Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40784
Docket No. MW-40446
10-3-NRAB-00003-080275

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

(Brotherhood of Maintenance of Way 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 (General Excavating) to perform Maintenance of Way and Structures Department work (operate loader and dump trucks to load and haul fouled ballast) from the Lincoln Terminal to the landfill at Milford, Nebraska on August 4, 2006 [System File C-06-C100-188/10-06-0332(MW) BNR].

2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an 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. Stoner, M. Lane and J. Beals shall now each be compensated for eight (8) 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 filed a claim dated September 8, 2006, after the Carrier had assigned outside forces to operate a front-end loader and two dump trucks to load and haul fouled ballast from line 19 on the west side of the Diesel Shop in the Lincoln Terminal to a landfill at Milford, Nebraska, on August 4, 2006. According to the Organization, the work was routine bargaining unit work performed using the same equipment as owned by the Carrier, and it should have been assigned to M of W employees. Moreover, the Carrier failed to provide proper notice as required by the Note to Rule 55.

The Carrier contends that the ballast was contaminated by petroleum and required environmentally safe clean-up, which its forces are not trained to do. The cleanup of contaminated ballast and soil is not exclusive to M of W employees, so the Note to Rule 55 does not apply. Accordingly, the Carrier did not violate the parties' Agreement when it contracted the work to outside forces, nor was it required to provide notice.

The record in this case includes evidence regarding the contaminated nature of the soil. In an e-mail dated September 19, 2006, the Manager of Environmental Operations explained in response to an investigative query:

> "It is my understanding the fouled ballast referenced in the attached claim was generated from track maintenance activities on the west

> side of the Lincoln Diesel Shop and then stockpiled adjacent to a drainage ditch north of the area. Upon discovery and follow-up inspection by Environmental Operations personnel, this ballast was determined to be impacted or contaminated by petroleum, thereby making it a special waste. Therefore, further handling of this material by BNSF MOW employees was not possible due to applicable OSHA regulations and company policy. General Excavating was subsequently hired by the Mechanical Department to load and transport the ballast for disposal. . . .
>
> A special waste disposal permit was required for disposal of the petroleum-impacted ballast at the Milford landfill. Disposal costs were covered by the BNSF environmental reserve account..."

The Manager added an additional explanatory note in a separate e-mail shortly thereafter:

> "To the best of my knowledge, the determination was made by sight and smell by Environment personnel, which is often done in these circumstances. In addition, the source area (i.e. tracks where the ballast was removed) was visibly impacted with oil according to information provided to me. Based upon this observation and the subsequent inspection of the stockpile, sampling of the ballast was not necessary. In addition, potential stormwater runoff from the ballast stockpile posed a threat to a nearby drainage ditch. Therefore, a timely response and removal was necessary to mitigate environmental risks to the company."

A copy of a "Special Waste Approval" form from Waste Connections, Inc., for "petroleum contaminated soil from diesel fuel spill" was attached.

This evidence was provided to the Organization. In response, the Organization, in its October 15, 2007, post-conference letter, rejected the Carrier's "contaminated soil" explanation:

> "In Carrier declination letter of October 27, 2006, Ms. Johnson defends the declining of this claim based on the assumption the soil was contaminated in some way. Ms. Johnson did not provide any proof for this affirmative defense.
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> Again, in Carrier letter of January 26, 2007, the issue of contaminated soil was brought up. The carrier referred to an e-mail from Mr. Ron Buhrman. Mr. Buhrman indicated there were no soil samples taken to determine if the material met the requirements of being classified as a contaminated material. The only test that was taken was sight and smell.
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> This is a rail yard. Everywhere you go you will smell oil or diesel in the air. There are diesel locomotives operating all over and this being near a diesel shop you would encounter the smell of diesel and oil. This is not a proper way of determining if a material meets the requirements of being a contaminated material...."

The Organization goes on to contend that even if a disposal permit had been required, the work could and should have been assigned to Carrier forces.

Hauling dirt is routine bargaining unit work, which would ordinarily be subject to the Note to Rule 55. However, prior Awards between the parties have established the Carrier's right to contract out removal of contaminated soil, which must be handled and hauled by individuals who have special training. See Third Division Awards 34213, 39913 and 40213.

Accordingly, the Carrier having raised the issue of contamination, the threshold issue in this case is whether the dirt that was moved was contaminated. The Organization has the burden to establish violations of the Note to Rule 55, but it is the Carrier's burden to establish the existence of contamination by way of an affirmative defense to the Organization's claim.

The Carrier submitted evidence explaining why its Environmental personnel concluded that the soil was contaminated. No formal soil sample was taken but, as explained by the Manager of Environmental Operations, "determination by sight and

smell . . . is often done in these circumstances." (Emphasis added.) The observation was followed by an inspection that showed the area "visibly impacted with oil." Despite the Organization's criticism of the conclusions of the Carrier's Environmental Department personnel, there is no objective evidence that demonstrates their conclusion was wrong. The Organization is correct, but only up to a point: it is a rail yard and the odor of oil and diesel will pervade the air. But the smell of diesel is not the only basis on which the Carrier's environmental personnel determined that the fouled ballast in question should be treated as contaminated. The stockpile was inspected and found to contain oil and diesel residue. Moreover, the location of the stockpile presented a potential stormwater runoff problem.

On the basis of the record before it, the Board is not in a position to second-guess what appears to have been a good-faith determination by the Carrier's Environmental Department that the material at issue should be treated as if it were contaminated. The explanation offered by the Manager of the Department credibly indicated that Department personnel followed normal professional practices in making the determination that the material was contaminated. The Organization may not have liked the explanation, but it provided no substantial rebuttal other than argument and assertion, which was insufficient to overcome the Carrier's evidence.

Under the circumstances, the Board concludes that the Carrier met its burden to establish that the material in question was contaminated. That being the case, the Carrier did not violate the parties' Agreement when it contracted the work to outside forces. Moreover, it did not violate the parties' Agreement when it failed to provide notice under Rule 55, because the Rule did not apply to the work.

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.