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

Award No. 43704
Docket No. MW-42591
19-3-NRAB-00003-140279

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 (R. J. Corman) to perform Maintenance of Way and Structures Department work (rehab switches and a bridge panel) at various locations on the Orin Subdivision of the Powder River Division on August 14, 15 and 22, 2012 (System File C-12-C100-474/10-13-0009 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 the aforesaid 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, Claimant R. Shaffer shall now be compensated for twenty-two (22) hours straight time at his applicable rate of pay. Claimants G. Hagen, T. Mills, M. Skilbred, J. Thompson, R. Noggle, J. Manzanares, M. McDonald and J. Hall shall each now be compensated for nineteen (19) hours straight time at their applicable 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 challenges the Carrier's decision to contract out bargaining unit work. The Note to Rule 55 of the parties' Agreement establishes the parties' rights and obligations regarding such contracting out. If the disputed work is work "customarily performed" by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

> **"[S]uch work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or 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."**

In addition, if the Carrier plans to contract out work on one of these bases, the Note requires the Carrier to notify the Organization "as far in advance of the date on the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases." The Organization may request a conference to discuss possibilities for avoiding the proposed contracting out, pursuant to the Note and Appendix Y.

The Organization alleges that the Carrier violated the parties' Agreement when it assigned historically traditional bargaining unit work—rehabbing switches and a bridge panel—to an outside contractor at various locations on the Orin Subdivision of the Powder River Division on August 14, 15 and 22, 2012, and when it failed to provide proper advance notice as required by Rule 55.

The Carrier responds that it provided notice, by letter dated February 13, 2012, to the General Chairman of the Organization. The notice carries the heading "Re: Switch Renewals — Various Locations — Powder River Division." It states:

> **"As you are aware, BNSF has multiple large-scale installation and improvement projects in progress on the Powder River Division. BNSF is not adequately equipped to handle all aspects of these projects nor do BNSF forces possess the specialized skills required for all aspects of these installations. BNSF plans to contract for additional heavy equipment, such as trackhoe (excavators), 100 ton off-track cranes, side-boom cranes, extra-capacity long haul trucks, as it has done in the past, to assist BNSF forces with the replacement of multiple switches and crossovers at several locations on various sub-divisions. The work to be performed by the contractor includes but is not limited to, unload/haul switch and track panels to locations; remove/replace necessary switches; necessary sub-grade work; and debris removal at the following locations. . . ."**

The notice then listed one Yard and six different Sub-divisions, with some thirty locations within them.

There is no significant dispute that the work at issue is traditional Maintenance of Way work, and notice was properly required under Rule 55. The Organization contends that the February 13, 2012, notice was defective, however, in that it was too vague and non-specific to be useful—it failed to describe a specific contracting out transaction, it failed to establish any of the enumerated grounds that would justify contracting out and it failed to indicate when the work would be occurring at the various locations set forth. Moreover, the inclusion of the phrase "but not limited to" that was added to the description of the work to be performed by outside forces was so open-ended that it did not meet the requirements of adequate notice under Rule 55.

What is the purpose of advance notice under Rule 55? It is not simply to give the Organization a "heads-up" that certain work is going to be contracted out, but to give it an opportunity to object and to request a conference during which the parties are required to engage in good-faith efforts to reduce the amount of subcontracting. To that end, a proper notice must be sufficiently specific for the Organization to be able to make an informed judgment whether it believes the proposed contracting out is permissible under Rule 55 and then engage in meaningful discussions on alternatives to contracting out during conference.

In a perfect world, every individual instance of proposed contracting would have its own notice, specifying the precise location, the exact nature of the work to be performed, and the actual date that the work would be done. In many cases, that is possible. But ideals often run up against the realities associated with an operation the size of the Carrier's, where large infrastructure projects, which must be planned well in advance, can be extensive in scope, location and time. Moreover, with such large projects, there is necessarily some ambiguity in terms of details. For instance, it is not always possible to say definitively in advance "On such-and-such a date, the work will take place here," because changes in schedule in one location can have a ripple effect down the line; a certain amount of flexibility has to be built into scheduling. From the Carrier's perspective, the February 13, 2012, notice here identified the nature of the project, the types of equipment needed, the type of work that would be done, the locations where it would be done, and the reasons why the Carrier believed that contracting out would be permissible under Rule 55.

The challenge for the Board is to balance the needs of the Organization for enough information to be useful for the purposes of Rule 55 against the needs of the Carrier in planning and executing large projects that extend across multiple territories. The February 13, 2012, notice was clear from the beginning on the general type of work that would be done: switch renewal. The Carrier alleged in the notice that it was not adequately equipped "to handle all aspects of these installations," citing the need for "additional heavy equipment." The Carrier also indicated its belief that its own forces did not possess "the specialized skills required for all aspects of these installations." The notice went on to identify the types of work that the contractors would perform and thirty locations where the work would occur. The Board concludes that the information set forth in the notice was sufficient under Rule 55 to provide the Organization with enough detail to be able to evaluate the proposed contracting and to respond in

conference in a meaningful way. The number of locations identified is not a disqualifying factor. It might make the conferencing process more complicated and time-consuming, but the nature of the proposed work is the same at all locations. The Organization objected specifically that the phrase "but not limited to" in the description of the work to be performed by the contractor was so vague as to render the notice inadequate under Rule 55. If the entire notice were not specific as to the scope of the project—switch renewal—that argument would be more persuasive. As it is, one would anticipate that the phrase would be limited to tasks associated with switch renewal, which the Organization would be familiar with.

The adequacy of the notice having been resolved, the Board turns now to whether the Carrier established that the proposed contracting was permissible under any of the exceptions to Rule 55: (1) special skills; (2) special equipment; (3) the Carrier is "not adequately equipped to handle the work"; and (4) emergency situations. The notice cited special skills, special equipment and "not adequately equipped" as the bases for contracting out the work. The record, however, does not indicate what special skills the Carrier's forces lacked to perform this routine track maintenance work. Nor does it specify any ways in which the Carrier was "not adequately equipped" to perform the work with its own forces. Finally, while the Carrier stated that it would be using special equipment, there is no indication in the record that it did so. All in all, the Board concludes that the Carrier failed to meet its burden of proof that the contracting out at issue fell within the exceptions to Rule 55.

This brings us to the question of remedy. The Carrier contends that because the named Claimants were fully employed, they are due no remedy. If there is no remedy, however, the Carrier could violate the parties' Agreement with no consequences whatsoever. The Board adopts the holding set forth in Award 43394 (Helburn 2019), citing Award 40567: "While it may seem unfair to compensate an individual who already received pay for the time claimed, it would be even more of a miscarriage of justice to permit an employer to violate the terms of the parties' agreement with impunity." The Claimants shall be compensated for the number of hours claimed.

AWARD

Claim sustained.

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 18th day of June 2019.