

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43700
Docket No. MW-42586
19-3-NRAB-00003-140269**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**(Brotherhood of Maintenance of Way Employes 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 (haul rock to Lincoln Yard) in Lincoln, Nebraska on February 28 and March 1, 2013 (System File C-13-C100-219/10-13-0301 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 March 7 and 8, 2013 (System File C-13-C100-224/10-13-0317).**
- (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 March 12, 2013 (System File C-13-C100-225/10-13-0318).**
- (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 5, 2013 (System File C-13-C100-235/10-13-0337).**

- (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 8, 2013 (System File C-13-C100-236/10-13-0338).**
- (6) 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 9, 2013 (System File C-13-C100-237/10-13-0339).**
- (7) 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 10, 2013 (System File C-13-C100-238/10-13-0340).**
- (8) 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 11, 2013 (System File C-13-C100-239/10-13-0341).**
- (9) 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 12, 2013 (System File C-13-C100-240/10-13-0342).**
- (10) 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.**

- (11) As a consequence of the violations referred to in Parts (1) and/or (10) above, Claimants C. Lindholm, T. Brandt and W. Schenk shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for four (4) hours at their respective time and one-half rates of pay.**
- (12) As a consequence of the violations referred to in Parts (2) and/or (10) above, Claimants C. Lindholm, T. Brandt, H. Pelayo, W. Schenk, J. Covarrubias, B. Snyder and K. Kildow shall now each be compensated for twelve (12) hours at their respective time and one-half rates of pay.**
- (13) As a consequence of the violations referred to in Parts (3) and/or (10) above, Claimants C. Lindholm, T. Brandt, H. Pelayo, W. Schenk, J. Covarrubias, B. Snyder and K. Kildow shall now each be compensated for six (6) hours at their respective time and one-half rates of pay.**
- (14) As a consequence of the violations referred to in Parts (4) and/or (10) above, Claimants C. Lindholm, L. Miller, M. Perez, J. Covarrubias, D. Rockenbach and J. Warner shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for one (1) hour at their respective time and one-half rates of pay.**
- (15) As a consequence of the violations referred to in Parts (5) and/or (10) above, Claimants C. Lindholm, L. Miller, M. Perez, J. Covarrubias, D. Rockenbach and J. Warner shall now each be compensated for six (6) hours at their respective time and one-half rates of pay.**
- (16) As a consequence of the violations referred to in Parts (6) and/or (10) above, Claimants C. Lindholm, L. Miller, M. Perez, J. Covarrubias, D. Rockenbach and J. Warner shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for two (2) hours at their respective time and one-half rates of pay.**

- (17) As a consequence of the violations referred to in Parts (7) and/or (10) above, Claimants C. Lindholm, L. Miller, M. Perez, J. Covarrubias, D. Rockenbach and J. Warner shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for two (2) hours at their respective time and one-half rates of pay.**
- (18) As a consequence of the violations referred to in Parts (8) and/or (10) above, Claimants C. Lindholm, L. Miller, M. Perez, J. Covarrubias, D. Rockenbach and J. Warner shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for one (1) hour at their respective time and one-half rates of pay.**
- (19) As a consequence of the violations referred to in Parts (9) and/or (10) above, Claimants C. Lindholm, L. Miller, M. Perez, J. Covarrubias, D. Rockenbach and J. Warner shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for two (2) 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.

As part of its expansion of operations in the Powder River Division, the Carrier began a multi-phase yard improvement project at the Hobson Yard in Lincoln, Nebraska toward the end of 2011. On October 20, 2011, the Carrier sent a notice to the

Organization, informing it of its intent to contract out certain aspects of the Hobson Yard improvements:

“This is a multi-year, 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; ... ; furnish/grade/compact approx. 1,500 c.y. sub-ballast;”

The initial notice was followed by another notice on October 23, 2012, which amended the original notice “to include the following work and for the same reasons stated on October 20, 2011: install erosion-control measures; remove/excavate existing switches...; necessary sub-grade prep; load/haul/set 2-No 11 switches...; and debris removal.” A further notice was issued January 15, 2013, to include still more work: “install erosion-control measures; excavate/grade/compact prep for foundations; install new yard storm drain inlets ...; grade/build-up/compact new sub-grade material ...; pave hot-mix asphalt roadway and adjacent sidewalk; load/haul/set pre-cast foundations; load/haul/set new modular buildings; and debris removal.

The Organization began filing claims on March 13, 2013, after a contractor, Buel/Pavers, delivered “crush and run rock to the parking lot east of the freight house” in the Hobson Yard on February 28 and March 1, 2013. A number of subsequent claims were filed as Buel/Pavers delivered rock to various locations in the Hobson Yard on various dates between March 1 and April 12, 2013. Several of the claims contended that “with this amount of rock, a Georgetown belt train would have been more cost effective if sufficient planning by management had happened....”

While there might be some differences of opinion about how much rock (ballast) was delivered, how many contract forces were used, and so on, there does not appear to be any serious dispute that during the time frame at issue, Buel/Pavers did deliver rock to the Hobson Yard as part of the Yard improvement project.

The Organization contends that the work of hauling materials is “quintessential” track work that has historically, customarily and traditionally been performed by Maintenance of Way forces and is contractually reserved to them in accordance with

Rules 1, 2, 5, 55 and the Note to Rule 55 of the Agreement. Accordingly, the work in dispute should have been assigned to MoW employees. The Note to Rule 55 requires the Carrier to give advance written notice to the Organization of any plans to contract out work customarily performed by MoW forces. The Organization argues that the Carrier failed to provide adequate notice of its intent to contract out the hauling of ballast for the Hobson Yard improvement project or to make a good faith effort to reduce the incidence of subcontracting. Specifically, the notices provided by the Carrier do not address such work. Instead, they cite specialized equipment and skill, when this work required only ordinary dump trucks. The Carrier's defenses are without merit. The notice discussed the need to contract out specialized dirt and paving work; the work involved here required no specialized skill or equipment and there is no evidence in the record of such. The Carrier's failure to comply with its good-faith obligation to provide notice requires payment of the Claim as presented.

The Carrier responds that arbitral precedent has repeatedly established that construction of complex, large-scale projects is not work that is reserved to BNSF employees. The Carrier properly notified the Organization that it was contracting a large capacity expansion project at the Hobson Yard. The parties met in conference but failed to reach agreement. The Claim should be denied. The Organization has failed to show a past practice of the work at issue having been assigned to BNSF forces system-wide, to the exclusion of others, and there is no evidence in the record to support its position. Nor is the Carrier required to piecemeal portions of large construction projects like the Hobson Yard improvements. In addition, at best the evidence from the Organization establishes a mixed practice of assigning the work in dispute not only to BNSF forces but to outside contractors as well. Board precedent recognizes that in cases of mixed practice, the Carrier does not violate the Agreement when it contracts out the work. Finally, even if the Carrier is found to have violated the Agreement, the Organization has failed to prove any damages and Claimants are not entitled to any monetary damages.

After having reviewed the extensive record in this case, the Board concludes that the Organization has not met its burden of proof. As with every claim, it is important to focus on the details of the underlying facts.

The notice requirements of Rule 55 apply to contracting work that has been customarily, historically and traditionally performed by BMWWE-represented employees. The Organization is correct when it claims that "hauling" is "quintessential track work," at least insofar as that refers to hauling rock and ballast from one Carrier

site to another. But the hauling at issue here is different in one significant respect: it is the initial delivery of rock to the Carrier from the vendor. Whether Buell/Pavers sold the ballast to the Carrier or merely delivered it to the Hobson Yard from the vendor is not clear on the record, but it does not make a difference. The record does not include significant evidence that MoW forces customarily performed such delivery. The Carrier acknowledges that in the past, it has sometimes assigned its employees to pick up rock from a vendor, but that the rock has also been delivered by outside forces, either the vendor or a contractor.

Established Board precedent recognizes that where there is a mixed practice of assigning work both to BNSF employees and to outsiders, Rule 55 does not apply. That is the case here, and the Claim must be denied. As a result, it is not necessary to address the arguments raised by the Organization regarding the adequacy of the notices on the Hobson Yard improvements that the Carrier provided.

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 18th day of June 2019.