Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40796
Docket No. MW-40693
10-3-NRAB-00003-080478

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 (JEM Restoration Services, Inc.) to perform Maintenance of Way and Structures Department work (repair exterior masonry, roof valley and wall flashing, surrounding pavement and related work) at Hobson Yard Office in Lincoln, Nebraska, beginning on July 5, 2006 and continuing [System File C-06-C100-186/10-06-0330 (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, Claimants R. Larimer, R. Thoms and J. Scherer shall now each be compensated at their respective and applicable rates of pay for all the straight time and overtime hours worked by the

outside forces in the performance of the aforesaid work beginning July 5, 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.

The Organization filed the complaint in this case after the Carrier contracted out certain roofing and masonry work at the Hobson Yard Office in July 2006. Specifically, according to the claim letter, the contractor cleaned the masonry exterior of the building, repaired and replaced mortar or caulking as required, applied wall sealer to the exterior masonry, and made necessary repairs to the roof valley and wall flashing. The Carrier had notified the Organization of its intent to contract the work by letter dated May 26, 2006:

> "As information, the Carrier plans to contract the repairs to the exterior of the Hobson Yard Office facility located in Lincoln, Nebraska. The Carrier is not adequately equipped to perform this work; Carrier forces do not possess the necessary certification and the specialized equipment is not available for lease. The work to be performed by the contractor includes but is not limited to the cleaning of the exterior using Prosoco's Custom Masonry cleaner to remove efflorescence, repair/replace mortar or caulking as required, and apply Tremco Decktite WDS Silane wall sealer to the exterior, and necessary repairs to roof valley and wall flashing. The application of

the Tremco Decktite wall sealer requires certified installers and specialized spray applicator."

The record includes a May 8, 2006, letter from a Product Manager at Tremco Incorporated stating "Tremco will supply a warranty upon completion of a WDS application, if it was applied by a contractor certified by Tremco." A cover facsimile to the letter, from a Tremco Field Advisor in Lincoln, states: "Decktite WDS Silane Sealer must be applied using the special sprayer to achieve the proper material mixture. This sprayer is available to Tremco certified contractors. Certified contractors must apply the product in order to receive a warranty. . . ."

The Organization contends that the work done, cleaning exterior masonry and repairing roofing, is typical B&B forces structural work, so Rule 55 applies. The work could have, and should have been performed by those forces. The product and an applicator are available over the counter at building supply stores. Even if the sealing required specialized equipment, it was only a small part of the job, and the rest of the work should have been assigned to the Carrier's employees. The Carrier violated the parties' Agreement when it failed to do so.

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 has 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 BMWE-represented employees have

performed similar structural work in the past, which brings the Note to Rule 55 into play.

The Note to Rule 55 generally prohibits contracting out work customarily performed by Carrier forces. There are, however, exceptions to that prohibition:

> "By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' forces. However, 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 a supplier are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces." [Emphasis added]

Management is entitled, as part of its right to direct operations, to determine what materials to use for various purposes throughout the enterprise. Here, the Carrier decided that it wanted to use Tremco Decktite as the sealer for the exterior masonry at the Hobson Yard Office. There is absolutely no evidence that management decided to use Tremco Decktite in an effort to take work away from its own forces. The record clearly establishes that Tremco Decktite must be applied by a certified contractor in order for its ten-year warranty to apply. The Organization suggests that the Carrier could have used its own forces to apply the sealant nonetheless, but there is nothing in the parties' Agreement that would require the Carrier to void a product warranty in order to increase the amount of work available to its forces. As a matter of common sense, such an outcome would be undesirable: what would be the point of spending extra money to purchase a state-of-the-art sealant without a warranty?

The "special equipment" exception to the Note to Rule 55 permits contracting of work that requires "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 a supplier." Tremco's Decktite hits all three marks: the Carrier's employees are not trained or certified in proper application of the sealant; proper application requires a special sprayer not owned by the Carrier; and the warranty is available only when the sealant is applied through a certified contractor. To the extent that the Hobson Yard Office work required application of the Tremco Decktite, the Carrier did not violate the parties' Agreement when it contracted it to a certified Tremco Decktite contractor.

The Organization also contends that even if some part of the job required special skills and/or equipment, the Carrier should have assigned its own forces to do the rest of the work on the project. While there are Awards that uphold "piecemealing" of large projects, the Board does not find that the Hobson Yard Office was a project where the Carrier should have been required to carve out bargaining unit work. First, it was a relatively small project compared to many of those undertaken by the Carrier. Second, the amount of work that could have been separated out from the cleaning and sealing[1] of the exterior walls represented only a small part of the job, and neither the Note to Rule 55 nor Appendix Y requires the Carrier to break down an otherwise integrated project into inefficient component parts. The additional work beyond the Tremco Decktite application was incidental to that largest part of the project, and the Carrier did not violate the parties' Agreement when it contracted out the entire job.

For the reasons discussed above, the Board denies the claim.

AWARD

Claim denied.

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[1] Cleaning the exterior prior to applying the Tremco Decktite sealant is included here because the Tremco Decktite product materials from Tremco include specific instructions for "Surface Preparation." Where the manufacturer bases a product's warranty on very particular requirements for application of the product, one would expect that proper preliminary surface preparation would be part of the approved application process.

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.