Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40788
Docket No. MW-40515
10-3-NRAB-00003-080351

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 (Pavers, Inc.) to perform Maintenance of Way and Structures Department work (operate backhoe) in connection with track rehabilitation of the 2-Line at the Havelock Wheel Shop at Havelock, Nebraska on October 9 and 10, 2006 [System File C-07-C100-14/10-07-0020(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 sixteen (16) hours at his respective straight time rate 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.

On March 16, 2006, the Carrier notified the Organization of its intent to rehabilitate the existing "shop tracks" at the east end of the Havelock Yard:

> "There is approximately 3 miles of track buried under asphalt and dirt, which will have to be removed in order to renew the ties (approximately 2,557) and OTM. In addition to the rehab work on the track, the Carrier will be installing 2 #11 and 4 #20 switches in the crossovers at Havelock and Greenwood (MP 52.9 to MP 53.0). The Carrier's track hoe is not capable of lifting the switches from the gondola or 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 work to be performed by the contractor includes, but is not limited to removal of asphalt, soil, and ballast from around the track structure, any necessary sub-grade work, unloading of switches and track panels, removal of existing switches and placement of new switches, track panels, OTM, and ballast. The contractor possesses the necessary specialized equipment and forces necessary to successfully complete this work.
>
> It is anticipated that the work will start on approximately March 31, 2006 and should complete approximately October 31, 2006."

On October 9 and 10, 2006, the contractor's operator used a crawler backhoe to assist the Havelock section forces and the Lincoln Yard section crew with the rehabilitation at the Havelock Wheel Shop. According to the Organization, the operator worked eight hours each day. The work performed consisted of digging, dragging and placing rail and nipping ties for spiking by M of W forces. Again according to the Organization, no specialized equipment was used and no special skills were required to perform the work, which was routine non-emergency track maintenance/repair work. Specifically, the Local Chairman submitted a written statement, dated April 10, 2007, to the General Chairman regarding the work:

> "This letter is in regard to your letters of January 30 and April 3, 2007 requesting information on claim C-07-C100-14.
>
> (1) The work performed on 2-Line at Havelock was that of digging out a x-ing on the East end of 2-Line, dragging and placing new rail onto new ties, nipping ties for spiking by the MOW sectionmen. (2) There were no switches involved in the Havelock project. None were unloaded or moved as this work was all about removal and replacement of track not switches. (3) The crawler back-hoe used at Havelock was a John Deere 270 which is smaller [than] the crawler back-hoes owned by the BNSF, the back-hoes owned by the BNSF could have easily performed the claimed work had they been utilized by the BNSF.
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> The hours are correct because I was working at Havelock on 2-Line with the Lincoln Lower yard section and witnessed the work."

The Organization contends that the Note to Rule 55 pertains because the disputed work was routine track work of the type "customarily performed" by M of W 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." Moreover, its own forces were already fully engaged on the project. Finally, the Claimant is not entitled to any compensation for missed work opportunities because he was fully employed and also worked overtime during the claim period.

The Board notes that this case raises many of the same issues already addressed in Third Division Award 40567 involving similar subcontracting of bargaining unit work on the same project, the 2-Line in the Havelock Yard, and in Third Division Award 40565, also involving subcontracting in the Havelock Yard.

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 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"[1] (2) work is such that the 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 sufficiently specific about the disputed work, i.e., what the work entailed, where it occurred, what equipment was used, and how many hours were involved on each date. 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

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

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 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 October 9 and 10, 2006, was ordinary track work, primarily digging out a crossing, dragging and placing rail onto new ties and nipping ties for spiking by the Carrier's forces. 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, smaller than those the Carrier owns. It was the kind of work that M of W 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 16, 2006, in which it described the scope of the "Havelock Yard Shop Track Rehab" and announced its intent to contract some of the work. The notice stated: "The Carrier's track hoe is not capable of lifting the switches from the gondola or 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 tenor of the letter is that the contracting was 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 switches and no specialized equipment. Instead, it was ordinary track work, performed using a crawler back-hoe that was smaller than those owned by the Carrier and operated on a daily basis by M of W forces. With its emphasis on specialized equipment being used to assist Carrier forces, the notice implied that the contracting out would be limited in scope. In this case, however, the contractor performed work customarily done by bargaining unit employees, using the same type of equipment it already owns. The contractor did not use specialized equipment to assist Carrier forces; it used ordinary equipment to replace Carrier forces.

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."[2] That purpose is frustrated if the scope of the proposed contracting is not revealed in the notice. Under similar circumstances, the Board has ruled that a lack of notice warrants sustaining a claim.[3]

In this case, the Carrier's position is that it was entitled to contract the work because the project required specialized equipment. As stated in the Carrier's Submission, "The indisputable facts of this case are that the equipment involved is special equipment within the meaning of the Note to Rule 55, and that it was unavailable for lease to Carrier without using the lessor's personnel to operate the equipment." The record, however, establishes that the equipment used was not specialized, nor was it used for the specialized work of lifting and setting switches that was set forth in the March 16, 2006 notice. The notice clearly implied that the contracting would be limited to specialized equipment that would be used "to assist Carrier forces with this project." The work in dispute here is not the type of work that was noticed for contracting out. Nor does it appear on its own to fall under any of the exceptions to the Note to Rule 55. Accordingly, the claim shall be sustained.

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

3 See, discussion of Third Division Award 26770 (Vernon 1988) in Third Division Award 40565.

The Carrier contends that because the Claimant was fully employed when the work at issue was done, he is not entitled to any monetary relief. For the reasons set forth previously by the Board in Third Division Award 40563, the Board will follow the numerous prior Awards that support awarding monetary damages to employees who were already working or on leave when the Carrier violated the Agreement. Accordingly, the Claimant is entitled to compensation as claimed, unless (in the words of Arbitrator Marx in Award 1, Public Law Board No. 4768) "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 15th day of December 2010.