading existing fall protection systems at various locations. Currently, the Mechanical department plans to contract the following work:

* * *

3. At the Havelock, NE Car servicing area, the Carrier will install a horizontal lifeline fall protection system.

* * *

The Carrier anticipates that it will contract for the installation of these fall protection systems, which are state-of-the-art, registered and patented systems that can be installed only by authorized distributors. This work will require special skills not possessed by the Carrier's employees, and use material only available when installed by an authorized supplier.

The Carrier is contracting this work in order to comply with recent and upcoming changes to the OSHA fall protection and safety standards for the construction industry. The OSHA requirements are outlined in CFR 29 1915.159 and 1926 subpart M appendix C, and stipulate design and installation must be by a qualified person 'one with a recognized degree and extensive experience in design and installation.' This contracting and its associated work are consistent with Carrier policy and the historical practice of contracting out such work where compliance with changing Federal Regulations is required. Notwithstanding this, even if Carrier forces

had performed similar work in the past, in this case the Carrier does not have the available equipment and qualified manpower to perform this work, or the proper licenses to install these systems.

These projects will be contracted and work will begin sometime after April 1, 2005.

Contracting the fall protection systems like that here involved is consistent with Carrier policy and the historical practice of contracting out specialty work. Moreover, the Carrier does not have the available forces or equipment to perform this work."

The Organization's claim is for concrete work, but the real work required use of a licensed, skilled installer/contractor for the OSHA-regulated installation of a specialized horizontal lifeline fall protection system. Employee statements acknowledge that they have not installed this kind of system; the Organization must prove the Claimants' qualifications to perform specialized work. (See Third Division Award 32274.)

Concrete work is a piecemeal part of a much larger project and the entire system installation was part of a larger initiative to upgrade these systems to comply with OSHA regulations. The work of a contractor to perform intertwined concrete work is within the intent of the Agreement. A similar claim involving only a portion of the work (concrete) of a larger, more complex project was denied. (See Third Division Award 38093.)

The dealer is responsible for the safe and proper installation of the entire fall protection system and it would be impractical and inefficient to piecemeal the work. The contractor cannot integrate two work groups when it is required to distribute portions of the work to Carrier forces simply because they may have performed some of the peripheral items in isolation. That would disrupt or impede the project. (See Third Division Awards 34213 and 36155.)

Because this work never belonged to the Claimants, they lost no time or wages when they did not perform it and are not entitled to any monetary relief. The Claimants suffered no losses, so even if the Agreement was violated, an award of

damages is not warranted in the absence of proof of injury. (See Third Division Awards 20308, 25002, 29330 and 34214.)

Having considered the record, the Board finds that the claim materially complies with Rule 42A. It identifies contract work as disputed at the Havelock Shops in Lincoln, Nebraska, on August 31, September 1, 2 and 5, 2005. During claim processing, the Organization sufficiently identified the claimed work as site layout, excavation, rebar installation, anchor bolt installation, form work, concrete placement, form removal and site cleanup.

Carrier forces customarily perform this type of work (pour and form concrete) using the Carrier's equipment. Employee statements, photographs and a B&B Helper/Driver job bulletin describes duties and various projects assigned to Carrier forces performing work similar to or more complex than all aspects of the work involved here. This is maintenance-of-way work under the scope of the Agreement. Because the claim does not encompass the contractor's erection of upright steel beams or the installation of the horizontal cable for attachment to the safety lines, those matters will be handled by the licensed, skilled installer consistent with OSHA regulations.

There was notice and conference. On February 5, 2005, the Carrier notified the Organization of its plan to contract. A telephone conference was held on March 30, 2005, and the Organization understood that further discussions would ensue, but that did not occur. The parties' actions, thereafter, comport with Appendix Y: "if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith." That occurred and the claim is properly before the Board.

This is not a piecemeal request for work given the magnitude of the week-long project and the fact that employee statements show other concrete projects of similar or identical nature being handled by Carrier forces. The Carrier owns the equipment; Carrier forces are qualified and capable of performing this work. Integration of employees (contractor or Carrier) is an ever-present task when planning a project with numerous components for preparation and installation.

Notwithstanding the full employment of the Claimants, the Carrier is aware that a decision to contract out work, which is customarily performed by Carrier

forces, may result in an award of compensation. In contracting out this work, the Carrier denied the Claimants work opportunities. Compensation is appropriate to preserve and protect the integrity of the Agreement and Appendix Y. The Claimants shall be made whole for the actual number of hours of contractor-performed work at the Claimants' respective rates of pay. (See Third Division Awards 30661, 31521, 36093, and 37470.)

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 15th day of December 2010.