Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41465
Docket No. MW-40338
12-3-NRAB-00003-080104

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 St. Louis –
(San Francisco Railway)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Kenley Construction) to perform heavy equipment work (operate excavator and backhoe) at the fuel facility in Springfield Yards on September 14 through October 6, 2005 instead of regularly assigned excavator and backhoe operator J. Johnston [System File B-1584-13/12-05-0090(MW) SLF].

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Johnston shall now be compensated for one hundred sixty (160) hours at his respective straight time 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.

By letter dated March 23, 2005, the Carrier notified the Organization of its intention to contract out for the construction of a new fueling station at its Springfield Yard:

> "The Carrier will contract out the building of a new pump house and DFO pumping system, tanker truck offloads station at Springfield, MO. The work will include all the pipeline connections to the existing platform from the new offload facility, concrete containment pad for the tanker trucks, necessary connections to the wastewater system. Additionally the contractor will remove the existing offload system. The work involves special skills and licenses that Carrier forces do not have.
>
> This work may begin as soon as April 15, 2005.
>
> The contracting of the work here is consistent with Carrier policy and the historical practice of contracting out such work. Moreover, the Carrier does not have the available forces or equipment to perform this work. . . ."

Building the new fueling station was a large project requiring several phases of construction. During the summer of 2005, the Claimant worked on Phase I of the project, performing excavator and backhoe work up until the dates involved here. Beginning September 14, 2005, however, he was replaced by contractor forces. The Organization filed a claim on his behalf by letter dated October 7, 2005:

"On September 14, 2005, through October 6, 2005, and continuing the carrier has contracted with Kenley Construction to do heavy equipment, 320 Cat Excavator and a 310 JD Backhoe, work on a new fuel facility at Springfield Yards, Springfield West Division. The claimant states he was allowed to do this work on Phase I of this project, using his bid in Excavator and a leased backhoe, but the carrier contracted out this portion of the project. The contractor worked 160 hours from September 14, through October 6, 2005."

The parties being unable to resolve the dispute through the grievance process, it was progressed to arbitration before the Board.

According to the Organization, the Claimant previously performed precisely the work in dispute, which establishes two things: (1) that the work falls within the scope of the Agreement, and (2) that the Claimant was sufficiently skilled and capable of performing the work. The Carrier violated the Agreement when it replaced him and assigned the work to an outside contractor. The work is work of the type traditionally and customarily performed by Maintenance of Way forces. The Claimant, who had already been doing the work, should have continued to perform it instead of being reassigned elsewhere. As a result of his reassignment, he missed a work opportunity that was given to the contractor instead. The reason given by the Carrier for the contracting out, that it did not have available forces or equipment, has no credible evidence to support it, in light of the fact that the Claimant was doing the work before it was given to the contractor. The Carrier's piecemeal defense is not valid. The Organization filed a claim for all work performed by the contractor in this instance. Moreover, the Carrier itself assigned the work on a piecemeal basis by assigning a part of the work to the Claimant, then assigning the remainder to the outside contractor. The Carrier is obligated to assert good-faith efforts to assign portions of the work that are readily severable to its employees. Finally, numerous Awards from the Board have established that the fact that the Claimant was fully employed elsewhere is not a defense and does not bar a monetary award to him. The Claimant was deprived of the opportunity to perform work to which he was entitled under the terms of the Agreement, and the monetary benefits flowing from it. The claim should be sustained.

The Carrier contends that it met all of its contractual obligations regarding contracting out for the work in dispute. It provided proper notice and the parties met to discuss the proposed contracting out. Under Rule 99, after that it was entitled to contract out the work. The Organization has not carried its burden of proof. There is no Rule that prevents the Carrier from contracting out the work in question after it has provided a notice and discussed the proposal with the proper representative from the Organization. The Claimant worked during Phase I of the project. The work at issue involved a small portion of Phase II. Phase I took longer than expected and the Carrier used contractor forces extensively during Phase II in an attempt to get the project back on schedule. As the notice of intent indicated, the Carrier did not have the available forces or equipment to perform the work on schedule. The contractor forces were a supplement to the Carrier's forces, who were already fully employed during the claim period. On-property precedents from the Board have already established that the Organization has the burden to establish that the Agreement specifically reserves the work in question to Carrier forces, or that there is a practice of Carrier forces performing the work to the exclusion of others. The Agreement does not reserve this work to the Organization's members, and the Agreement provisions cited by the Organization are not reservation of work Rules. The Organization has not, and cannot, prove that Carrier forces have exclusively performed the work at issue. Rule 99 requires only that the Carrier give timely notice, and upon request, meet with a representative of the Organization. After that, it may proceed with the contracting. The Carrier met its contractual obligations and the claim should be dismissed.

The Board notes first that this case arises pursuant to Rule 99 of the August 1, 1975 Agreement, not Rule 55, and Appendix Y of the current Agreement. Rule 99 provides, in relevant part:

> "Rule 99. Contracting Out
>
> (a) In the event the Carrier plans to contract out work within the scope of the applicable schedule agreement, the Carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

(b) If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Carrier may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

(c) Nothing herein shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

(d) The amount of subcontracting on a carrier, measured by the ratio of adjusted engineering department purchased services . . . to the total engineering department budget for the five year period 1992-1996, will not be increased without employee protective consequences. . . ."

Additionally, the Board notes that there is no dispute that the notice was properly served and that the parties met to discuss the proposed contracting out as provided in Rule 99 (b).

Unlike Rule 55, which expressly limits the Carrier's ability to contract out scope-covered work, subject to specific exceptions, Rule 99 is more general in its language. The record here establishes that the work in dispute was part of a large construction project that had properly been noticed to the Organization and discussed with its representative(s) under Rule 99. Numerous prior Awards from the Board have recognized that large construction projects may properly be contracted out. The record also establishes that the work in dispute was work of the sort customarily and traditionally performed by Maintenance of Way forces and that the Claimant was able, willing, and qualified to do it – he had been performing it for some time before it was reassigned to the contractor's forces.

The Carrier contends that the contractor was used to supplement its own forces. There is support in the record for that position: it appears that the Carrier was using its own forces on the fuel facility construction project when feasible; otherwise, the Claimant would not have been assigned to the work during Phase I of the project. The Carrier's use of its own forces during Phase I suggests that it was, in fact, making a good faith effort to assign work to its own forces before assigning it to outside forces. The problem here arose when the Carrier decided to stop using its own forces on the project after Phase I and switched to contractor forces during Phase II.

Some work is contracted out not because it is work that Carrier forces cannot perform, but because the Carrier does not have adequate manpower and/or equipment to do all the work that needs to be done within a certain window of time. The Board has previously recognized that timeliness can be a legitimate reason for contracting. Work in any enterprise ebbs and flows much like a tide. It is management's right to determine the size of its workforce, and few employers maintain a "high tide" workforce, or one large enough to perform the unusually large projects that occasionally arise. Except for those periods of highest demand, there would be more employees than required for the normal amount of work to be performed, and it is a rare employer that is willing to retain employees for whom it has no work on a regular basis. When the "tide" is high – that is, there is more work than normal – management has to decide how the extra work will be accomplished: having regular employees work more hours, hiring extra employees on a temporary basis, or contracting the work to a third party. In the absence of limiting provisions in the parties' Collective Bargaining Agreement, the employer is entitled as a matter of management right to decide how to get the extra work done. In cases of large construction projects, the Board has recognized in numerous Awards the Carrier's right to subcontract such work.

Rule 99 establishes parameters and procedures for contracting out. The Carrier gave notice in accordance with Rule 99(a) and met with the Organization pursuant to Rule 99(b). The only other express limitation in Rule 99 on the Carrier's right to contract out is found in Rule 99(d) which limits the amount of subcontracting as a ratio of the total Engineering Department budget. The fact that neither side raised this provision of the Rule indicates to the Board that they did not believe it to be relevant. Rule 99(c) states: "Nothing herein shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the Carrier to give

advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith." (Emphasis added.) As for "the existing rights of either party in connection with contracting out," there is no evidence in the record of an "existing right" that would limit performance of the work to bargaining unit employees. Even work that is customarily and traditionally performed by bargaining unit employees may occasionally be subcontracted, particularly large complex projects that cannot be completed in a timely fashion using only Carrier forces.

The Organization contends that the Carrier should have continued to assign the Claimant to the disputed work after Phase II started, even if contractor forces were brought in to do other work on the project. From the Organization's perspective, the Carrier itself "piecemealed" the work when it assigned the Claimant to perform certain aspects of the disputed work during Phase I of the project. However, there is a difference in the Carrier's electing to piecemeal a project and its being required to do so. The fact that the Carrier elects to use its own forces on portions of a large construction project does not automatically transform the work into something that is reserved exclusively to Carrier forces. For a large project that extends over a period of time, the work may be severable up to a point, but not throughout the entire project. The Carrier's rationale for assigning the work to the contractor during Phase II – that the use of outside forces was necessary to get the project back on schedule – was reasonable, and numerous Board Awards have held that the Carrier is not required to piecemeal large projects. Third Division Award 35975 (Benn, 2002) cited by the Organization, is distinguishable. In that case, the carrier did not contract out the work until after the employee had been doing it for some period of time. Here, the entire fuel facility construction project had been contracted out before the work in dispute was assigned to the Claimant. The Carrier could have assigned it to outside forces from the beginning. Instead, it used its own employee to perform as much of the work as possible before turning the project over to the outside contractor. That is the essence of using Carrier forces as much as possible, and doing so is not a violation of the Agreement.

The Board finds that the Organization has not met its burden of establishing that the Carrier violated the parties' Agreement when it assigned the Claimant to perform the work in dispute during Phase I of the Springfield Yard fuel facility construction project, but replaced him during Phase II with contractor forces

pursuant to the notice given on March 23, 2005, and subsequent discussion between the parties. Accordingly, the instant claim must be denied.

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 29th day of November 2012.