

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43701
Docket No. MW-42588
19-3-NRAB-00003-140275**

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 (L. G. Pike Construction and Hulcher Professional Services, Inc.) to perform Maintenance of Way and Structures work (replace switches) at Cushman East, Receiving yard track in Hobson Yard, Lincoln, Nebraska on October 22, 23, 24 and 25, 2012 (System File C-13-C100-104/10-13-0138 BNR).**
- (2) 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.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Brennan, S. Hrenchir, M. Halpin, L. Miller, G. Stall, R. Hetherington, A. Henderson, D. Francke, J. Francke, K. Kildow, D. Ficke, S. Conradt, M. Portenier, D. Fierstein, B. Ruzicka, V. Havorka, J. Willey and J. Lyons shall each now be compensated for twenty-four (24) hours at their respective straight time rates of pay and four (4) hours at their respective overtime 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.

In 2004, the Carrier had begun a large capacity expansion project on the Powder River Division, located in Wyoming and Nebraska, to accommodate increased traffic volume. By the end of 2011, the Carrier was ready to take the expansion project to the Hobson Yards in Lincoln, Nebraska. On October 20, 2011, the Carrier sent the Organization a notice of its intent to subcontract certain work associated with the Yard expansion:

“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 multi-year, multi-phase project requiring the installation of new track, crossovers, crossings and pavement. BNSF is not adequately equipped with the necessary equipment to perform all aspects of this work. 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.

BNSF forces will be on-hand to perform associated track work (including install 1,300 t.f. new track; welding turnouts; install crossing planks; install 3-No. 11 turnouts; installing 1-No. 5 turnout; install 2-No. 9 turnouts; relocate existing turnout; and surfacing)."

The Notice indicated that the work would begin on approximately November 9, 2012. The parties met in conference but were unable to reach any agreement.

This claim arose in October 2012 after the Carrier used contractors, LG Pike Construction and Hulcher Professional Services to transport machines and replace switches 113 and 114 at Cushman East, in the Hobson Yards, Lincoln, Nebraska. The contractors worked on the job October 22-25, 2012, and according to the Organization's original appeal, dated February 12, 2013, they worked in conjunction with the Carrier's gang TCGX0157. The Organization filed this claim on October 27, 2012, citing the dates, equipment and manpower used by the contractors. The claim alleged that the work should not have been contracted out and that the Carrier had failed to provide notice of its intent to do so. In its correspondence with the Carrier about the claim, the Organization stated that the notice was invalid for the work performed in this case because the October 20, 2011, notice "was for yard improvements that took place in the middle of the Hobson Yards and the work performed in this particular case was performed on the west end of the Yards at Cushman East, Receiving Yard Track and had nothing to do with the work listed in the Carrier's October 20, 2011, notice." The Organization went on to contend that no specialized equipment was used, only crawler/hoe excavators, front end loaders, and lowboys of the same sort already owned by the Carrier. The Carrier responded that the Organization had failed to establish that the work occurred as alleged, offering only assertions. With respect to the notice, the Carrier pointed out that, while the work occurred later than originally anticipated, nothing in the Agreement requires the Carrier to notify the Organization of the exact date any contracted work is to occur. The October 20, 2011, notice still covered the work in dispute. At least a portion of the work was nothing more than the contractors hauling their own equipment to and from the job site.

The Organization contends that the work of replacing switches and transporting machines has customarily, historically and traditionally been performed by Maintenance of Way forces and, as such, it is covered by the Note to Rule 55. This was ordinary, non-emergency track maintenance work and should have been assigned to the Carrier's own forces. The Notice was inadequate because it did not describe the work

performed and it was sent more than a year before the work occurred. Nor did the work meet any of the exceptions under the Note to Rule 55 that permit contracting out under limited circumstances. The Organization cited sufficient evidence that the work occurred to establish its *prima facie* case, and the Carrier never denied that it assigned contractor forces to perform the claimed work. Nor did the Carrier identify any specialized equipment that was used. The work was routine track maintenance work that should have been scheduled for MoW forces to do.

According to the Carrier, the contracting of all, or significant portions, of capacity expansion projects has been an ongoing practice at BNSF for many years. The Carrier does not have adequate equipment or forces to undertake such massive projects. The disputed work was properly contracted out because the Carrier was not adequately equipped to handle all aspects of the Hobson Yards improvement project, nor did its forces possess the specialized skills required for all aspects of the project. The Organization has not established that the work performed is work that was historically, customarily and traditionally performed by MoW forces to the exclusion of others. Finally, the Organization has not established that the work actually occurred as alleged. The Board has ruled in the past that unsupported, self-serving statements are not evidence and cannot take its place.

The Carrier is correct that the Board has recognized the fact that BNSF may need to turn to outside contractors in order to complete complex, large-scale projects because it is not adequately equipped to do so on its own. In discussing large-scale projects like the one at issue, in Award 41223 the Board stated:

“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 exception to the Note to Rule 55’s strictures against contracting),

the end result is the same—the claim will be denied. . . . 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.”

The Hobson Yards improvement project is similar in many respects to the Lincoln Yards improvement project addressed above. The Notice stated up front that the Hobson Yards project was a “multi-year, multi-phase project requiring installation of new track, crossovers, crossings and pavement.” The work occurred a year after the October 2011 notice, but that was within the “multi-year” time frame specified in the notice. The Carrier’s justification for contracting out part of the project was because it was “not adequately equipped with the necessary equipment to perform all aspects of this project.” The fact that some specialized equipment was clearly needed, such as that required for hot-mix asphalt paving, does not mean that the Carrier did not also need more regular equipment (and operators) than it currently had. In addition, the Notice specified the work that BNSF forces would continue to perform; in other words, contractor forces would supplement, not replace, the Carrier’s own forces.

Looking at the disputed work as it occurred, it appears that the contractor’s employees were working on the switch replacements in conjunction with Carrier forces, specifically gang TCGX0157, and that the work was of the type identified in the notice. To the extent that transporting equipment was part of the claim, there would be no violation of the Agreement for contractor forces to move their own equipment, and there is no allegation that they were moving Carrier equipment. The Organization complains that the work occurred in an area of the Hobson Yards that was not identified in the October 2011 notice. But the notice did not identify any specific area of the Hobson Yards where the contractors would be working. The concept of a “multi-year, multi-phase project” suggests that large areas of the Yards would be affected.

After considering the totality of the evidence in the record, the Board concludes that the Carrier provided adequate notice of contracting out at the Hobson Yards improvement project. The proposed contracting fell within the “not adequately

equipped” exception to the Note to Rule 55, and the work as performed comported with the notice. The Carrier did not violate the Agreement.

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.