

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43282
Docket No. MW-42578
18-3-NRAB-00003-140240**

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 work (haul ballast in connection with the removal of old crossovers) from Chariton Yard, Iowa to various locations on the Ottumwa Subdivision on October 12, 15, 16, 17, 18, 19 22, 23 and 24, 2012 (System File C-13-C100-144/10-13-0187 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 violation referred to in Parts (1) and/or (2) above, Claimants R. Deevers, R. Beeler, R. Rutledge and D. Horn shall now each be compensated for seventy-two (72) hours at their respective straight time rates of pay and for eighteen (18) hours at their respective 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.

During the time relevant to this dispute, Claimants R. Deevers, R. Beeler, R. Rutledge and D. Horn established and maintained seniority within the Carrier's Maintenance of Way and Structures Department. They were regularly assigned to Truck Driver positions on District 500.

According to the Organization, on October 12, 15, 16, 17, 22, 23 and 24, 2012 the Carrier assigned outside forces from Hulchers and Pettycord to haul ballast from the Chariton Yard in Iowa to Afton, Thayer, Osceola and Russel, Iowa. To accomplish this work, four drivers from the contractor used dump trucks to transport the ballast on each date, with each of the four drivers working a total of seventy-two straight time hours and eighteen hours of overtime. Once moved to those locations, it was stockpiled and eventually used in removing old crossovers.

The Organization asserts that the work of hauling materials in connection with Maintenance of Way Track and Bridge and Building (B&B) construction, repair and maintenance operations is "quintessential" railroad work which has customarily been performed by Maintenance of Way forces such as the Claimants. See, Rules 1, 2, 5, 55 and the Note to Rule 55.

This dispute arose between BNSF and the Organization when the Organization filed the instant claim. The Carrier denied the Organization's claim based on several grounds including that not only was the Organization's claim incredibly vague but it was also devoid of any evidence to support its allegations. The Organization then appealed BNSF's denial on April 25, 2013. BNSF denied the

Organization's appeal based on the fact that the Organization did not show a past practice of the system wide assignment of the work to BNSF forces, to the exclusion of others – including contractors. Further, BNSF's declination informed the Organization that it had still failed to provide any evidence of any kind supporting its claim.

The Organization asserts that the Carrier failed to provide required notice to the General Chairman. The Carrier sent the General Chairman a letter on February 24, 2011 informing him of its intent to contract out the following work:

**“RE: Switch and X-Over Installs – Various Locations – Ottumwa Sub-Division
File No. 184-04-4-2890**

Dear Mr. Craft:

As information, BNSF plans to contract out for multiple cross-over locations and sub-grad 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; install necessary geotextile fabric; furnish/haul/unload necessary aggregate sub-grade; grade/compact/compact new aggregate; approx. 12,500 c.y. new sub-grade material; grade/compact new material; furnish/haul/place necessary sub-ballast; install/ grade/compact new rep-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.”

General Chairman Craft responded to that letter on February 25, 2011 objecting to the February 24, 2011 letter as insufficient notice.

“The letter dated February 24, 2011, includes the language “but not limited to” which makes this an improper notice under the Note to Rule 55. A valid notice under the Note to Rule 55 must specify the work the Carrier wishes to contract out and it cannot be an open-ended notice that does not allow for the specific work to be discussed during a conference. Account of the inclusion of this language, I do not recognize this letter as satisfying the notice requirements of the Note to Rule 55. If any work is to be discussed during conference it would require an additional notice to be provided to me.

It is not a matter of just discussing the project, I am requesting a contracting out conference per the Note to Rule 55 to truly made a good faith effort to reach an agreement on what work should be contracted out, if any, and what work should be performed by the Carrier forces. . . .

Regarding the work outlined in your notice, I do not concur with the work being contracted to outside parties as the Carrier forces do possess all the skills necessary to perform this work and the BNSF possesses all of the necessary machinery and equipment to accomplish this work. Any equipment that the BNSF feels they need in addition to what they currently own can very easily be rented or leased with Carrier forces operating. In addition, this type of work has customarily been performed by Carrier forces through the years and the skilled and trained Carrier employees are available to perform this work.”

The parties held a contracting out conference on November 6, 2013. At the conference, the Organization presented a statement from one of the Claimants

describing the work in question, but the Carrier did not dispute that the work was contracted out until the System Board.

The heart of the Carrier's position is that the Note to Rule 55 reserves the right of BNSF to contract this piecemeal portion of this project. According to the Carrier, the Note to Rule 55 reads in pertinent part:

"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 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."

Here, however, the "project" is the replacement of multiple crossovers at several locations and it is BNSF employees who are to do the replacement work and the contractors were there to "assist" the BNSF forces. See, the Carrier's February 24, 2011 letter informing the General Chairman of its intent to contract out the work. This is not the large project contracted out because the BNSF forces cannot complete all of the project.

Next, it is clear from numerous awards that hauling ballast is a customary part of Maintenance of Way work. See, e.g., Third Division Award 40558 (Referee Gordon). There was no specialized equipment, only dump trucks. Combined with the less than full notice, there is sufficient evidence in this record to sustain the claim.

Finally, the Organization requested that the Claimants each be paid the equivalent hours worked by the contractor's employees. The Carrier objected that this would be unjust enrichment because the Claimants all worked their full weeks during the period in question. However, the weight of arbitral authority is that when there is a contract violation, there should be some effective remedy. Here, that remedy is equivalent pay as identified in the claim quoted above. The Carrier is correct, however, that Claimant Beeler was on vacation on October 12 and Claimant Deevers was absent on October 17 and should not receive pay for those dates.

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 25th day of September 2018.