Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40779
Docket No. MW-40401
10-3-NRAB-00003-080205

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 (B&L General Contractors and Perfect Paving) to perform Maintenance of Way and Structures work (replace drain pans, remove/replace concrete and asphalt and related work) at the fuel facility and along Rip Tracks 1, 2 and 3, in the 23rd St. Yards in Denver, Colorado beginning on November 14, 2005 and continuing through December 2, 2005 [System File C-06-C100-64/10-06-0097(MW) BNR].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance notice of intent to contract 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 violation referred to in Parts (1) and/or (2) above, Claimants M. Norris and J. Olmedo shall now be compensated for one hundred twenty (120) hours at their respective straight time rates of pay, Claimants J. Loza and W. Smith shall now each be compensated for fifty-six (56) hours at their respective straight time rates of pay and Claimants K. Abeyta, C. Bachicha,

M. Baker and A. Savala shall now each be compensated for sixty-four (64) 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 has challenged the contracting out of certain work at the Globeville Yard in Denver, Colorado. By letter dated August 29, 2005, the Carrier informed the Organization of its intent to contract out "the removal and replacement of the fiberglass track pans located in the fueling track in the Globeville Yard. . . . The work includes, but is not limited to, removal of existing fuel track pans, level surface area under pans, installation of new fiberglass track pans, and placement of 20,786 sq. ft. of a 2-4" asphalt overlay on existing asphalt surface. The contractor possesses the necessary specialized equipment, and skilled employees necessary for a successful completion of this project...."

The Organization filed a claim dated December 15, 2005, for work done by a contractor in the 23rd Street Yard and Rip Tracks 1, 2, and 3 in or near the same yard between November 14 and December 2, 2005. According to the Organization, the work involved was work normally performed by M of W forces: replacing the worn out fuel pans and tearing out old concrete and asphalt. One employee submitted a statement that sometime between 1995 and 2000, the B & B crew he worked on had replaced the fuel pans at 23rd Street "without any outside help." Another employee statement detailed a number of concrete and asphalt jobs that he had done in his ten years with the Carrier.

Moreover, the Organization contends, the notice was inadequate because the work was not done where the notice said it would be. Specifically, the Organization contends

that the work occurred at the fueling facility at 23rd Street and the fueling facility on Rip Tracks 1, 2 and 3, both of which are separate from the Globeville Yard. A third employee submitted a statement, with photographs, saying "The two jobs were separate. In picture No. 1 are the track pans which were replaced. The asphalt job was a few tracks over toward the right, the old rip track. I was on the crew that installed the original pans as well as the manholes and original paving back in 1988. . . ." The statement also described similar drain and paving work in another location that the author had worked on in 1992. The statement concluded "I hope this helps clear up any misunderstandings about the equipment or expertise needed to do this type of work."

The record also includes an e-mail from the Project Manager, dated January 3, 2006, who stated: "Hot asphalt paving is the reason for contracting, and is the major work item in the project. . . . Asphalt work has been contracted in the past and our forces are not equipped nor have the skills. Removal was incidental to the asphalt placement, and was necessary to provide drainage." Accordingly, the Carrier asserts that the work is not work "customarily performed" by M of W forces and that even if it was, contracting would be permissible under the Note to Rule 55 because of the need for specialized equipment and skills necessary to lay hot asphalt.

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."

The Organization has the initial burden of establishing that the work at issue is work "customarily performed" by bargaining unit employees. The Board previously set forth the basis for its conclusion that the term "customarily performed" does not mean "exclusively performed throughout the entire system," but that it should be interpreted according to its ordinary usage, that is, meaning "historically and traditionally performed." (See Third Division Award 40563.)

In this case, the Organization submitted credible evidence that M of W employees have performed this work in the past. However, the Carrier submitted credible evidence that hot asphalt work has been contracted out in the past because of the need for

specialized equipment and skills. As used in the Note to Rule 55, the term "customarily performed" means that, in the ordinary course of events, the work would routinely be done by Carrier forces. "Customarily performed" does not mean that the work is sometimes done by Carrier forces; the term requires more than occasional performance. In this case, the evidence in the record is insufficient to support a conclusion that the hot asphalt work in dispute is work "customarily performed" by Carrier forces. At best, the record suggests that there may be a mixed practice regarding hot asphalt work. Accordingly, the Board finds that the Organization has not met its burden of proof and the claim must be denied.

As for the claim that the work was done in different locations and the notice was deficient as a result, again the evidence in the record is mixed. On balance, the Board again finds that the Organization has not met its burden of proof, and that part of its claim is also denied.

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 15th day of December 2010.