Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41166
Docket No. MW-40397
11-3-NRAB-00003-080197

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(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 to perform Maintenance of Way and Structures work (operate equipment to clean and remove dirt and ballast between ties) on the yard tracks at 23rd St. Yards in Denver, Colorado beginning on January 23, 2006 and continuing through February 9, 2006 [System File C-06-C100-93/10-06-0148(MW) BNR].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper notice of its intent to contract out 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 violation referred to in Parts (1) and/or (2) above, Claimants B. Smyth, C. Subia, J. Marintzer, F. Lopez and D. Gonzales shall now each be compensated for one hundred twelve (112) 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.

By letter dated December 19, 2005, the Carrier gave the Organization notice of its intention to "continue the ongoing program of contracting the use of yard cleaners and vacuum trucks on the BNSF system in 2006." The notice described the work to be done system-wide in general terms. With respect to vacuum trucks, the letter stated "Two vacuum trucks will be used this year. Each vacuum truck will have one contract technician and one contract operator/driver." The letter further stated, "We will have one vacuum truck working 150 days and one vacuum truck working 90 days. We plan to use these yard cleaners and vacuum trucks over the entire Burlington Northern Santa Fe system." The letter noted that the schedule had not yet been developed. By letter dated January 16, 2006, the Carrier supplemented the December 19, 2005, notice with a "tentative" vacuum truck schedule for 2006, indicating the anticipated dates and locations where the contracted forces would be working. The letter clearly stated "Obviously, the schedules are subject to change as the work season progresses."

According to the claim, on January 23, 2006, a Foreman, a Truck Driver and three Laborers from an outside contractor "showed up on the property" at the23rd Street Yards in Denver, Colorado, and vacuumed out between the ties on the yard tracks. The contractor's employees worked eight hours per day January 23 through 27, 30 and 31, and February 3, and 6 through 9. The Organization filed this claim by letter dated February 10, 2006. The Carrier denied the claim on the substantive basis that "the Carrier does not have adequate equipment and using outside sources for this work is consistent with our past practice." The Carrier also contested the Organization's claimed dates and hours of work by the contractor. The Organization's appeal, dated May 16, 2006, noted that the contractor had continued to

work until March 3, 2006, for a total of 240 hours of work for each of the contractor's employees. In its July 10, 2006, response to the Organization's appeal, the Carrier noted that, in addition to its having already provided notice of the contracting out by letter dated December 19, 2005, the material that was vacuumed was environmental waste, which "is not customarily or exclusively BMWE work."

Simultaneous with the processing of this claim, by letter dated March 29, 2006, the Organization contacted the Carrier about the larger issue of contracting out for vacuum trucks throughout the system. In that letter, it provided information on multiple locations, including the Denver area, where vacuum trucks could be leased or purchased without operators being required from an entity named Ditch Witch. The Carrier responded by letter dated April 6, 2006, indicating that it had contacted the local Ditch Witch in the Denver area and that its vacuum trucks were not "hy-rail equipped," which is necessary for accessing track areas where cleanup takes place. The Organization's May 24, 2006, reply suggested that the Ditch Witch vacuum systems could be mounted on existing BNSF hy-rail trucks. The Carrier closed the conversation when it declined further to consider the Organization's suggestions in a letter dated June 13, 2006.

The parties held a claims conference on May 16, 2007, in which they exchanged information and documentation. According to photographs submitted by the Organization, the truck used by the contractor was not a hy-rail truck. Also, in relation to a dispute about the number of contractor employees who were working, the Organization submitted a statement from two employees who were present, confirming that there were five contractor employees in total: three men working the vacuum, picks, and water spray, a Truck Driver, and a Foreman. Attached to the Carrier's Submission was a soil sample report from Evergreen Analytical, Inc., of Wheatridge, Colorado, that was prepared on July 12, 2005, for "Total Extractable Hydrocarbons: Diesel Fuel (No. 2)" located at the "Soil Stockpile 711 W 31st Ave." However, there is no indication in the record that this information was shared with the Organization during the handling of the dispute on the property.

According to the Organization, track cleaning is routine track maintenance and for that reason, this claim falls under the Note to Rule 55. This is a no-notice case and should be sustained on that basis. The Carrier failed to provide proper advance notice in several respects. First, neither the December 19, 2005, nor the January 16, 2006, letters names Denver, Colorado, as a location where contractor vacuum trucks would be used. Furthermore, the December 2005 notice indicated that only two contractor

employees would be used, not five. Finally, the Carrier's statement in the December letter that it had historically contracted out the work was untrue. BMWE-represented employees have operated vacuum trucks to clean tracks in the past, and the Carrier provided no good reason why the work needs to be contracted out. Because of the Carrier's failure to provide advance notice, the Organization was deprived of any meaningful opportunity to engage in good-faith discussions with the Carrier for the purpose of reaching an understanding relative to the Carrier's desire to contract out the work at issue. As for the work that was done, the Claimants were qualified to do it and were available to perform all routine track maintenance. The Carrier could have leased the necessary equipment, which was available locally. In addition, the Carrier's belated "environmental" defense, first raised in July 2006, must fail. There is no showing that the material removed by the contractors was in fact environmental waste, nor did the notice give that as a reason for contracting out the work.

This claim must be denied, according to the Carrier. The advance notice was proper and timely, and specifically reserved to the Carrier the right to use contractors anywhere throughout the entire system. The Note to Rule 55 does not apply, because this type of cleanup work has been subject to a "mixed practice." The material that was cleaned up was environmental waste, which is not bargaining unit work, nor do the Carrier's forces have the Hazardous Operations training required by OSHA to perform the work. The Carrier had no choice but to contract out the work. If the Note to Rule 55 applies, the Carrier does not own the vacuum trucks that are needed to clean the tracks properly, and it is entitled to contract out the work under the "specialized equipment" exception to the Note to Rule 55. Finally, the named Claimants were either fully employed or otherwise unavailable (on vacation, sick leave, etc.) to perform the work, and giving them a monetary remedy would be an unjust windfall.

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. 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. . ." are in play. Moreover, if the work is covered by the Note to Rule 55, the Carrier is obligated to

provide advance notice of its intent to contract out what would otherwise be bargaining unit work.

The threshold issue in any contracting case is whether the Note to Rule 55 applies. Track cleaning is routine track maintenance work, customarily and historically performed by BMWE-represented employees,[1] and the Organization has established a prima facie case that this claim is subject to the Note to Rule 55 and its notice provisions.

The Carrier contends the Note to Rule 55 does not apply, because the material cleaned up was environmental waste, which has been recognized as work not performed by BMWE-represented employees. The Carrier's position is unpersuasive, for several reasons. First, the Carrier's notice nowhere referenced environmental waste as a reason for contracting out the work at issue. The reason cited by the Carrier in its initial response to the claim was that the Carrier needed to contract out the work because it does not have adequate equipment to perform the work. That is an entirely different defense. In addition, there is no evidence in the record of the handling of this dispute on the property to establish that an analysis of a soil sample taken from the location involved here indicated that excessive contamination was present.

The Carrier contends that its two notices to the Organization, on December 19, 2005, and January 16, 2006, were adequate. After reviewing the record in its entirety, the Board has concluded that the Carrier did not provide adequate advance notice of its intent to contract out, as required by the Note to Rule 55, and that this claim must be sustained as a no-notice case.

The most obvious flaw in the Carrier's notices was that they nowhere mentioned Denver, Colorado, as a location where it intended to use the contracted vacuum trucks. As the Board held in Third Division Award 40798, "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." In Award 40798, the Carrier stated that "special equipment and skills" required contracting

[1] Numerous Board awards have adopted the "historical and traditional" definition of "customarily" in preference to the "exclusive throughout the system" definition put forth by the Carrier, and have put forth their reasoning in detail. This Board follows the "historical and traditional" definition, for the same reasons set forth in said prior Awards. Accordingly, this Award is not going to reprise the reasoning yet another time.

out the work, when in fact the real reason was "inadequately equipped." The Board in that case held:

> "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. 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."

The Board's holding in Award 40798 is not limited to the reasons set forth in a notice for contracting out the work. In order for the parties to have the meaningful discussions envisioned by the procedures set forth in the Note to Rule 55, a notice must include enough information about the proposed contracting for the Organization to determine if it wants to protest. There is a reason why "who, what, when, where, how and why" is taught to high school English students as a checklist for writing non-fiction – the list covers all the important information in just about any situation. In this case, the "where" given in the Carrier's 2006 schedule did not include Denver. The Carrier cannot simply say "we intend to use these vacuum trucks throughout the system." The Organization is entitled to more specific information on how extensive the contracting is going to be, so that it can make informed decisions about whether to protest and what alternatives it might present to the Carrier during a contracting conference. It appears here that the Carrier had contracted out vacuum truck work at other locations in the past. The record also includes correspondence dated September 20, 2001, from the Organization to the Carrier, regarding contracting for the use of a vacuum truck on the Colorado Division. In its letter, the Organization agreed to the proposed contracting under certain conditions. The record does not indicate whether the parties actually memorialized their understanding. If they did, the 2006 schedule needed to be discussed in the context of any prior understanding. If not, and the track cleaning had not been subcontracted before, the Organization was entitled to notice that the Carrier intended to introduce it to the area. The failure to give the Organization

effective notice of where the proposed contracting would occur is a fundamental flaw that renders the notice ineffective.

In addition, the December 19, 2005 notice indicated that two contractor employees, "one contract technician" and "one contract operator/driver," would accompany and operate the vacuum truck. In this case, five contractor employees – a Foreman, a Truck Driver, and three Laborers – accompanied the truck and did the work. "What" and "where" are important components to a notice, but so is "who": the Organization is entitled to a reasonable estimate regarding who is going to perform what work – what contractor employees will do and how many there will be – in order to evaluate the Carrier's proposal. In this case, the Carrier had indicated that there would be two contractor employees. It is not surprising that the Organization took exception when five showed up. Whether the notice was inadequate or the Carrier failed to abide by the notice, either is a basis for sustaining the claim.

The Board wants to take note of another on-property Award, Third Division Award 40791, which addressed the same issue of contracting out vacuum trucks for track cleaning but reached a different outcome. The facts of this case distinguish it from the earlier one, and it is important for the parties to understand why. In Award 40791, the Carrier's notice of proposed contracting out was adequate because it included the location, the approximate date of the contracting out, and the amount of anticipated work the contractor would perform. The claim in Award 40791 was denied because the Carrier successfully established that there had been a "mixed practice" of contracting out, at least at that location. The Carrier did not argue mixed practice in this case or present any evidence of such a practice. Accordingly, the Board did not consider that argument in the present case.

The Carrier contends that the Claimants are not entitled to any monetary remedy because they were fully employed, on vacation, on sick leave, or otherwise not available to perform the work done by the contractor. For reasons set forth previously the Board will follow the numerous prior Awards that support awarding monetary damages to employees who were already working or on some sort of leave when the Carrier violated the Agreement. However, the parties are in dispute regarding the number of hours claimed by the Organization. An accounting needs to be undertaken to verify the correct number of hours to be split among the Claimants by way of compensation, and the Board remands the matter to the parties to perform a joint check of the pertinent records to make such determination.

For the reasons discussed above, relating to the inadequacy of notice, the Board sustains the claim in accordance with the Findings.

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 21st day of November 2011.