

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41222
Docket No. MW-40343
12-3-NRAB-00003-080145**

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

**(Brotherhood of Maintenance of Way Employees 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 (Hulcher) to perform Maintenance of Way and Structures Department work (remove/install track panels and switches, realign track and related track rehabilitation work) at Mile Post 45.5 on the Orin Subdivision on May 22, 23 and 25, 2006 [System File C-06-C100-154/10-06-0266(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 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 Part (1) and/or Part (2) above, Claimants G. A. Hagen, T. K. Mills, D. H. Penfield, K. J. Brandt, C. R. Lynn, B. G. Kutschara, T. L. Anderson, B. P. Ruzicka, R. D. Andrews, M. A. Roloff, R. Teniente, F. M. Alvarado, U. Gamez, R. Vergil, D. T. Walker,**

D. P. Sabala and M. S. Brueckner shall now each be compensated at their respective straight time rates of pay for an equal and proportionate share of the three hundred thirty-six (336) man-hours expended by the outside forces in the performance of the aforesaid work.”

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 July 8, 2006, in which it alleged that the Carrier had improperly contracted out certain work on the Orin Sub-Division:

“On May 22, 2006, at milepost 45.5 on main track 2 of the Orin sub the Hulcher company used 2 front loaders, 3 excavators, 1 scraper, and 2 foremen to move waste ballast from the shoulder of the track to prepare for the next day’s work. These men and machines worked six (6) hours on this claim date.

On May 23, 2006, at milepost 45.5 on main track 2 of the Orin sub the Hulcher company used 6 excavators, 3 loaders, 1 scraper and 10 people on the ground working labor and machine assistance work. The work this day consisted of realigning one-half mile of track from narrow track center to a wider track center and the machines cleaned the wasted ballast as they went. The entire crew worked ten (10) hours on this claim date.

On May 25, 2006, at milepost 45.5 on main track 2 on the Orin sub the Hulcher company used 3 loaders, 2 excavators and 8 ground people to remove 800 feet of track, install 2 #24 switches and the track panels to connect these switches. These men and machines worked eleven (11) hours on this claim.”

The Organization objected to the contracting out of routine track work as a violation of the Note to Rule 55. The Organization alleged in addition that it had not received adequate notice of the proposed contracting out, specifically that the work at issue was not mentioned in the notice cited by the Carrier.

The Carrier has been engaged in a large expansion project on the Orin Sub-division, to add a third track to handle the greater volume of traffic that has developed on the route. By letter dated March 17, 2006, the Carrier provided notice of its intention to contract out a portion of this work. The title of the notice was “Capacity Expansion – Triple Track Project – Orin Sub-Division.” The notice stated:

“As information, the Carrier is continuing its efforts to expand capacity on the Orin Sub-Division due to the continued increase in coal traffic flowing out of the Powder River Basin area. As you are aware, the Carrier began construction of a 3rd main line between MP 103.5 and MP 117.6 in 2004 and continued those efforts between MP 39.9 and MP 58.4 in 2005 [referencing prior notice letters]. As part of the capacity expansion and construction of the 3rd main line, Mains 1 & 2 will need to be removed and new ones installed. The Carrier is not adequately equipped to perform this work in the necessary time frame without disrupting rail service to the coal mines and other customers. . . . [T]he August 4, 2005 letter is hereby amended. The work to be performed by the contractor includes, but is not limited to . . . removal of debris . . . shift Main 2 between MP 41.7 and MP 58.0 to achieve 25-foot track centers.”

The Carrier denied the claim:

“A Letter of Intent to include shifting Mains 1 and 2 in conjunction with construction of new Triple Track on the Orin Subdivision was

issued March 17, 2006. . . . This notice covered the equipment and personnel needed to move Mains 1 and 2, replace the affected switches, and other related work, in order to achieve a safe distance between tracks. Coal traffic requires that work in this area be completed as quickly as possible, and the Carrier does not have adequate equipment or employees to perform this work in the necessary timeframe. Carrier employees, including several of the Claimants, were working at the claimed location”

The record developed on the property includes an email from the Assistant Roadmaster dated August 2, 2006, reiterating those points: that (1) the work was part of the triple track expansion project (2) the Carrier did not have adequate forces or equipment to complete the project on a timely basis, and (3) Carrier forces were also working on the project.

The Note to Rule 55 establishes the parties’ rights and obligations regarding contracting out of bargaining unit work. The threshold issue is whether the work under consideration is work “customarily performed” by bargaining unit employees. If the disputed work is work “customarily performed” by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

“[S]uch work may only be contracted provided that special skills not possessed by the Company’s employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company’s forces.”

In addition, if the Carrier plans to contract out work on one of these bases, the Note to Rule 55 requires the Carrier to notify the Organization “. . . as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in ‘emergency time requirements’ cases.”

The Organization may request a conference to discuss possibilities for avoiding the proposed contracting out, pursuant to the Note to Rule 55 and Appendix Y.

In this claim, the work done by Hulcher, including relocating the track to provide a wider center, was routine track work of the sort regularly done by BMW-represented employees in connection with the maintenance or repair of structures or facilities located on the right-of-way. Accordingly, the work is covered by the Note to Rule 55.

The analysis moves next to the question of notice. The Carrier's March 17, 2006, Letter of Intent to contract out the work clearly covered the work at issue. It specifically referenced shifting Main 2 between Mile Post 41.7 and Mile Post 58.0 to provide a wider track center, and associated removal of debris. The contractor widened Main 2 at Mile Post 45.5, which was in the geographic area specified in the Letter of Intent. The triple track project was already well underway, a fact that the Organization was well aware of. The Board concludes that the March 17, 2006, notice of the proposed contracting was adequate as it related to the work at issue here.

The Board now reaches the substance of the claim; that is, whether the Carrier properly contracted out the work under one of the three criteria set forth in the Note to Rule 55, pursuant to its notification to the Organization: (1) "special skills, equipment, or materials" (2) the Carrier is "not adequately equipped" to handle the work; and (3) emergencies. The Carrier noticed the Orin Sub-Division triple track project under the second criterion. "Not adequately equipped" is a broad and ambiguous term open to many interpretations, and subcontracting claims based on it must be reviewed closely to ensure that there is substance to them. Laying a third track through an entire sub-division is a huge undertaking that could easily require the assistance of outside forces to complete in a timely manner – and completing such a large project quickly, with a minimum of disruption to the existing service, is an important and legitimate goal for the Carrier. The Carrier is a large corporate entity, operating and maintaining some 30,000 miles of track, with a work force and equipment equal to almost any task. Even so, there will still be times when the Carrier needs to use outside resources to complete especially large projects in a timely manner. The Orin Sub-Division triple track expansion is one such project. The Organization alleged that existing Carrier forces could have done the work, but it provided no evidence of how such a large

undertaking could have been accomplished by Carrier forces in a timely manner. Carrier forces were already fully employed. Requiring the work to be done on weekends, off-days, and overtime would have significantly affected the Carrier's ability to get the job done effectively. The Board concludes that the Carrier was not, in fact, adequately equipped to handle the work, and it did not violate the Note to Rule 55 when it contracted out the work in this claim.

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.