Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41223
Docket No. MW-40357
11-3-NRAB-00003-080092

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 (Pavers, Inc.) to perform Maintenance of Way and Structures Department work (haul ties and ballast from stockpiles, haul/unload track and switch panels and related work) at locations in Lincoln, Cullom, Oreapolis, Havelock and Carling, Nebraska on February 15, 24, March 1 and 2, 2006 [System File C-06-C100-108/10-06-0170(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 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, Claimant R. Hetherington shall now be compensated for seventeen (17) hours at his respective straight time rate of pay and one (1) hour at his respective time and one-half rate of pay,

Claimants D. Ficke, S. Conradt and M. Portenier 'shall now each be compensated for twelve (12) hours and twenty (20) minutes at their respective straight time rates of pay and for one and one-half (1.5) hours at their respective time and one-half rates of pay and Claimants R. Ramos, L. Johns, R. Stoner and D. Klaus shall now each be compensated for twelve (12) 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 this claim by letter dated March 23, 2006, alleging a violation of the Note to Rule 55. Specifically, the Organization claimed that the Carrier had improperly contracted out routine track and maintenance work without proper notice:

". . . the Carrier contracted with Pavers Inc. . . . to perform various jobs using their Crawler Back-hoe and operator and their semi trucks and drivers and dump trucks and drivers. On February 15, 2006, the contractor used 1 of his semi trucks and operator to haul track ties from the stock pile at Lincoln Ne. and hauled them to Cullom Ne. to be used there. The contractor worked 8 hours hauling track ties on this date.

> Also on February 15, 2006, the Carrier contracted with Pavers Inc. to use their crawler backhoe and operator and 2 dump trucks and operators to assist the Lincoln Hump section and DMG working on the East end of the Departure 1 Lead by the Rip-Track building with the removal of existing track and replacement with track panels. The contractors were used to remove and haul off fouled ballast and to haul in new ballast from the ballast stock pile at Old 14. The contractors worked 8 straight and 1 overtime hours each performing this work. . . .
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> On February 24, 2006 the Carrier again contracted with Pavers Inc. to use 3 of their semi trucks and 4 of their dump trucks to haul ballast from the stock pile at old 14 in the Lincoln terminal to Oreapolis Ne. . . .
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> On March 1, 2006, the Carrier again contracted with Pavers Inc. to use one of their crawler back hoes and 1 of their semi lowboys to unload and haul new switch panels to be used at Havelock Ne. for the hand throw x-overs there. . . .
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> On March 2, 2006 the Carrier again contracted with Pavers Inc. to use their crawler back hoe and operator to assist the Lincoln Lower Yard Section in the unloading of track panels at Carling."

The Organization alleged that there was no notice at all of the proposed contracting, and that none of the work done by the contractor fell within any of the exceptions in the Note to Rule 55 that would permit the work to be performed by someone other than Carrier forces.

In its initial response, dated May 8, 2006, the Carrier stated:

> "Most of the work claimed is a continuation of the Lincoln Yard Improvement (including Hobson Yard). Letters of Intent were issued March 22 and December 14, 2005. . . . The Carrier does not have adequate equipment to complete a project of this size, or

> available employees to minimize the time frame in high traffic areas. . . . A Letter of Intent to contract work related to new switches on the Creston Subdivision was issued December 14, 2005. . . . This notice included equipment to load, haul, and unload various track material related to the switch installation. . . ."

The March 22, 2005, Letter of Intent outlined ambitious and extensive plans to improve the Lincoln Yard, taking place in several phases over an extended period of time (more than a year). For all six phases, the Carrier indicated that BNSF forces would do the track and signal work, while the "dirt work and other related work" would be performed by the contractor. The December 14, 2005, notice referenced by the Carrier informed the Organization of the Carrier's intent to contract out work associated with installing three new turnouts in the Hobson Yard on the Creston Sub-Division. According to the letter, the contractor would "assist Carrier forces with all aspects of this project including but not limited to the removal and haul off of fouled ballast, haul, unload new ballast to site and necessary handling of track material."

The record also includes a Letter of Intent dated July 28, 2005, notifying the Organization that the Carrier planned to use an outside contractor to remove and replace switches on the Creston Sub-Division near Cullom and on the St. Joseph Sub-Division near Waldron. The basis cited for using a contractor was specialized equipment with operators that would assist Carrier forces with placement of the switches and track panels. According to the Carrier, it was necessary to contract out the work because it did not "have the necessary equipment or operators skilled in its operation available in the timeframe necessary to complete this work" and its forces were already "fully employed and not available to perform this work even if the equipment were available to be rented or leased."

The Organization contends that the notices were for work other than that claimed here, and that the claim should be allowed on that basis alone. None of the exceptions in the Note to Rule 55 apply to the work done by contractor forces; moreover, it was all track work that was supposedly reserved to BNSF employees in the Letters of Intent. In none of the incidents cited did the contractor use specialized equipment. Conversely, the Carrier's position is that this claim is but one of a repetitive series of claims filed by the Organization in conjunction with the Lincoln Yard Improvements. The claim was untimely filed, because the initial notice was

dated February 27, 2004, and followed by further notices in March, July, and December 2005. The work has been ongoing, and this claim was filed outside the period for timely filing. In addition, on-property precedent has already determined that Carrier forces do not perform new construction projects of the magnitude and type found in the Lincoln Yard project. Nor does the Carrier have an obligation to piecemeal small portions of more complex projects.

The claim here encompasses five separate incidents, linked by a common contractor. Each incident must be examined separately, as they involve different locations, dates, and facts. Before turning to each instance, however, it is important for the Board to establish the framework of analysis. Contracting issues are governed by the Note to Rule 55. The starting point is whether the work in dispute is work "customarily performed" by Maintenance of Way forces. The Board has in the past distinguished between individual elements of work that may be routinely performed by bargaining unit employees and large construction projects that, while comprised of such elements, occur on such a scale that it is not realistic to think that they could be accomplished by Carrier forces working on overtime and weekends. In Public Law Board No. 4768, Award 22 (Marx, February 29, 1992) the Organization objected to the Carrier having contracted out a large construction project in St. Paul, Minnesota. The Board held:

> "After reviewing all the circumstances, the Board concludes that this project was of a nature which would have prevented the use of Carrier equipment and forces on any practical basis. While there is no doubt that elements of the work are regularly performed by Carrier forces, this does not therefore determine that such major projects could have been undertaken by other than outside forces. More significantly, however, is that the Organization has failed to demonstrate that such projects are 'customarily performed' by Maintenance of Way forces. This is the necessary element for consideration of the application of the Note to Rule 55."

The Board finds this on-property precedent persuasive. The Carrier determines the size of its work force, which should be adequate for routine track work and maintenance. But periodically, the Carrier will engage in large construction projects requiring an even larger investment of resources (both labor and equipment).

Typically these projects will be either for capacity expansion or major renovation of existing facilities. The Carrier simply does not have the existing manpower and equipment to complete such large projects in a timely fashion. Whether the Board concludes, as did Referee Marx in Public Law Board No. 4768, Award 22, that the work is not "customarily performed" by Carrier forces (in which case the Note to Rule 55 does not apply) or that the work is of the type "customarily performed" but that the Carrier is "not adequately equipped to handle the work" (one of the exceptions to the Note to Rule 55's strictures against contracting) the end result is the same—the claim will be denied. Nor does the Carrier have an obligation to piecemeal parts of these large complex projects. The Lincoln Yard Improvement Project, scheduled to proceed in six phases over several years, is such a large-scale project. The Carrier could not hope to complete the project using its existing workforce, nor did it own all of the specialized equipment needed for the project. The Letters of Intent related to the project clearly laid out the work that contractors would perform, reserving the track and signal work to BNSF employees. This is not a case where the Carrier used contractor forces to replace its employees, but where it used them to supplement its own forces.

The second point that the Board notes is that with larger or continuing projects, the time for the Organization to object is when the project begins, not with each new component or phase. In the Note to Rule 55, the parties established a conference procedure to address contracting out issues, during which they can discuss the Organization's concerns and attempt to reach an understanding on the appropriate scope of the contracting. If they are not able to reach such a resolution, the Organization can file a claim when the work actually commences. At some point, however, it becomes too late to file a claim. With these two points by way of background, the Board turns now to the individual incidents that the Organization objected to.

(1) On February 15, 2006 (Incident No. 1) the contractor hauled track ties from the stockpile at Lincoln to Cullom, Nebraska.

On July 28, 2005, the Carrier notified the Organization of its intention to contract out certain aspects of track and switch replacement in the Cullom area, beginning approximately August 15, 2005. It appears that the disputed work is part of that project; there is no evidence in the record to indicate otherwise. Nor is there

evidence in the record to indicate that the claim was filed shortly after the project commenced, or that the work at issue was a new aspect of the project that had not occurred previously, which might warrant a new and different claim. The claim here was filed more than five months after the project was supposed to start. The time limit for filing a claim is 60 days. The Board finds that the claim, as it relates to this incident, was untimely filed.

(2) Also on February 15, 2006 (Incident No. 2), the contractor used a crawler backhoe and two dump trucks, with operators, "to assist the Lincoln Hump section and DMG working on the East end of the Departure 1 Lead by the Rip-Track building with the removal of existing track and replacement with track panels." The contractors removed and hauled fouled ballast and hauled in new ballast from the ballast stockpile at Old 14.

In its letter of August 13, 2007, the Organization acknowledges that this incident took place in the Lincoln Yard. As noted above, the Board finds that the Lincoln Yard Improvement Project was of such size that the Carrier was justified in hiring outside forces to assist its own employees in completing the work in a timely fashion; nor was the Carrier required to piecemeal the work. In addition, the Organization filed its first claim for similar work on the Lincoln Yard Improvement Project on June 13, 2005, and it was both unnecessary to file again and too late to file again. Accordingly, the Carrier did not violate the Note to Rule 55 when it had contractors perform the work at issue in this incident.

(3) On February 24, 2006, the contractor hauled ballast from the stockpile at Old 14 in the Lincoln terminal to Oreapolis, Nebraska.

(4) On March 1, 2006, the contractor used a crawler backhoe and a semi lowboy to unload and haul new switch panels to be used at Havelock, Nebraska, for the crossovers to be installed there.

(5) On March 2, 2006 the contractor used a crawler backhoe and operator to assist the Lincoln Lower Yard Section unloading track panels at Carling.

These incidents are all, according to the Carrier, part of the switch rehabilitation on the Creston and St. Joe Sub-Divisions and at the Lincoln Terminal, which were noticed to the Organization in Letters of Intent dated July 28 and December 14, 2005. There is no evidence to the contrary in the record. The December 14, 2005, notice specifically indicated that the contractor forces would remove, haul, and deliver ballast. While not as large as the Lincoln Yard Improvement Project, it appears that the switch installation project on the Creston and St. Joe Sub-Divisions is of sufficient size that Carrier forces could not realistically complete the work in a timely manner. Accordingly, the Carrier did not violate the parties' Agreement when it hired an outside contractor to assist its own employees in performing 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 22nd day of February 2012.