Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41167
Docket No. MW-40398
11-3-NRAB-00003-080198

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 to perform Maintenance of Way and Structures work (remove ballast material left by undercutter gang under a bridge) at Mile Post 63.2 near Nacco, Wyoming on January 30, 31 and February 1, 2006 [System File C-06-C100-95/10-06-0150(MW) BNR].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an 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 violation referred to in Parts (1) and/or (2) above, Claimants C. Lynn and M. DeRue shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and for six (6) hours at their respective time and one-half rates of pay and Claimant B. Hirchert shall be compensated for sixteen (16) hours at his

respective straight time rate of pay and for four (4) hours at his respective time and one-half rate 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.

On January 30 and 31 and February 1, 2006, GMHR, a specialized contractor based in North Dakota, cleaned up ballast material that was left by an undercutter gang under a bridge at Mile Post 63.2 near Nacco, Wyoming. According to the Organization, to complete the work GMHR's employees used a crawler hoe, front end loader and a dump truck, all equipment that is owned by the Carrier and operated by its employees. By letter dated March 9, 2006, the Organization filed the claim, contending that (1) the work done by GMHR was routine track maintenance work (2) the Carrier should have given the Organization notice of its intention to contract out the work (3) the work should not have been contracted out and (4) the Carrier violated the Note to Rule 55 when it did so. The Organization seeks compensation for the three Claimants for the hours worked by the contractor's employees. The Carrier responded that it had been required by the Wyoming Department of Environmental Quality to clean up the material, which was located in a creek channel. According to the Carrier, removal of environmental waste "is subject to special permits, and is not work performed by BMWE employees." For that reason, the work is not covered by the Note to Rule 55 regarding contracting out, and it did not need to give notice under that provision of the parties' Agreement.

The record developed on the property includes various correspondence between the Wyoming Department of Environmental Quality (WDEQ), the Carrier's Manager of Environmental Operations, and local Environmental Operations employees. The correspondence establishes that WDEQ contacted the Carrier about the issue of ballast and other debris underneath the Antelope Creek Bridge on or about January 17, 2006. It appears that normal operation of the undercutter on the bridge caused waste material to drop incidentally from the track bed down into the creek and surrounding areas below. The initial e-mail from the Carrier's Manager of Environmental Operations to local personnel, dated January 17, 2006, raised concerns about the scope of the cleanup that the Carrier would be required to accomplish, particularly in relation to "coal fines:"

> ". . . [A]s I indicated to you on the phone, please do not attempt to clean up any of this area until we have had a chance to evaluate this further. We need to find out if the state wants us to clean up the coal fines along with the ballast. In addition, there could be possible permitting and other environmental issues because of the creek. . . . Cleaning up the ballast would be relatively straightforward from what I can see in the photos; however, removing the coal fines as well would definitely complicate the situation. Basically, I want to make sure that we fully understand what the WDEQ requirements and expectations are in this matter."

A follow-up e-mail, dated January 24, 2006, discussed the cleanup requirements in more detail:

> ". . . WDEQ is considering this a violation of the Corps 404 permit requirements regarding "placement of fill" in wetlands or waterways. WDEQ expects us to have this area cleaned up by February 8. They also intend to send an inspector to the site on that date to ensure that we have completed the cleanup work.
>
> Care must be taken during the cleanup process. Both WDEQ and Corps [the Army Corps of Engineers] want us to only remove material from the creek channel, including below the high water mark. Therefore, the scope of work would include scraping and removing the

> material and no excavating. They do not want us to alter the channel in any way. Basically, they want us to restore the channel to its original condition. . . .
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> According to my conversations with WDEQ, they do not expect us to cleanup coal fines in the surrounding area. However, I would think that some would need to be removed to restore the channel as they have requested. WDEQ is focused on us cleaning and removing the ballast that has fallen into the channel from the bridge. . . . If you wish, I could probably make arrangements to have an environmental consultant present to provide oversight during the cleanup. . . .
>
> WDEQ also wants us to contact the Antelope Coal Company prior to the cleanup. . . . The mine is concerned about possible damage or other adverse impacts to their in-stream monitoring station and equipment. I believe the mine may want to have a person there during the cleanup. Therefore, please schedule the work with them. . . ."

The e-mail goes on, to discuss possible reuse of the ballast removed during the cleanup, depending on its condition. It also references the fact that there may be other bridge crossings with the same problem, and the need for cleanup in those areas as necessary.

According to a March 23, 2006, e-mail from the Assistant Roadmaster, "the contractor was called in to deal with environmental issues brought to the Carrier's attention by the State of Wyoming. . . . The contractor did load the material that was in the creek bed area only, to eliminate the environmental impact from having a waste pile in the creek bed."

In July 2007, a representative of the Organization contacted WDEQ about the incident, inquiring whether there were any special licensing or permits required to perform the work or whether it might have been done by BNSF employees following WDEQ guidelines. The same WDEQ Environmental Scientist that had originally contacted the Carrier about the waste pile responded that the State had not required any permits or work requirements to complete the ballast removal work. He attached a memorandum affirming that WDEQ had considered "the deposition of this material

in the channel" to be a "direct violation of Section 15, Chapter 1 of the Wyoming Water Quality Rules & Regulations concerning settleable solids." The Memorandum continues: "WDEQ had no requirements that BNSF Railroad obtain a permit from the State of Wyoming for removing the ballast material. The WDEQ did request that BNSF minimize the channel disturbance so as not to cause any alteration to the channel course and bed gradient. No requests were made by WDEQ to BNSF regarding the need to follow any guidelines to complete the removal work." The Memorandum concludes with a reference to the Army Corps of Engineers and WDEQ's recommendation that BNSF consult with it regarding possible permits it might require. There is no indication in the record that the Corps of Engineers required any special permits. Nor did the Memorandum speculate as to whether BNSF employees could have cleaned up the ballast.

The Organization contends that removing ballast material left by an undercutter gang is routine, fundamental track maintenance work that has "customarily, historically, and traditionally" been performed by BMWE-represented employees. As such, it is covered by the Note to Rule 55 and its notice requirements. There is no dispute that the Carrier failed to provide notice in this case and the claim should be sustained on that basis alone. Moreover, assigning work of this character to anyone other than the appropriate employees under the parties' Agreement would defeat the intent and purpose of the Agreement. The Carrier's "environmental cleanup" defense is definitively rebutted by the Memorandum from WDEQ, which indicated that no special permits or work requirements were requested of BNSF to remove the ballast. The claim should be sustained and the Claimants awarded monetary compensation.

The Carrier contends that the Note to Rule 55 does not apply to environmental waste removal, which is what is at issue in this case. The on-property record establishes that, and the Memorandum relied upon by the Organization does not indicate that the Carrier was not required to obtain a special permit, only that the author was not aware that BNSF was required to obtain any special permits from the Army Corps of Engineers. The Organization cannot prove that BNSF employees exclusively perform such removal, and its attempt to bring the work in question under the Scope Rule of the parties' Agreement is without merit. Environmental remediation work is not normally railroad workers' work, nor is there any evidence that the Claimants were trained or experienced in such work. Moreover, one of the e-

mails from the Carrier's Manager of Environmental Operations stated "this will be the first time the WDEQ has required us to perform this type of work." The work cannot have been exclusively reserved to members of the bargaining unit if it had never been done before. As a result, the Note to Rule 55 does not apply to the work in question. No notice was required, and the Carrier was free to engage an outside contractor to perform the environmental remediation. The claim should be denied in its entirety.

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. . . ." Environmental cleanup work has frequently been performed by outside contractors who have special training and qualifications.

The work at issue in this case arose as a result of the Wyoming Department of Environmental Quality's finding that the Carrier was in violation of state water quality rules and regulations regarding dumping or depositing material into state waterways, as well as similar federal regulations. WDEQ raised the issue with the Carrier's Manager of Environmental Operations and the cleanup was handled through that office. Correspondence in the record establishes that the problem was not just a matter of bringing in a crawler hoe and dump truck to cart the ballast away. The problem was more complex. There were initial concerns about environmental contaminants and the extent to which the Carrier might be required to clean up "coal fines" as well as the ballast. The Army Corps of Engineers became involved, adding another layer of regulation to be complied with. WDEQ asked the Carrier to coordinate with a local coal company, which had concerns about the impact of any cleanup on its environmental monitoring equipment. The Carrier was required not simply to clean up the waste, but to restore the creek bed to its original state, without any disturbance above the high water mark or to the banks on either side. Finally, there were concerns that this incident might be the first of many, which led in turn to concerns about how to address the problem on a larger scale.

In general, prior Awards have recognized that environmental cleanup is not work customarily and traditionally performed by the Carrier's employees and have held that it is not covered by the Note to Rule 55. The Organization contends that the work in dispute here was not truly "environmental remediation" because no special permits or licenses were required. Considering the record properly before it, the Board disagrees. It is true that there is no evidence in the record of any special permits or licenses that were required. But they are not the sole measure of what may be necessary to comply with state and federal environmental regulations. This is not a case involving, for example, a toxic chemical spill or other obvious and serious environmental contaminants. In conducting the cleanup of the spilled ballast, however, the Carrier nonetheless had to meet state and federal environmental standards for completing the work, specifically in restoring the creek bed to its original condition. Coordinating with the local coal company to ensure that its environmental monitoring equipment was not harmed added another layer of complexity. These specific requirements transformed what was otherwise routine track work into something requiring more specialized skill and expertise in terms of environmental sensitivity. There is no evidence that bargaining unit employees have any training in the environmental restoration that was necessary in this case, or that they have performed such work in the past.

In the ordinary course of things, cleaning up spilled ballast is, as the Organization contends, "routine, fundamental" track work. But cleaning up spilled ballast in a protected waterway pursuant to state and local environmental water quality regulations is altogether another matter. It is not routine track work, and it does not meet the definition of work "customarily performed" by BMWE-represented employees. Because it does not meet that definition, it is not covered by the Note to Rule 55. The work in dispute here was undertaken pursuant to state and federal environmental regulations and had to be completed in a manner that complied with those regulations. As a result, it was not routine track work of the type customarily performed by BMWE-represented employees, and it was not subject to the Note to Rule 55. Therefore, the Carrier was not obligated to give notice, and it did not violate the Agreement when it contracted out the work.

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.