Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40794
Docket No. MW-40690
10-3-NRAB-00003-080417

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

(Brotherhood of Maintenance of Way Employes 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 to perform Maintenance of Way and Structures Department work (remodeling and related work) at the Round House in Cicero, Illinois beginning on April 24, 2006, and continuing. [System File C-06-C100-147/10-06-0259 (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 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 violations referred to in Parts (1) and/or (2) above, the Claimants, Water Service Foremen J. McGill and D. Foutch and B&B Carpenters D. Snider, B. Blackmon and R. Steponik, shall now each be paid at their respective straight time rates of pay for an apportioned amount of the hours expended by the outside forces in the performance of the aforesaid work beginning April 24, 2006, and continuing."

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.

In this case, the Organization objected to the Carrier's contracting out renovation work in the locker room at the Roundhouse in Cicero, Illinois. The Carrier sent notification of the proposed contracting to the Organization by letter dated September 21, 2005, in which it indicated its intent to contract similar renovations at the Roundhouse locker room and the Eastbound locker room in Cicero, Illinois, and at the Corwith locker room in Corwith, Illinois. The work entailed removing and replacing existing lockers, painting, removing, and replacing plumbing fixtures, replacing acoustical ceiling tile, electrical work, and installing a water main from the Cicero water supply to the Roundhouse facility. According to the letter, "The contractor possesses the special equipment, such as an off-track crane, and skilled forces necessary for successful and timely completion of this work. The Carrier is not adequately equipped to perform this work, nor do Carrier forces possess the necessary skills or licenses." During the contracting out conference and subsequent proceedings between the parties, the Carrier's position was that Town of Cicero regulations required that it obtain a licensed general contractor to perform the work. The Carrier also objected that the claim was not timely filed and that the work was not subject to Rule 55 because there was a mixed practice regarding renovation work.

According to the Organization, the work is of the type routinely and typically performed by the Carrier's Bridge and Building (B&B) Department forces, and the record includes 70-plus pages of photographs and descriptions of similar work done by B&B employees, much of it in Cicero. The claim, which was filed by letter dated

June 13, 2006 (received by the Carrier on June 19, 2006) was not untimely. Despite the contractor's invoice showing an April 13, 2006, start date, the project did not actually commence until April 24, 2006, because the contractor did not have a flagman, who was needed for the work, until then. Moreover, the Carrier's contention that it needed a licensed contractor to perform the work was rebutted by a memorandum from the Cicero Town Attorneys' Office stating: "The Town of Cicero has no authority to require railroad laborers to be licensed and bonded provided they are doing work on railroad property. We are pre-empted by federal law." Finally, the Carrier's contention that it needed specialized equipment was false: the work was done using ordinary equipment of the sort already owned by the Carrier and routinely operated by its forces.[1]

The record includes evidence submitted to the Organization by the Carrier in support of its mixed-practice argument, a lengthy chart documenting similar work that had been contracted out across the system. The record also includes an e-mail response to the Town Attorneys' Office memorandum by one of the Carrier's Structures Engineers, indicating that a building project still needed to be permitted by the Town, which required licensed professionals:

> "The city may not require railroad laborers to be licensed and bonded. This has nothing to do with our project. They do require the craft trades to be licensed with the city. We do not have to piece meal this project to get part of the work to railroad laborers. We needed a licensed General contractor and licensed craft tradesmen that could get this project permitted. We are not pre-empted for this type of work. That only applies to anything that would effect [sic] interstate commerce (the running of our trains). This remodel and addition of an existing building would not apply."

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[1] The Carrier's letter of notification addressed three separate locker room renovation projects, at the Roundhouse and East Bound Yard Office in Cicero and at the Corwith facility. The Carrier acknowledged that it did not need specialized equipment for the Roundhouse job, only for the Corwith locker renovation. The notice letter specified specialized equipment for purposes of completeness, without separating the three jobs. Accordingly, the Board will not address the specialized equipment argument further, because it does not apply to this claim.

In response to the Organization's position that the work did not start until the contractor's flagman arrived on April 24, 2006, the Carrier pointed out that a flagman is only required for work within 25 feet of track centers, but not for any work performed indoors. The contractor's invoice indicated a start date for the project of April 13, and there was no reason to believe that the work did not in fact start then.

The threshold issue for the Board is whether the complaint was timely filed under Rule 42A, which requires claims to be presented "within sixty (60) days from the date of the occurrence on which the claim or grievance is based." The question is when the project started: there is no dispute that if the project started on April 24, the complaint was timely, and if the project started on April 13, it was not. The original complaint indicated a start date for the project of April 24, 2006. This date was corroborated by statements submitted by one of the Claimants, who tied the April 24 start date to the arrival of the contractor's flagman. However, the hours submitted by the contractor for the project for April 2006 indicate that the first day of work on the "Roundhouse Locker Room Project" was April 13, 2006, when one laborer worked eight hours. No further work was done until April 24, 2006, when that same laborer was joined by two plumbers, and all three men worked eight hours. The work then continued daily from April 24 through April 28, with anywhere from three to five individuals working for the contractor.

The obvious problem is that lone date, April 13, 2006, when a single laborer worked eight hours. Except for that one day, anyone would say that the project obviously started on April 24, 2006, when a crew from the contractor appeared at the Roundhouse and commenced to work on the project on a daily basis thereafter. There is no indication in the record what the one laborer did on April 13, 2006, and whether he was on site at the Roundhouse or performing work in preparation for the project off-site and/or at the contractor's workplace. The unexplained 11-day gap between the first charge and the bulk of the work on the project is odd; typically, once a project starts, the work proceeds relatively quickly thereafter.

Rule 42A requires that claims be presented within 60 days "from the date of the occurrence on which the claim . . . is based." The meaning of "date of the occurrence" may not be as clear as the actual words suggest, however. It is a well-recognized principle in arbitration that a union should not be held to strict timelines for filing a grievance if it did not know or have reason to know about the activity complained of.

There are two reasons for this. One is to discourage employers from trying to hide activities in an effort to seek a procedural advantage over the unions representing their employees. The other is a general disinclination on the part of arbitrators charged with interpreting the parties' agreement to dismiss possibly meritorious claims for relatively minor procedural reasons. In Third Division Award 24440, the Board adopted that general approach in this relationship:

> "The recognized purpose of a negotiated grievance or complaint procedure is to vindicate the rights achieved by the agreement. In the process, unsettling uncertainties about those rights are effectively resolved. Bearing in mind that purpose, we deem it to be sound labor-relations policy that doubts as to the precise boundaries of time limits which shut off access to those procedures should, in general, be resolved against forfeiture of the rights sought to be vindicated."

Applying that holding to this case, the Board finds that the claim was not untimely. If the Organization was unaware of the work done on April 13, 2006, it should not be held to that date for purposes of filing its claim. Even if some work was done on the project on April 13, 2006, it was minimal, and the apparent start of the project, at least the Organization's awareness of it, was on April 24, 2006.

Having decided that the claim was timely filed, the Board has now to address the merits of the case.

The next issue is whether the Note to Rule 55 applies to this case. The Note to Rule 55 only limits contracting out of work "customarily performed" by the Carrier forces defined therein. While the parties may disagree about the exact meaning of "customarily performed," numerous prior Awards have established that the Note to Rule 55 does not apply where there is a "mixed practice" of work being done by both Carrier forces and outside contractors. The Organization submitted evidence that B&B forces have performed a substantial amount of work similar to that done on the Roundhouse project, and clearly they were capable of doing the work involved in the Roundhouse renovation. However, the Carrier also submitted evidence that outside contractors have performed a substantial amount of the same type of work. The Organization criticized the Carrier's evidence as out-of-date and geographically irrelevant, but the Carrier's chart contains at least 26 instances of construction and

renovation work performed by outside contractors in Illinois during the seven years prior to its compilation (i.e., between 2000 and 2007). On the basis of this evidence, the Board finds the Carrier's evidence of a mixed practice persuasive. Accordingly, the Note to Rule 55 does not apply, and the claim must be denied.

The parties should note that even had the Note to Rule 55 applied, the conflict in facts regarding the need for licensing would have compelled a similar result.

The Carrier did not violate the parties' Agreement when it subcontracted the work at issue.

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.