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

Award No. 43708
Docket No. MW-42596
19-3-NRAB-00003-140303

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 Carrier violated the Agreement when it assigned outside forces (R. J. Corman) to perform Maintenance of Way and Structures Department work (clean out culvert and winterize switches) at Mile Posts 511.9 and 516.3 on the Blackhills Subdivision on November 28 and 29, 2012 (System File C-13-C100-188/10-13-0250 BNR).

(2) The Agreement was further violated when the Carrier failed to 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 J. Dibble and D. Schmitz shall now each be compensated for sixteen (16) hours at their respective straight time 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.

On February 13, 2012, the Carrier sent the Organization notice of its intent to contract out cleaning and maintenance work on certain switches:

> **"As information, BNSF plans to contract for a vacuum truck, as it has done in the past, to perform the necessary cleaning and maintenance on switches, switch heaters, and other track equipment. BNSF does not possess the specialized vacuum trucks necessary to perform this work including removal/proper disposal of coal dust and coal-fouled ballast at the following locations on the Powder River Division:**
>
> **[There follows a list of eleven Sub-Divisions, with locations ranging from 9.8 miles of track to over 229 miles]**
>
> **It is anticipated this work will begin on approximately March 1, 2012."**

The instant claim was filed by letter dated January 8, 2013, alleging that the Carrier violated the Agreement on November 28 and 29, 2012, when it used a contractor, RJ Corman, to vacuum up ballast at MP 511.9 on the Blackhills subdivision and to clean up a culvert at MP 516.3. According to the claim, the work was part of winterizing switches, which is done every year and has historically been performed by Maintenance of Way forces.

The Organization contends that the work of maintaining rail and track throughout the Carrier's system is typical Maintenance of Way work, which has always been the responsibility of MoW forces and may be contracted out only subject to certain conditions set forth in the Note to Rule 55. The Carrier's threshold obligation under the Note to Rule 55 is to provide advance written notice to the

Organization of its intention to contract the work in dispute. The blanket notice given here was dated February 13, 2012, but it did not meet the requirements of adequate notice: it was generic and vague, covering over 1100 miles of track, and it did not specify when the work would occur at different locations. Moreover, the work did not take place until November 28 and 29, more than nine months later. The Claim should be sustained for failure of notice. The Carrier alleges that the work needed to be done using specialized equipment, a vacuum truck, which it does not own. However, the Carrier owns vacuum trucks in some locations and has rented vac trucks for its own forces to operate. The Organization has given the Carrier information on companies that rent the equipment readily without operators. Moreover, vacuum trucks may make winterizing switches easier, but the work does not actually require a vac truck to perform. Winterizing switches involves clearing out ballast from under and around the switches and switch heaters so that ice, snow and water can drain away, minimizing the risk of the equipment freezing up. This is work that MoW forces could readily have done and it should have been assigned to them. The Carrier failed to abide by its obligation to make a good faith attempt to minimize the incidence of subcontracting, and its reasons for contracting the work do not meet the criteria set forth in the Note to Rule 55.

The Carrier points out that contracting vacuum trucks has been an ongoing practice across the BNSF system for many years because it does not own the specialized equipment. It provided proper notice, consistent with its prior practice. After the parties met in conference and were unable to reach a resolution, the Carrier proceeded to contract the work. While BNSF employees have operated leased vacuum trucks in the past, there were no trucks available for rent without an operator at the time this work was performed. The work was properly contracted out under the "special equipment not owned by the Company" exception in the Note to Rule 55.

The first step in the analysis of any contracting dispute is whether the work at issue is work "customarily, historically and traditionally" performed by Maintenance of Way forces. Cleaning and maintaining switches and switch heaters is that type of work. If it is, the Note to Rule 55 requires the Carrier to provide the Organization with advance written notice, so that the parties may have an opportunity to meet in conference to discuss alternatives to contracting out the work. The Note also reserves the right to perform the work to MoW forces unless it falls within one of three exceptions: (1) specialized equipment or skills; (2) the work is such that the Carrier

is not adequately equipped to handle it; or (3) emergencies.

Here, the Carrier issued a notice to the Organization dated February 13, 2012, in which it stated its intention to contract out "as it has done in the past … cleaning and maintenance on switches, switch heaters and other track equipment" over eleven subdivisions on the Powder River West and Powder River North Divisions. The Notice stated that the work would start "on approximately March 1, 2012," but it did not indicate how long it would continue. The work in this Claim occurred on November 28 and 28, 2012.

This Board has previously addressed what constitutes adequate notice under the Note to Rule 55. As it recognized in Award No. 40798:

> **"The purpose of the notice provision is to set the stage for the parties to "make a good faith attempt to reach an understanding concerning said contracting" when they meet to discuss it. . . .**
>
> **… The purpose of giving notice is to encourage the parties to engage in meaningful discussions about, and explore alternatives to, contracting out scope covered work. . . . The contracting conference established by the Note to Rule 55 is not intended to be merely a pro forma stop en route to the Carrier's doing what it wants. Processes negotiated and agreed by toby the parties in their Agreement are important. The Board would make a sham of the conference process established in the Note to Rule 55, and the good faith obligation attendant upon the parties under that process, if it condoned the Carrier's action in sending out a notice giving the wrong reasons for contracting out. Under similar circumstances in other cases, the Board also ruled that improper notice warrants sustaining a claim."**

In Award 40798, the Board held that the notice was inadequate because the reason given in the notice for contracting the work was not the real reason the work was being contracted. In Award 41166, another case between these same parties involving contracting vacuum trucks, the Board addressed other reasons for finding that a contracting notice was inadequate:

> **"The Board's holding in Award 40798 is not limited to the reasons set forth in a notice for contracting out the work. In order for the parties to have the meaningful discussions envisioned by the procedures set forth in the Note to Rule 55, a notice must include enough information about the proposed contracting for the Organization to determine if it wants to protest. There is a reason why "who, what, when, where, how and why" is taught to high school English students as a checklist for writing non-fiction—the list covers all the important information in just about any situation. In this case, the "where" given in the Carrier's 2006 schedule did not include Denver. The Carrier cannot simply say "we intend to use these vacuum trucks throughout the system." The Organization is entitled to more specific information on how extensive the contracting is going to be, so that it can make informed decisions about whether to protest and what alternatives it might present to the Carrier during a contracting conference. . . . The failure to give effective notice of where the proposed contracting would occur is a fundamental flaw that renders the notice ineffective."**

Given the size and scope of some of the Carrier's capacity expansion projects, giving adequate notice of its intention to contract out work covered by the Note to Rule 55 can be problematic for the Carrier. The size and scope of the projects can make it difficult for a simple notice to provide adequate information to the Organization. The problem is demonstrated in Award No. 40546, where the Board concluded that the Carrier's notice (regarding asphalt work it intended to contract out across the Carrier's entire system) was inadequate:

> **"Although the General Chairman met with representatives of the Carrier on February 11, 2004, thus satisfying the requirement that such a meeting take place, the Carrier's letter of January 15, 2004, failed to list with specificity where the asphalt work was expected to occur in 2004, because the letter listed more than 1,800 separate locations across the Carrier's rail system where asphalt work was anticipated."**

In evaluating charges of inadequate notice, the Board has to balance the Carrier's interest in moving forward on large projects with the Organization's right to know.

This claim presents yet another variation of the "adequate notice" cases. The February 13, 2012, Notice identified the work to be done (cleaning and maintenance of switches and switch heaters "and other track equipment"), the reason for contracting the work (specialized equipment not owned by the Carrier), the locations where the work would take place (some 1100 miles of track in the Powder River Division), and when the work would start (approximately March 1, 2012). At first glance, the Notice appears sufficient. But upon closer analysis, it falls short, because it only superficially identifies the work that is to be performed by the contractor, the locations of the work, and when it will occur at those locations. The Notice does not indicate an end date for the proposed contracting. Nor does the Notice identify how many outside personnel will be used to do the work. In similar cases previously, the Carrier provided the Organization with a schedule of when work would be done at different locations, how many contractor personnel would be involved, and what equipment they would be using. (See, e.g., Award No. 40791 and Award No. 41166.)

As the Notice is written, the Carrier is claiming the right to contract out essentially all cleaning and maintenance of switches and switch heaters "and other track work." The only reason cited for needing a vacuum truck is "removal/proper disposal of coal dust and coal-fouled ballast." The presence of coal dust is a normal occurrence on the Powder River Division because of the number of mines there. So the Notice leaves unclear how much routine switch cleaning and maintenance would be performed by regular forces and how much would be done by the contractor. The Notice does not indicate when the contractor would do its work across the 1100 miles of track cited as the location for the work—would it visit different sub-divisions once during the year? Twice? More regularly than that? There is also a temporal problem as well. Track maintenance needs and tasks vary widely by the season. The Notice was sent in February 2012, as winter was ending and spring approaching. What is required to keep switches clean in the heat of summer is quite different when the weather is sub-freezing in the deep of winter. The work in dispute here was winterizing switches and switch heaters. Nor does the Notice address how much outside equipment it intends to use. This is important because according to the Organization, the Carrier actually does own some vacuum trucks and has leased them in the past for its forces to operate. The Carrier asserted that there were no vacuum trucks for lease without operators in the area identified in the Notice (although there is nothing in the record to substantiate that claim). But what is not a viable solution for a short-term project may be a real possibility if the work were going to continue

over the course of an entire year. Finally, the Notice did not indicate an end date to the proposed contracting. The Organization would be understandably concerned that the Carrier intended to contract the work indefinitely into the future without further discussion and an opportunity to conference.

All of these problems lead the Board to conclude that the February 12, 2012, Notice did not meet the requirements for adequate notice under the Rule to Note 55. As the Board has noted in previous awards, this requires that the Claim be sustained.

As for remedy, the Carrier argues that Claimants are not entitled to be compensated because they were fully occupied and suffered no monetary loss. The Board has addressed this issue previously as well:

> **"The Organization filed this complaint of behalf of five named Claimants all of whom were either working full-time or on paid leave or vacation when the work at issue was done. Because they suffered no monetary loss as a result of the subcontracting, the Carrier contends that none of them is entitled to any monetary relief. … [T]here are competing lines of precedent the come down on both sides of the "compensation/no compensation debate" for the Claimants who are either working or on paid leave. Neither of the parties' positions is entirely satisfactory: the Claimants were already fully employed or receiving paid time off when the work was done, so paying them for any violation amounts to double pay. At the same time, the Carrier's position—that no one is entitled to any compensation—is even more unsatisfactory. It is not only that the individual Claimants have lost a work opportunity. Perhaps more important to the process of collective bargaining, if there were no penalty associated with a contractual violation, the Carrier would be free to violate the Agreement with impunity, knowing that there was no real cost associated with any violation. Such an outcome would make a mockery of the parties' undertakings in their Agreement, and for that reason must be rejected. There are numerous prior Awards that support awarding monetary damages to employees who were already working or on leave when the Carrier violated the Agreement. (See, particularly, Third Division Award 19899, which traces the development of these principles over**

time.) The Board finds the reasoning of these precedents compelling and will follow them. The Claimants are entitled to compensation as claimed, unless (in the words of Arbitrator Marx in Public Law Board No. 4768, Award 1) "the Carrier can demonstrate to the Organization that the requested number of hours' pay does not entirely conform to the amount of work performed by the outside contractor, and payment should be modified."

The named Claimants are entitled to be compensated for the number of hours worked by the contractors on the dates cited in the original claim.

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.