Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40798
Docket No. MW-40696
10-3-NRAB-00003-080526

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 (L. G. Pike Company) to perform Maintenance of Way and Structures Department work (remove/install track and switch panels and related work) on the Valley Subdivision of the Powder River Division on November 6, 8, 21, 22, 30, December 1 and 13, 2006. [System File C-07-C100-58/10-07-0093(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, Claimants T. Anderson, B. Kutschara, J. Ringbauer, R. Andrews, P. Fries, L. Yerton, G. Griffee, B. Ruzicka, H. Schillereff, R. Peetz and H. Sulzbach shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the four hundred and

ninety-six (496) hours worked by the outside forces in the performance of the aforesaid work."

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 by letter dated December 18, 2006, after the Carrier contracted out certain track renewal and switch replacement work on the Valley Sub-Division in November and December 2006. According to the complaint, the contractor removed and installed track and switch panels at various locations on November 6, 8, 21, 22, and 30, and December 1 and 12, 2006. The Organization contends that the Note to Rule 55 applies because the work done by the contractor is work customarily performed by Carrier forces. The Carrier violated the Note to Rule 55 because the work did not fall under any of the exceptions set forth in the Note and because the notice provided by the Carrier was inadequate.

In 2006, the Carrier was engaged in a large expansion project to meet the demand for greater capacity in the Powder River Basin. By letter dated January 3, 2006, it notified the Organization of its intent to contract out certain work associated with double tracking approximately 41 miles of main line track in Nebraska and Wyoming. In the January 3 letter, the Carrier indicated that it would be contracting the "dirt work" associated with the project due to the need for specialized equipment that it did not own and skilled operators for that equipment. At the end of the letter, the Carrier stated "All track and signal work at each location will be performed by BNSF forces." By letter dated July 6, 2006, the Carrier notified the Organization of its intent to contract specialized equipment with operators "to assist Carrier forces with switch renewal at various locations on the Valley and Angora Sub-Divisions." The

work at issue was part of the larger double tracking project. According to the Carrier, it needed to contract out the track work because:

> "The contractor will provide specialized equipment such as side booms, crawler hoe, large front-end loaders, scraper, crane, and dozer to assist with the removal and placement of new #24 and #11 switches. The Carrier does not possess the necessary specialized equipment, nor are its forces skilled in its operation." (Emphasis added)

The Organization requested contracting out conferences following each letter, but was unsuccessful in convincing the Carrier to use its own forces to perform the work. The record does not indicate the nature of the discussions that were held.

According to the claim, the contractor used primarily track hoe excavators on the switch renewal project and, on two dates, front-end loaders, operated by its forces. In addition, contractor employees were also working on the ground, not just operating equipment.

The Carrier responded to the claim by letter dated February 15, 2007, denying the claim: "The Carrier did not have adequate equipment or available employees to complete these projects in a timely manner." By letter dated April 4, 2007, the Organization replied:

> "The Claimants are qualified and capable of performing the work that was done by the contractor's employees. The Carrier has on property the type of machines used by the contractor's employees for this project and the qualified operators to perform this work. It is a fact that this type of work was done with the Carrier's own employees operating the Carrier's own equipment for years before contractors were ever brought in to perform this Maintenance of Way work."

In essence, the Organization challenges the Carrier's cited need for specialized equipment and special skills to operate that equipment for what it characterizes as "routine, non-emergency track work." The Carrier again responded, by letter dated May 29, 2007:

> ". . . [T]his notice was discussed in good faith concerning this large scale project, the lack of equipment and manpower to perform the heavy lifting in these claims. . . . Carrier employees performed the track work, and the equipment only assisted Carrier employees. . . .
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> In fact many of these Claimants were at the location doing this very work."

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. The Organization has the initial burden of establishing that the work at issue is work "customarily performed" by bargaining unit employees. This 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.) The work at issue in this case (switch removal and replacement) is manifestly routine track work, and the Note to Rule 55 pertains.

In general, the Note to Rule 55 prohibits contracting out work customarily performed by Carrier forces, except under certain limited, specified conditions:

> "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."

Thus, there are three separate bases under which the Carrier may contract work otherwise performed by its own forces: (1) special skills, equipment or materials

(2) the Carrier is "not adequately equipped to handle the work" and (3) emergency time requirements.

The Carrier issued two notices in conjunction with the disputed work. The first notice (January 6, 2003) was a broad one stating the Carrier's intent to contract the dirt work associated with the 41-mile double tracking project to expand its capacity out of the Powder River Basin. In that notice, the Carrier explicitly reserved all track work to its own forces. The second notice (July 6, 2006) essentially revised the first, by indicating the Carrier's intent to contract out some of the track work in a small area (relative to the overall size of the project). The Carrier asserted a need for specialized equipment and operators skilled in using that equipment to "assist" its own forces in doing the track work at issue.

"Specialized equipment and skills" is one of the explicit exceptions recognized in the Note to Rule 55 under which the Carrier may properly contract out work normally done by its forces. The Organization, however, objects that the work performed by the contractor was done without any special equipment, nor were any special skills needed: the Carrier owns - and its employees routinely operate - front end loaders and crawler hoes.

The crux of this case is that the reason for contracting out the work given by the Carrier in its notice to the Organization appears not to be the real reason for contracting out the work. The July 6, 2006, notice indicated that the reason for the contracting was "specialized equipment and skills." But the work was done using equipment very similar to, if not the same as, equipment owned by the Carrier and operated by its employees. However, the record contains evidence of a different reason for the Carrier's desire to contract out the track work: in its response to the Organization's complaint, the Carrier indicated that it "did not have adequate equipment or available employees to complete these projects in a timely manner." "Special equipment and skills" and "inadequately equipped" are different exceptions under the Note to Rule 55, and would generate quite different discussions in a conference about alternatives to contracting out unit work.

The purpose of the notice provision is to set the stage for the parties to "make a good faith attempt to reach an understanding concerning said contracting"[1] when they meet to discuss it. That purpose is frustrated if the real reason for the

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

proposed contracting is not set forth in the Carrier's notice to the Organization. If the notice provision is to have any meaning - if it is to fulfill its purpose in initiating good faith discussions aimed at reaching a resolution regarding the proposed subcontracting - the Carrier must disclose in its notice the real reasons for the proposed contracting.

Given the size of the double tracking project, it appears that the Carrier may in fact have had good reason to contract out the work because it was inadequately equipped in terms of both equipment and manpower to perform the work in a timely manner without contracting it out. But that does not change the fact that the notice was fundamentally flawed because it gave the Organization a different reason for contracting out the work. The purpose of giving notice is to encourage the parties to engage in meaningful discussions about, and explore alternatives to, contracting out scope covered work. That cannot occur if the Carrier gives one reason for contracting out - special equipment and skills - when the true reason is something else - inadequate resources to perform the work in the time required. There is no way that the parties can have any meaningful discussions if the Organization is unaware of the real reason for the contracting. The contracting conference established by the Note to Rule 55 is not intended to be merely a pro forma stop en route to the Carrier's doing what it wants.[2] Processes negotiated and agreed to by the parties in their Agreement are important. The Board would make a sham of the conference process established in the Note to Rule 55, and the good faith obligations attendant upon the parties under that process, if it condoned the Carrier's action in sending out a notice giving the wrong reasons for contracting out. Under similar circumstances in other cases, the Board has ruled that improper notice warrants sustaining a claim.[3] (See also other on-property Awards sustaining claims where notice was inadequate or otherwise improper: Award 1, Public Law Board No. 4768 (Marx 1990); Third Division Awards 38010 and 38011 (Zusman 2006). The Board will follow their precedent.

The Carrier contends that because the Claimants were either fully employed or on vacation when the work at issue was done, they are not entitled to any monetary relief. For the reasons set forth previously by the Board in Third Division Award

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[2] Under the Note to Rule 55, the Carrier is permitted to move forward with the contracting if the parties are unable to reach an understanding in conference: ". . . if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith."

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

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. However, the record is not clear that the number of hours claimed by the Organization is correct, and an accounting needs to be undertaken to verify the correct number of hours to be split among the Claimants. Otherwise, the Claimants are 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."

For the reasons discussed above, relating to the inadequacy of notice, the Board partially sustains the claim.

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.