Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 43258
Docket No. MW-42576
18-3-NRAB-00003-140238

The Third Division consisted of the regular members and in addition Referee Randall M. Kelly when the award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division – (IBT Rail Conference (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 (Buel/Pavers) to perform Maintenance of Way and Structures work (haul rock) to Hobson Yard in Lincoln, Nebraska on November 1, 2012 (System File C-13-C100-136/10-13-0179 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces (Buel/Pavers) to perform Maintenance of Way and Structures work (haul rock) to Hobson Yard in Lincoln, Nebraska on November 5, 6, and 7, 2012 (System File C-13-C100-137/10-13-0180 BNR).

(3) 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.

(4) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants G. Colombe, R. Glanz, S. Kehler, L. Miller, K. Kildow and M. Perez shall now each be compensated for eight (8) hours at their respective straight time rates of pay.

(5) As a consequence of the violation referred to in Parts (2) and/or (3) above, Claimants G. Colombe, R. Glanz, S. Kehler, L. Miller, K. Kildow and M. Perez shall now each be compensated for twelve (12) hours at their respective straight time rates of pay and for seven (7) 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.

Claimants Foreman Gregory G. Colombe and truck drivers Robert L. Glanz, Stephen J. Kehler, Lynn R. Miller, Kris L. Kildow and Marcial Perez have established and hold seniority within the Carriers' Maintenance of Way Department.

According to the Organization, on November 1, 5, 6 and 7, 2012, the Carrier assigned outside contractor Buel/Pavers to perform the work of delivering ballast to Hobson Yard in Lincoln, Nebraska. On November 1, Buel/Pavers utilized one foreman and two drivers and on November 5, 6 and 7, the contractor utilized one foreman and five truck drivers. They worked eight hours on November 1 and nine hours on the other three days.

"The work of hauling materials in connection with Maintenance of Way track and Bridge and Building (B&B) construction is quintessential railroad work. Moreover, such work has customarily, historically and traditionally been performed by Maintenance of Way forces such as the Claimants and is contractually reserved to them in Accordance with Rules 1, 2, 5, 55 and Note to Rule 55."

The Carrier gave contractual notice to the General Chairman by letter dated October 20, 2011 that it planned to contract "for the heavy equipment, such as excavators (track hoes), F/E loaders, graders, compactors, dumps, and hot-mix asphalt paving equipment with operators to assist BNSF forces with the yard improvements at Hobson Yard located in Lincoln, NE. This is a multi-year, multi-phase project requiring installation of new track, crossovers, crossing and pavement". The Carrier sent another follow up letter dated October 23, 2012 adding some additional work to the notice.

The parties engaged in a contracting conference without reaching agreement.

The Carrier does not deny that the subcontracting occurred but asserts that the Claimants failed to provide adequate evidence of the violation. However, the Carrier's principal defense is that this was a new construction project and that precedent establishes that BNSF forces do not have exclusive rights to projects of this magnitude and type as found in this project. The Carrier cites Third Division Award 41223 (Knapp), an on property award. In that award, the Organization argued that BNSF violated the Agreement by hiring an outside contractor to haul ties and ballast from stockpiles, haul/unload track and switch panels and related work. The Organization there, as in this claim, argued that the work could be performed with BNSF-owned equipment or with leased equipment and that BNSF forces had the skills and expertise to perform all aspects of the project. BNSF responded that the work had to be performed with equipment that BNSF did not possess and that BNSF forces were not experienced in operating the required equipment.

The Board rejected the Organization claim stating:

> **"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."**

See also **on-property Third Division Award 37433 (Kenis) where after reviewing the record, the Board rejected the Organization's arguments quoting from Public Law Board 4768, Award 22, another case in which the Organization had filed a claim over the contracting of a major construction project:**

> **"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."**

This position is repeated in several awards, such as Third Division Awards 41222 (Knapp); 37434 (Kenis) and 38383 (Wesman).

Further, numerous past on-property awards have recognized that the Carrier does not have an obligation to piecemeal out small portions of more complex projects simply because its own employees might occasionally perform some of these peripheral work items in isolation. This bedrock standard was established many years ago by decisions such as Third Division Award 5521 in which Referee Whiting concluded:

> **"We have previously held that claims involving only a small part of work contracted out are not sustainable if the entire project, considered as a whole, was properly subject to being contracted out. See our Awards Nos. 2819, 3206, 4753, 4776 and 5304."**

This position has been subsequently reaffirmed on many occasions. For example, the Board in Third Division Award 20899 (Norris) found:

> **"Secondly, we find no evidence in the record that the disputed work could in fact have reasonably been segregated from the whole construction project and assigned to Claimants; nor is there any Rule in the Agreement requiring Carrier to make such fragmentation of the work.**
> **See Awards 4776 (Stone), 4954 (Carter), 5304 (Wuckoff) and 9335 (Weston).**
> **Similarly the Second Division under analogous circumstances has denied similar claims. See 2nd Div. Awards 2186, 2377, 2488, 3278, 3433, 3461, 3559 and 4091.**
> **Accordingly, based on the record evidence and controlling authority, we will deny Claim No. 1 and Claim No. 2."**

The Organization argued that the Carrier did not raise these issues in the notices in the conference and should be estopped from arguing the issues at the System Board. However, the Carrier's notice informed the Organization that this was to be a "multi-year, multi-phase project" with various work on numerous sub-projects. Once the Carrier gave this notice, the Organization was on notice that the Carrier considered this to be the type of extensive project subcontracted in the past and allowed by prior Third Division awards. Accordingly, based on this record and Division precedent, this 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 26th day of June 2018.