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

Award No. 43341
Docket No. MW-42637
19-3-NRAB-00003-140350

The Third Division consisted of the regular members and in addition Referee I.B. Helburn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - (IBT Rail Conference
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(BNSF Railway Company (Former Burlington Northern (Railroad)

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 (deliver rock to Lincoln Yard) in Lincoln, Nebraska on April 13, 2013 (System File C-13-C100-254/10-13-0363 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces (Buel/Pavers) to perform Maintenance of Way and Structures work (deliver rock to Lincoln Yard) in Lincoln, Nebraska on April 16, 2013 (System File C-13-C100-255/10-13-0364).

(3) The Agreement was violated when the Carrier assigned outside forces (Buel/Pavers) to perform Maintenance of Way and Structures work (deliver rock to Lincoln Yard) in Lincoln, Nebraska on April 17 and 18, 2013 (System File C-13-C100-256/10-13-0371).

(4) The Agreement was violated when the Carrier assigned outside forces (Buel/Pavers) to perform Maintenance of Way and Structures work (deliver rock to Lincoln Yard) in Lincoln, Nebraska on April 19, 2013 (System File C-13-C100-257/10-0372).

(5) The Agreement was violated when the Carrier assigned outside forces (Buel/Pavers) to perform Maintenance of Way and Structures work (deliver rock to Lincoln Yard) in Lincoln, Nebraska on April 22, 23, 24, 25 and 26, 2013 (System File C-13-C100/258/10-13-0373).

(6) 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.

(7) As a consequence of the violations referred to in Parts (1) and/or (6) above, Claimants C. Lindholm, L. Miller, M. Perez, J. Covarrubias and J. Warner shall now each be compensated for six (6) hours at their respective time and one-half rates of pay.

(8) As a consequence of the violations referred to in Parts (2) and/or (6) above, Claimants C. Lindholm, L. Miller, M. Perez, J. Covarrubias, D. Rockenbach, W. Flentie and J. Warner shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for four (4) hours at their respective time and one-half rates of pay.

(9) As a consequence of the violations referred to in Parts (3) and/or (6) above, Claimants C. Lindholm, L. Miller, M. Perez, J. Covarrubias, D. Rockenbach, W. Flentie and J. Warner shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for eight (8) hours at their respective time and one-half rates of pay.

(10) As a consequence of the violations referred to in Parts (4) and/or (6) above, Claimants C. Lindholm, L. Miller, M. Perez, J. Covarrubias, D. Rockenbach, W. Flentie and J. Warner shall now each be compensated for eight (8) hours at their respective straight

time rates of pay and for six (6) hours at their respective time and one-half rates of pay.

(11) As a consequence of the violations referred to in Parts (5) and/or (6) above, Claimants C. Lindholm, L. Miller, R. Kuwmoto, R. Reimers, G. Waegli, W. Flentie and J. Othmer shall now each be compensated for forty (40) hours at their respective straight time rates of pay and for thirty (30) 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.

This claim arises from the Carrier's decision, allegedly made without proper notification of intent to the Organization, to contract out the delivery of rock to the Lincoln Yard in Lincoln, NE on nine days in April 2013. All of the Claimants held seniority in various classifications within the Maintenance of Way and Structures Department and were regularly assigned in accordance with their seniority.

The Organization avers that the delivery of rock is basic, fundamental Maintenance of Way Track Sub-department work that has been reserved to the appropriate bargaining unit employees.

Rules 1, 2, 5 and the Note to Rule 55 established the disputed work as that of the Carrier's Maintenance of Way and Structures Department.[1] The evidence shows that Maintenance of Way employees with appropriate seniority in the appropriate classes historically have done this fundamental maintenance work. The Organization does not have to establish the disputed work as exclusively that of the affected Claimants, but only that historically the work has been done by Maintenance of Way employees. There is no mutually recognized past practice that would allow the work to be contracted out.

The Board should not consider the Carrier's defenses because there was no specific contracting out conference and the Organization further contends that the Carrier has not presented a valid defense to the instant claims. Outside forces performed the disputed work using common ordinary machinery and equipment . . . which were also readily available for rent/lease in case the Carrier's inventory was inadequate. The Organization has presented a *prima facie* claim that shifts the burden of proof to the Carrier to show that the claim is not valid. The disputed work obviously was contracted out. The mention of alleged scheduling difficulties is a red herring that has no justification. The Carrier contention based on the Claimant's unavailability is not persuasive as the Carrier must adequately staff and train the Maintenance of Way work force. The Carrier simply failed to make an effort to assign the stone delivery work to the Claimants. Nor was an effort made to bulletin new positions. The Carrier failed to have sufficient numbers of new employees to perform the regular and predictable work of the bargaining unit. There is an obligation to increase the work force before contracting out. The Carrier's piecemeal defense fails as there was no Organizational request that the work be done piecemeal. The work was "part of an overall track rehabilitation project to which Maintenance of Way forces were also assigned . . . "Piecemeal" is not one of the criteria allowing contracting out. Even if some contracting out was justified, contracting out the entire project was not. Nor was the project too large for the bargaining unit, thus there is no evidence to support the Carrier's "magnitude" contention. Economy is not a criterion that justifies subcontracting. The Board should not consider the economic consequences of an agreement.

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[1] All Organization contentions refer to support from previous Third Division and Public Law Board awards, many of them on-property awards. The support will not be noted in the summary of the Organization's contentions, but will be referenced as appropriate in the analysis that follows.

The remedies set forth in the claims are appropriate as they would make the Claimants whole for lost work opportunities and would protect the integrity of the Agreement. That the Claimants were fully employed on the days in question should not deprive them of remedies. They could have worked daily or weekend overtime or deferred other work. Any time off for the Claimants for training or vacation had to have been approved by the Carrier knowing that the need to move rocks was forthcoming. It is settled that the Organization gets to name the Claimants when a claim is filed.

For reasons summarized below, the Carrier asserts that the claim should be denied.[2] "On-property precedent has already determined that BNSF forces do perform new construction projects of the magnitude and type as found in the Powder River Expansion Project." The Organization has admitted that outside forces and not Carrier forces should have performed the disputed work, reserved to the Carrier in the Note to Rule 55. "BNSF submits that . . . after-the-fact, case-by-case decisions are not within the Board's purview." The Organization has not proved that the work was reserved to its members. The general Scope Rule does not do so. Nor has the Organization established a system-wide, exclusive assignment of the disputed work, even if some of the work has been done by Maintenance of Way Employees. A mixed practice defeats the claims. This is simply a factual dispute that requires the Board to dismiss the claim. Cited rules do not reserve the work. The Organization has not met its burden of proof by providing two self-serving statements to show that the disputed work was that of the Carrier's employees, as these statements cannot be considered probative evidence. The Carrier has not violated Appendix Y, which does not restrict contracting out, but "is a statement of the parties' intention to set up a vehicle to discuss reduction in contracting out." Appendix Y is not applicable unless the Organization shows that disputed work is reserved to Maintenance of Way employees. Appendix Y does not apply on the property and is not derived from Article IV of the May 17, 1968 National Agreement.

Assuming, *arguendo*, that the claim is meritorious, no damages are due because the Claimants were fully employed at times relevant. The Organization has

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[2] Carrier references to Third Division and PLB decisions, both on-property and off-property will not be referenced in this summary but will be referenced as appropriate in the analysis that follows.

not submitted proof of damages and the negotiated agreement has no provisions allowing for liquidated or punitive damages. Moreover, the Claimants unavailable for work at times relevant are not to receive damages. In an earlier case, the Organization "removed a claim date from an employee for the sole reason that he was on vacation and therefore was unavailable for work."

On October 11, 2011 the Carrier gave notice of intent to contract out work necessitating "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 in Hobson Yard located in Lincoln, NE. This is a multi-year, multi-phase project requiring installation of new track, crossovers, crossing and pavement." Additional letters (amendments) were sent on October 23, 2012 and January 15, 2013 noting additional work to be contracted out. Conferences were held on November 16, 2012 and January 25, 2013 with no agreement reached. The above-noted claims were filed on April 13 (one claim) and April 26 (four claims), 2013 covering the delivery of rock on ten (10) days in April 2013. The five claims are simply the latest in a continuing dispute over the work done by contractors as part of the "multi-year, multi-phase" project.

On-property Third Division Award No. 43258 addressed a claim arising from the hauling of rock to the Hobson Yard by Buel/Pavers on four days in early November 2012. The Board denied the claim. On-property Third Division Award No. 43259 addressed a claim arising from the delivery of ballast to Hobson Yard by Buel/Pavers on January 28, 2013. The Board also denied this claim. The claims considered herein involve the same work done by the same contractor, allegedly depriving some of the same Claimants of opportunities to work. We adopt the reasoning of Awards 43258 and 43259.

In both Award 43258 and Award 43259 the Board noted Third Division Award 41223, an on-property award that denied the claim stating that the Carrier had been involved in "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 disruption to the existing service, is an important and legitimate goal for the Carrier." The Board went on to indicate that the Organization had not provided evidence of how such a large undertaking could have been accomplished in a timely manner by already fully employed sources.

In Awards 43258 and 43259 the Board found the above-noted on-property precedent persuasive, finding that large construction projects will involve a larger-than-usual investment in labor and equipment resources—an investment needed to complete the project in a timely fashion. Whether the Board concludes that such work is not "customarily performed" (PLB 4768, Award 22 or that the Carrier is "not adequately equipped to handle the work," the end result is an exception set forth in the Note to Rule 55 and a denial of the claim. Furthermore, the Carrier is not required to piecemeal the project to give the work to existing Maintenance of Way forces. Awards 43258 and 43259 provide very strong on-property precedent, particularly when both awards present what are in essence fact situations identical to that with which the Board is faced. The Board finds no justification for a departure from the above-noted precedent.

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 14th day of December 2018.