

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43146
Docket No. MW- 42553
18-3-NRAB-00003-140214**

The Third Division consisted of the regular members and in addition Referee Randall M. Kelly 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 (Hulchers and Pettycord) to perform Maintenance of Way and Structures Department work (haul rock and track panels, remove and replace crossovers, replace and grade ballast and moved rail) at various locations on the Ottumwa Subdivision on October 18, 22, 23, 24 and 25, 2012 (System File C-13-C100-145/10-13-0191 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 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, Claimants D. Rogers, J. Horn, P. Dinneen, M. Denton, M. Fowler, H. Cottrell Jr., D. Jennings, J. Blazina, W. Nielsen, S. Mann, W. Jones and M. Yates shall be compensated as follows:**

... D. D. Rogers be paid 40 hours straight time and 20 hours at time and a half. J.D. Horn be paid 8 hours straight time and 2 hours at time and a half, P.G. Dinneen, H. T. Cottrell, M. E. Fowler, and M.

R. Denton be each paid 40 hours straight time and 10 hours time and one half, all other Claimants should get paid 40 hours straight time at their appropriate rates of pay as settlement of this claim.”

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.

Claimants D. Rogers, J. Horn, P. Dinneen, M. Denton, M. Fowler, H. Cottrell Jr., D. Jennings, J. Blazina, W. Nielsen, S. Mann, W. Jones and M. Yates have established and hold seniority within the Maintenance of Way and Structures Department. They were regularly assigned to positions in District 500.

On February 24, 2011, the Carrier sent a letter to General Chairman Dennis Craft, as follows:

“As information, BNSF plans to contract for multiple cross-over installations and sub-grade construction projects on the Ottumwa Sub-Division. BNSF is not adequately equipped to handle all aspects of this project nor do BNSF forces possess the specialized dirt work skills required for all aspects of these installations. BNSF plans to contract for additional heavy equipment, such as trackhoe (excavators), rollers, scrapers, graders, compactors, and water trucks as it has done in the past, to assist BNSF forces with the replacement of multiple crossovers at several locations. The work to be performed by the contractor includes but is not limited to, maintain site/construction access; install approx. 8,000 l.f. erosion control measures; clear/grub approx. 2 acres;

excavate approx. 12,500 c.y. existing material; necessary environmental testing of excavated material; install necessary geotextile fabric; furnish/haul/unload necessary aggregate sub-grade; grade/compact new aggregate; furnish/haul/unload approx. 12,500 c.y. new sub-grade material; grade/compact new material; furnish/haul/unload necessary sub-ballast; install/grade/compact new embankments; furnish/haul/place new rip-rap material; necessary extension of culverts; place new erosion control seeding; necessary assistance with unload/place of turnouts; and debris removal at the following locations: MP 250.2 (Beckwith); MP 288.7 (ISU Plant); MP 356.8 (Osceola); MP 381.8 (Afton) BNSF forces will be on-hand to perform construction/install 14 turnouts (associated track work including ties, rails, de-stress and surface track)

It is anticipated that this work will begin on approximately March 12, 2011 (Carrier Exh. 2, pp. 3-4)."

According to the Carrier, this constituted the appropriate notice to the General Chairman under the Note to Rule 22. The Organization objected to the notice by letter dated February 25, 2011 that the notice was improper.

Vice General Chairman Staci Moody-Gilbert and Khoury Farrar in Labor Relations spoke by phone about this notice. By letter dated March 21, 2011, Moody-Gilbert set forth the Organization position that the work involved should not be contracted out.

During this call you had stated that the work to be completed by the outside contractors was to perform sub-grade construction work, haul rock rip rap and sub-grade material, install new embankments, install culverts, and erosion control. The Notice issued to the General Chairman lists the work to be contracted and included the language "but not limited to". This is an improper notice as outlined in the Organization's letter to you dated February 25, 2011.

The notice issued to the General Chairman dated February 24, 2011 stated that the BNSF forces do not possess the specialized dirt work skills required for all aspects of these installations. During this call I asked you what special skills and training the contractor's employees

possessed that the Carrier's employees allegedly did not have but needed. You were unable to provide me an answer to this.

During the conference I pointed out to you that the Carrier has employees that are skilled in operating all equipment that is listed in the Carrier's notice of intent to contract dated February 24, 2011. This listed equipment is not special equipment and the Carrier has not proven that their own employees cannot operate this equipment to perform this work.

I referred you to recent Third Department Award 40558 rendered by Referee Gordon that clearly stated this type of work was historically and customarily Maintenance of Way work.

During our call you were unable to tell me the estimated number of outside contractors that were going to perform this work and did not provide the estimated number of contractor's hours that would be needed to complete the project. You stated that that the beginning was estimated to begin on March 12, 2011, and that the anticipated ending date of this project will be December 31, 2011. You also stated that there was nothing in the Agreement that the Carrier was obligated to provide the above information. I stated to you that it was a "good-faith effort" on behalf of the Carrier.

All work associated with this project is work that the BNSF employees are capable of performing. The Carrier has equipment available that can be utilized to do this work and the Carrier has not proven otherwise. If necessary, the Carrier can easily rent or lease equipment for this project.

During this conference I disagreed that the Maintenance of Way employees could not do this work as this type of work is customarily and historically performed by Maintenance of Way employees. The Carrier has the equipment readily available or can easily rent/lease for use by the Maintenance of Way employees.

On October 18, 22, 23, 24 and 25, 2012, the Carrier assigned outside forces from Hulchers and Pettycord to haul rock and track panels, remove and replace old

crossovers, grade and replace ballast and moved rail at various locations on the Ottumwa Subdivision of the Nebraska Division. To accomplish this work, Hulchers and Pettycord "...had 6 Employees on the 18th of Oct. that worked a total of 11 hours. On the 22nd, the contractor had 5 Employees that worked a total of 11.5 hours. On the 23rd of Oct., the contractor had 5 Employees who worked a total of 11 hours. On the 24th of Oct., the contractor had 7 Employees that work a total of 16.5 hours and on the 25th of Oct., the contractor had 6 Employees that worked a total of 11.5 hours performing this work at the exclusion of the Claimants."

The Organization filed a claim on December 4, 2012. The basis of the claim was that the Carrier failed to provide the General Chairman with a notice of their intent to contract out the work. The Carrier denied the claim on February 1, 2013, objecting to the Organization listing Rules 1, 2, 5, 29, 55, Note to Rule 55, and Appendix Y because the Organization simply listed Rules and did not provide specific reasons how the rules were violated. The Carrier asserted that the Organization did not provide any documentation that the work was done.

According to the Organization, track maintenance and repair, as well as the hauling of materials in connection therewith, is quintessential railroad work which has customarily, historically and traditionally been performed by Maintenance of Way forces. According to the Organization, the work is contractually reserved to them in accordance with Rules 1, 2, 5, 55 and the Note to Rule 55 of the Agreement.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out bargaining unit work. If the disputed work is work "customarily performed" by bargaining unit employees, the Carrier can only contract out the work under certain exceptional circumstances:

"... [S]uch work may only be contracted out 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 requires the Carrier to notify the Organization “as far in advance of the date of the contracting transaction as practicable and in any event not less than fifteen (15) days prior thereto, except in ‘emergency time requirements’ cases.”

The Carrier denied the appeal based on:

- “1. The fact that the Organization did not (and could not) show a past practice of the system wide assignment of the work to BNSF forces, to the exclusion of others – including contractors;
2. The Organization’s claim was internally inconsistent; and
3. The Organization had still failed to provide any evidence of any kind supporting its claim.”

The Carrier has raised a defense based on its position that the Organization must “show a past practice of the system wide assignment of the work to BNSF forces, to the exclusion of others – including contractors” in all of these contracting out cases. However, it is now well established that this is not the contractual standard at this Carrier. In his summary of the state of the issue, Herbert Marx pointed out that the agreement between the Carrier and the Organization is different from that of other carriers and the Organizations (“Examining Contracting Out Clauses in the Railroad Industry” in *Proceedings of the National Academy of Arbitrators*, 1996 at 279):

“Careful note should be taken, however, that this series of so-called National Agreements are not universally applicable. In many instances, carriers and the BMWWE have agreed to far different language. For example, the Burlington Northern agreement includes the following specific admonitions:

“However, such 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 the 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 [Citing Note to Rule 55].”

See also, H. Marx in Awards 1 of PLB No. 4768 (1990), and particularly Award 25 of PLB No. 4768.

The parties last arbitrated these issues in 2011 with Referees Daniel F. Brent and Andria S. Knapp and those Boards consistently applied the Note to Rule 55 to hold that the Carrier could only subcontract work that is ordinary, routine - “quintessential” - track work and is thus covered by the Note to Rule 55, under the specific exceptions in that Note.

Here, the Organization showed that the work was historically work of its members and the Carrier did not prove any of the exceptions. The Claim must be sustained. However, the Carrier is correct that the Organization’s claim contains an internal inconsistency. The Claim asks for a total of 400 hours for the Claimants, but the number of hours worked by the contractor only total 363 hours.

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 30th day of May 2018.