Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40797
Docket No. MW-40695
10-3-NRAB-00003-080525

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 (Atlantic Track Runway Services) to perform Maintenance of Way and Structures Department work (rail alignment for overhead gantry crane) at the Havelock Wheel Plant in Lincoln, Nebraska, beginning on August 28 and continuing through September 21, 2006 [System File C-07-C100-7/10-07-0011 (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 violation referred to in Parts (1) and or (2) above, Claimants R. Larimer, J. Stewart, R. Thoms, S. Zimbelman, F. Schrum, M. Maloney, R. Wall, T. Nichelson, W. Brhel and J. Scherer shall now each be compensated for one

hundred forty-four (144) 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.

This claim was filed on October 21, 2006, after the Carrier used an outside contractor to perform track alignment work on the overhead gantry crane at the Havelock Wheel Shop in Lincoln, Nebraska, beginning August 28, 2006, and continuing intermittently through September 21, 2006.

The Carrier sent a letter to the Organization dated August 9, 2006, regarding the "Overhead Gantry Crane Repair - Havelock Wheel Plant, Lincoln, Nebraska," in which it announced its plans to contract out track alignment work that it had discovered was necessary:

> "As information, during the process of ordering a new overhead gantry crane for the Wheel Plant in Havelock Yard at Lincoln, Nebraska, it was found that the rails (or runways) were out of alignment by as much as three inches. The Carrier intends to contract out the necessary repairs to bring the rail alignment back to the specification of ¼ inch in twenty feet required by Crane Manufactures Association of America to ensure the safety of the operator and other employees working in the area as soon as possible. The safety of the operator is a concern as the crane could

> derail and drop 25 feet to the ground due to this misalignment. Carrier forces do not have the manpower to complete this work in a timely manner.
>
> The work is anticipated to begin approximately August 25, 2006. However, due to safety concerns, work may begin before this date depending on circumstances.
>
> The contracting of the work here involved is consistent with Carrier policy. . . . Moreover, the Carrier does not have the available forces or equipment to perform this work. . . ."

The Organization telephoned the Carrier on August 11, 2006, to request a contracting conference and followed that request with a letter dated August 14, 2006. However, the requested conference did not take place until September 25, 2006, after the work was completed.

The record includes a statement from one of the Claimants, to the effect that he had performed similar track alignment work in the past, in 1982-83, and setting forth his opinion that "The adjustment on the cranes are [sic] not that much different than relining a through span bridge, which B&B has done numerous times over the years." In addition, the Local Chairman wrote a letter addressing whether laser liners were necessary to perform the work. He stated that while laser liners were not absolutely necessary, they did make the work easier. He further stated that B&B forces had one laser liner and that he personally had rented liners on prior occasions when needed on various B&B projects. The record also includes an e-mail from one of the Carrier's Engineers involved in the project regarding the need to contract out the work:

> "How notice covers contracted work – West 80' of crane way was taken out [of] service, costing BNSF 3 to 5% production per day. This project was considered an emergency do [sic] to production lost, as stated in the request for notice of intent to contract . . . BNSF forces do not have the manpower to complete this work in a timely manner. BNSF forces do not have the skills to align a 650' crane way to CMA guidelines without special training. Emergency, Special Training, and safety for BNSF crane operators are the reasons for contracting."

The Organization contends that the Note to Rule 55 applies 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 was improper because the Carrier has not demonstrated the need for either specialized equipment or a lack of manpower. According to the Organization, although the Carrier characterized the situation as an "emergency," the crane was not taken out of service until the disputed work commenced. Moreover, the Carrier took the time to import a contractor from Texarkana, Arkansas, and train its forces in BNSF Contractor policies before the work could be done, which undercuts the "emergency" nature of the work.

The Carrier contends that the Organization has not established that the disputed work was "customarily performed" by bargaining unit forces, or that BNSF forces are trained to repair overhead cranes in accordance with the standards set by the Crane Manufacturers Association of America (CMAA). In light of this failure of proof, the claim must be dismissed.

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 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."

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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 threshold issue in any contracting case is whether the work in dispute 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 Third Division 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 record here is insufficient to establish that the work performed by the contractor on the overhead gantry crane at the Havelock Wheel Shop was ordinary track work of the sort customarily performed by B&B forces. First, the only evidence in the record of similar work being done by Carrier forces was from a Claimant who recalled doing similar work in 1982-83. If the work were, in fact, work "historically and traditionally" performed by Carrier forces, the Board would expect much more recent evidence of that performance. Second, the record also includes unrebutted evidence from one of the project's Engineers that specialized training was needed to ensure that the work could be done to industry standards, i.e., a ¼" tolerance over 20 feet of crane track. The Board takes this evidence seriously, given the potential for catastrophic failure - that is, the crane's dropping 25 feet to the ground, with the possibility of serious injury or death to both the Operator and any employees in the immediate area - should the track not be properly aligned. All in all, it appears to the Board that alignment of overhead gantry crane track is not work that has been customarily performed by Carrier forces. (At best, there may be a mixed practice of such work being done by Carrier forces and outside contractors.)

If the work in dispute is not work customarily performed by Carrier forces, the Note to Rule 55 does not apply, and the Carrier may contract it out without complying with the Note. Accordingly, the Carrier did not violate the parties' Agreement when it contracted out the work in dispute in this claim. Accordingly, the claim must be 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.