Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40867
Docket No. MW-40694
11-3-NRAB-00003-080503

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 (B&L Contractor Design Inc.) to perform Maintenance of Way and Structures Department work (remove/relocate walls, hang dry wall, install suspended ceiling and floor tile and related work) at the Yard Office in Sterling, Colorado, beginning on August 3, 2006, and continuing [System File C-06-C100-180/10-06-319(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 L. A. Rakes, R. D. Karash, S. C. Martin and L. D. Rakes shall now each be compensated for eight (8) hours at their respective straight time rates of pay for each day the

outside forces performed the aforesaid work beginning August 3, 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.

By letter dated July 6, 2006, the Carrier informed the Organization of its intent to contract out certain improvements at its facility in Sterling, Colorado:

> "As information, the Carrier plans to contract improvements to its facility in Sterling, Colorado, specifically the trainmen's area and the restroom/locker room areas. The work to be performed by the contractor includes but is not limited to rotate shower to face bathroom area; cap water lines; installation of new fixtures as needed; painting; installation of approximately 600 square feet of new tile; demotion of 2 existing walls; construction of 2 new walls (approx. 7' x 12') including sheetrock for CBT and storeroom; install base; replace ceiling tiles as needed; and related carpentry and finishing work; and debris removal. Carrier forces do not possess the requisite Commercial A contractor's license(s) necessary for the performance of this work. The contractor possesses the requisite licensing and skilled workforce necessary for successful completion of this work."

The Organization requested a contracting conference, but the parties were unable to reach an understanding on an alternative to the contracting when they met,

and the work commenced on August 3, 2006. The Organization filed this claim by letter dated August 14, 2006.

The Organization contends that the Carrier violated the Note to Rule 55 of the parties' Agreement when it contracted out the work of remodeling the Yard Office in Sterling because the work done was routine building maintenance work of the sort customarily performed by B&B forces, and none of the exceptions to Rule 55 applied. The Organization also challenged the Carrier's notice and its good faith in conducting the contracting conference. Specifically, the notice referenced work to be done in the Trainmen's area and locker room, and the work that was done included work in the office area as well. The Carrier's licensing defense is not persuasive, i.e., no special requirements were required for the licensing. With a little managerial foresight, one of the Carrier's staff or one of the B&B employees could have applied for the license and there would have been no need to contract the work. Moreover, licensing is not one of the exceptions in the Note to Rule 55 that permit contracting out of work. In essence, the contractor was an agent of the Carrier who hired outside forces to perform the work instead of assigning it to BMWE-represented employees.

The Carrier disputes that it violated the Agreement. The work was a major remodeling job that required specific licenses according to the City of Sterling. The Carrier provided a proper notice that clearly included the work now being claimed. The work at issue is not exclusive to BMWE-represented employees. At best, there is a mixed practice of contracting out remodeling work, and the Note to Rule 55 does not apply. Even if it did, the work required licenses that Carrier forces do not have, nor does the Carrier have an obligation to train or obtain special licenses and certifications for its employees. The Carrier did not act improperly when it contracted the job.

The record developed on the property includes an e-mail from employees of the City of Sterling in response to a query from the Organization about the need for licensing. The e-mail, the body of which is from the City's Code Enforcement Supervisor, states:

> "To work on this type of building requires a Class I Contractors License for the City of Sterling. There is nothing to prevent an individual from your group if they are qualified from applying for and receiving an appropriate license to do this kind of work. After a

> license is in place, then that person can apply for permits as necessary to perform the required work." (Emphasis added)

The record also includes a statement written by one of the Claimants, attesting to the fact that the work that was done by the contractor was the same type of work that he has done many times in more than 33 years with the Carrier, except that the contractor's employees worked without personal protective equipment (PPE). The statement was signed by several of the Claimants.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of bargaining unit work. If the disputed work is work "customarily performed" by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

> "[S]uch 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; 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."

In addition, if the Carrier plans to contract out work on one of these bases, the Note to Rule 55 requires the Carrier to notify the Organization "as far in advance of the date on the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases." The Organization may request a conference to discuss possibilities for avoiding the proposed contracting out, pursuant to the Note to Rule 55 and Appendix Y.

The parties are at odds over whether the disputed work is work "customarily performed" by Carrier forces, whether there is a "mixed practice" of contracting out remodeling work, and whether Rule 55 even applies. Those are important issues, and ordinarily the Board would have to decide them first, but they become immaterial in this case in light of the City of Sterling's licensing requirement.

The record establishes indisputably that the City of Sterling required that a licensed contractor perform the work at issue. The work could not be legally done without a licensed contractor. Moreover, there is no dispute that at the time the Carrier wanted to remodel the Sterling facility, none of the Carrier's employees, either Managers, Supervisors, or B&B forces, had the required Class I Contractor's License. There is no evidence in the record that the work did not require a licensed contractor or that the Carrier was somehow acting in bad faith in using a licensed contractor to perform the work. To the contrary, the record contains evidence confirming the City's requirement that a license was required to do the work. And the Carrier can hardly be guilty of bad faith when it abides by the legal requirements imposed by the City before undertaking the renovation. Indeed, the Carrier would have been in violation of the city licensing ordinance if it had assigned the work to its own unlicensed forces.

The exceptions to Rule 55's constraints on contracting of work include one for "special skills, equipment, or materials" and another for situations where the Company is "not adequately equipped to handle the work." The Organization contends that a licensing requirement does not fall under any of the exceptions, but its position is not persuasive. The Carrier's B&B forces are experienced and the Board has no doubt that they are eminently capable of performing the work that was required. The insurmountable hurdle here has nothing to do with the skills of the Carrier's forces; it is the legal requirement imposed by the City of Sterling that the work be done by a licensed contractor. Given that no one at the Carrier had the requisite license, the Carrier was "not adequately equipped to handle the work" - the meaning of the word "equipped" is not strictly limited to physical equipment, but can encompass other aspects of what is required to do a job. In short, even if the Board concluded that Rule 55 applied to this situation, it would be compelled to find that the project at issue fell within one of the exceptions to Rule 55's limits on contracting and that the Carrier did not violate the Agreement when it hired an outside contractor - who had the required license - to remodel the Yard office facility in Sterling.

The Organization argues that the Carrier should have had someone obtain a license so that there would be no need to have an outside contractor come in to do work that its own forces are capable of doing. The idea is a good one, but there is nothing in the parties' Agreement that requires the Carrier to do that. Hence, there

was no violation of the Agreement when the Carrier failed to have any employee obtain a license. The issue is one that the parties will have to discuss at the bargaining table.

Finally, the Board finds that the Carrier's notice to the Organization of the proposed contracting met the standards set forth in the Note to Rule 55, i.e., it was sent more than 15 days in advance of the proposed contracting, and the parties met in a contracting conference in advance. Unfortunately, the licensing requirement was not something that the parties could negotiate around in terms of looking for alternatives to contracting out. As for the expansion of the project beyond the areas set forth in the Notice, there is no evidence in the record that such work would not also have been subject to the licensing requirement. Moreover, once the contractor had been called in because of the licensing requirement, the Carrier was not required to piecemeal the job. Accordingly, the Board finds that under the special circumstances of this case, the Carrier's failure to notice the entire scope of the project did not violate the notice provisions of the Note to Rule 55.

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 7th day of February 2011.