Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41161
Docket No. MW-40284
11-3-NRAB-00003-080045

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 (Davidson Plumbing and Welding) to perform Maintenance of Way and Structures Department work (install fall protection) in the Main Car Shop at Havelock, Nebraska on October 26, 27, 28 and November 5, 2004, instead of B&B Foreman R. A. Larimer, B&B 1st Class Mechanic/Carpenters J. N. Stewart and R. L. Thoms [System File C-05-C100-40/10-05-0072(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 R. A. Larimer, J. N. Stewart and R. L. Thoms shall now each be compensated for thirty-two (32) hours

at their respective straight time rates of pay and for two (2) hours at their respective time and one-half 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.

The Organization filed the claim in this case by letter dated December 17, 2004, to protest the use of an outside contractor to install a fall protection system (designed to safeguard employees working at considerable heights above the ground) at the Havelock, Nebraska, Car Shop in late Fall 2004. By letter dated April 19, 2004, the Carrier provided the Organization with notice of its intent to contract out the installation of fall protection systems at the Havelock Car Shop and at another facility in Wyoming. According to the Carrier, OSHA safety standards required contracting out the work:

> "The Carrier's Mechanical Department is responsible for the safe operation of the, locomotive and car repair and servicing areas across the system. Over the past several years it has been installing new and up-grading existing fall protection systems at various locations. . . .
>
> The Carrier anticipates that it will contract for the installation of the Latchway® Mansafe® system, which is a state-of-the-art, registered and patented system that can be installed only by authorized Latchway® distributors. This work will require special skills not

possessed by the Carrier's employees, and use material only available when installed by an authorized supplier.

The Carrier, in order to comply with recent and up coming changes to the OSHA fall protection and safety standards for the construction industry. [sic] The OSHA requirements are outlined in CFR 29 1915.159 and 1926 subpart M appendix C, and stipulate design and installation must be by a qualified person 'one with a recognized degree and extensive experience in design and installation.' This contracting and its associated work are consistent with Carrier policy and the historical practice of contracting out such work where compliance with changing Federal Regulation is required. Notwithstanding this, even if Carrier forces had performed similar work in the past, in this case the Carrier does not have the available equipment and qualified manpower to perform this work, or the proper licenses to install the Mansafe® system."

The Organization requested a conference on the proposed contracting. Discussions were held, but the parties were unable to reach an understanding. According to the Organization, during the conference, it requested that the Carrier consider providing whatever training would be necessary for B&B forces to perform the work, and then waited for the Carrier to continue the discussions. The Carrier understood the conference to be over and proceeded to contract the work.

Subsequently, the Carrier hired Davidson Plumbing and Welding to install the system. The Organization contends that on October 26, 27, 28 and November 5, 2004, three Davidson employees performed typical B&B concrete and steel beam construction work (forming and pouring concrete piers and pads and related work) using common ordinary equipment, working eight hours per day for the four days, and two overtime hours on one day. The record includes a statement from one of the Claimants that B&B crews had previously installed fall protection systems manufactured by Surety at the Havelock Car Shops in 1989-1990, 1991-1992, and 1995-1996.

The record also includes an e-mail from the Carrier's Manager of Safety-Mechanical, stating that "the OSHA requirement is that fall protection systems be designed by a 'qualified person,'" and setting forth sections of the OSHA

regulations found at CFR §1926.502 and §1926.450. Specifically, CFR §1926.502(d) states: "Horizontal lifelines shall be designed, installed, and used, under the supervision of a qualified person, as part of a complete personal fall arrest system. . . ." A letter to the Carrier from the manufacturer, Hy-Safe Technology, is also in the record. It states:

> "It is our policy, per contract with BNSF that we have a competent and certified technician on site at all times during the installation phase. In the case of job #HSMT2828 (BNSF Havelock), Dan Schultz was in direct supervision of all sub-contractors while they were on site."

Finally, the record includes a letter to the General Chairman from the General Director of Labor Relations that contains "a partial system-wide listing of locations where the Carrier has previously contracted out this work." The associated table lists more than 30 instances between 1999 and 2003 on which the Carrier had contracted out fall protection system work.

The Organization contends that the work at issue is typical Maintenance of Way work. B&B forces have done this work in the past and it should not have been contracted out. The Carrier failed to provide adequate notice and, in particular, failed to bargain in good faith during the conference: at the conclusion of the conference call, the Organization understood that the Carrier would not move forward with any contracting until such time as the parties resumed and concluded their negotiations. The Carrier failed to make any real attempt to assign its employees to perform the work. The Organization was led to believe that the Carrier was engaging in good faith negotiations, but that proved not to be the case. The work is typical B&B work. The Carrier failed to justify its decision to contract out the work under any of the criteria called for in the Note to Rule 55. The Carrier states that this system can only be installed by an authorized supplier, but provided no documentation to support that position. There is no evidence that the contractor that installed this system was authorized by the manufacturer to do so. In fact, it appears that the sub-contractors hired by the Carrier to perform the work were not certified to perform it, inasmuch as a Hy-Safe Technician had to supervise them. The exact same work should have been accomplished with Carrier forces performing the work and being supervised by the certified Technician. It further appears from the Hy-Safe letter that it has a standing contract with BNSF to

perform this work. Any future notices to the Organization will only be window dressing. The Carrier's defenses were without merit, and the Claimants are entitled to the monetary remedy requested. This is not a case where the Organization is asking the Carrier to piecemeal a project. The Carrier already piecemealed the job when it hired a certified Technician to supervise the installation of the fall protection by a non-certified outside contractor.

According to the Carrier, it provided proper notice to the Organization, in which it explained that the fall protection system would be installed by contractors properly licensed by the manufacturer and who had the training necessary to meet OSHA requirements. In its handling of the claim, the Carrier provided documentation identifying the specific OSHA requirements for installation of a fall protection system such as that in dispute, as well as documentation from the manufacturer stating that it was necessary to have a certified Technician in charge of the installation. The Carrier has the right to contract out installation of a fall protection system that the manufacturer requires be installed by a licensed Technician and which requires OSHA training. Moreover, the Organization has not proven that the work in dispute has been performed exclusively by Carrier forces system-wide. The Carrier contracted out this work more than 35 times since 1999. Finally, the Organization has not proven that any damages are payable to the Claimants.

The Board carefully reviewed the Organization's arguments regarding the notice provided by the Carrier, especially its contention that the Carrier acted in bad faith. The record is simply not sufficient to conclude that the Carrier acted in bad faith - the parties' different perceptions about whether they would engage in further negotiations may have been due to a simple misunderstanding.

The Board also reviewed the Organization's contention that the Carrier violated the parties' Agreement when it used outside forces to install the fall protection system and has concluded that the claim must be denied.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out 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. That conclusion may not be the end of the analysis, however. In some cases, Carrier employees may have customarily performed certain work, but outside forces may also have performed the same work on a regular basis. This is commonly referred to as a "mixed practice." Persuasive prior Awards have held that in instances of a "mixed practice," the Organization has not met its burden of proof in establishing that the work at issue falls under the Note to Rule 55. (See, e.g., Third Division Awards 31276 and 33938 as well as Public Law Board No. 2206, Award 8.) The record evidence establishes that when this claim was filed in late 2004, outside contractors had been installing fall protection systems on a regular basis since 1999, particularly between 2001 and 2003. There is evidence that B&B forces installed fall protection systems in the past, but by 2004, the practice regarding installation was mixed. On that basis, the Board concludes that the Organization failed to meet its threshold burden of establishing the applicability of the Note to Rule 55, and the claim must be denied.

The Board also notes that OSHA regulations set certain requirements for the installation of fall protection systems like the one in dispute here. Chief among them is that installation must be supervised by a "qualified person," which is further defined as "one who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his/her ability to solve or resolve problems related to the subject matter, the work, or the project." The record does not establish that any of the Carrier's employees is a "qualified person" as that term is defined by OSHA relative to the installation of horizontal lifelines and fall protection systems. Moreover, the manufacturer of the system selected by the Carrier for purchase and installation, Hy-Safe Technology, requires a "certified technician on site at all times during the installation phase." There is no evidence that any Carrier employees are certified by

Hy-Safe. The Organization suggests that B&B employees should have performed the work under the certified Technician, in lieu of the subcontractors allegedly hired by the Carrier. But the letter from the CEO of Hy-Safe that refers to subcontractors does not indicate whether they were hired by the Carrier or by Hy-Safe. Without that information, the Board has no factual basis on which to conclude that the Carrier hired the subcontractors. Moreover, in issues of technical safety, an employer must be allowed reasonable discretion in making judgments about how new protection should be installed, especially where mandatory federal, state or local regulations are involved. Thus, it appears likely that even if the Note to Rule 55 applied, the contracting out at issue would be justified under the exception for "special skills," and the end result would be the same.

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 21st day of November 2011.