

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43631
Docket No. MW-42722
19-3-NRAB-00003-140403**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(BNSF Railway 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 (deliver rock to Hobson Yard) in Lincoln, Nebraska on May 13, 14, 15, 16 and 18, 2013 (System File C-13-C100-294/10-13-0476 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 Hobson Yard) in Lincoln, Nebraska on May 20, 21, 22, 23 and 24, 2013 (System File C-13-C100-295/10-13-0477).**
- (3) The Agreement was violated when the Carrier assigned outside forces (Buel/Pavers) to perform Maintenance of Way and Structures work (deliver rock to Hobson Yard) in Lincoln, Nebraska on May 28, 29 and 30, 2013 (System File C-13-C100-296/10-13-0478).**
- (4) The Agreement was further violated when the Carrier failed to provide the General Chairman with 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.**

- (5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Claimants D. Ficke, S. Thomas, C. Zuhlke, J. Lyons, R. Jarvis and J. Willey shall now each be compensated for forty (40) hours at their respective straight time rates of pay and thirty (30) hours at their respective time and one-half rates of pay.
- (6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Claimants D. Ficke, S. Thomas, C. Zuhlke, J. Lyons, R. Jarvis and J. Willey shall now each be compensated for forty (40) hours at their respective straight time rates of pay and thirty (30) hours at their respective time and one-half rates of pay.
- (7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Claimants D. Ficke, S. Thomas, C. Zuhlke, J. Lyons, R. Jarvis and J. Willey shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and twenty-four (24) 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 concerns the Carrier's assignment of outside contractors (Buel/Pavers) to perform Maintenance of Way work to haul rock to Hobson Yards in Lincoln, Nebraska. This work occurred on various dates in May 2013. Claimants established and hold seniority in the Carrier's Maintenance of Way Department.

The Organization contends that the work is historically and customarily performed by the Carrier's Maintenance of Way forces and is reserved to them by Rules 1, 2, 5, 55, and the Note to Rule 55. The Organization contends that the Carrier failed to notify the General Chairman of its decision to assign outside forces to perform this work. The Organization contends that the Carrier may only assign its work to outside contractors under certain specified conditions and after notice to and conferencing with the Organization.

The Organization contends that the notices received on January 15, 2013 and October 23, 2012 were insufficient to comply with the Note to Rule 55. The Organization contends that the notices do not mention "hauling rock" and that the Carrier has failed to prove that an exception exists that would justify its decision to use outside contractors.

The Organization contends that the Carrier's defense that it need not "piecemeal" this work must fail, as it never asked for the Carrier to do the work piecemeal, and "piecemeal" is not one of the criteria which permits contracting out the work. The Organization contends that there is no evidence to support the Carrier's "magnitude" contention, and that "economy" is not one of the criteria which permits contracting out. The Organization contends that the Claimants are entitled to the requested remedy.

The Carrier contends that it did send a contracting notice to the Organization on October 20, 2011, with additional notices sent on October 23, 2012, and January 15, 2013. The Carrier contends that the Organization has failed to show a system-wide practice of assigning this work exclusively to BNSF forces, so its claim must fail.

The Carrier contends that on-property precedent has already determined that BNSF forces do not perform new construction projects of the magnitude found in the Powder River capacity expansion project. The Carrier contends that it has no obligation to piecemeal out small portions of more complex projects. The Carrier contends that, in any case, no damages have been proved and Claimants are not entitled to any monetary remedy.

On October 11, 2013, the Carrier gave notice to the Organization:

“As information, BNSF plans to contract for the necessary 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 multiyear, multi-phase project requiring installation of new track, crossovers, crossings and pavement. BNSF is not adequately equipped with the necessary equipment to perform all aspects of this project. Moreover, BNSF forces do not possess the necessary specialized dirt work or hot-mix paving skills for this project. The work to be performed by the contractor includes but is not limited to, install erosion-control measures; install vehicular traffic control (including barricades, signage and flags); remove/excavate existing crossover; furnish/grade/compact approx. 1,500 c.y. sub-ballast; grade/build-up/compact approx. 800 c.y. new embankment; install approx. 100 l.f. new culvert (including inlet/outlet protection and drainage route; pave approx. 1,200 s.y. hot-mix asphalt; assist with pick/set cross-over and turnout plants; and debris removal.”

Thereafter, additional notices were sent on October 23, 2012 and January 15, 2013. Contracting conferences were held, but no agreement was reached. These claims were filed on June 8, 2013, protesting the delivery of rock in May 2013. This is not the first claim filed protesting delivery of rock as part of the Hobson Yard project.

On-property Third Division Award 43341 addressed a claim arising from the hauling of rock to the Hobson Yard by Buel/Pavers on ten days in April 2013. The Board denied the claim, taking note of on-property Third Division Awards 43258 and 43259, which addressed the hauling of rock to Hobson Yard in November 2012 and January 2013, respectively. All of these awards addressed the same work done by the same contractor as at issue here. All the prior claims were denied by this Board.

All the awards referenced Third Division Award 41223, an on-property award that denied the claim after recognizing that the Carrier was 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.”

In Award 43341, this Board wrote,

“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.”

This Board finds the on-property precedent persuasive, especially as each addressed the same facts and arguments presented in the instant dispute. We see no reason to depart from this well-reasoned 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 17th day of May 2019.