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

Award No. 43710
Docket No. MW-42607
19-3-NRAB-00003-140292

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 work (moving ballast, unloading and laying out materials, moving switches, tearing out switches and related work) between Mile Posts 121 and 123 on the Glasgow Subdivision beginning on September 19, 2012 and continuing (System File B-M-2626-M/11-13-0071 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with 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.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants W. Oyloe, C. Gable, D. Stanton, E. Brunelle, G. Nybakken and D. Mix shall '... each receive an equal portion of all hours worked by the contractor's, beginning on September 19, 2012 and continue until the project is completed and with the pay to be at the claimant's respective straight and overtime rate's (sic) 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.

The development of shale oil production in the United States has resulted in increased demands on the Carrier's rail system, particularly in the Bakken Shale region. According to the Carrier, its oil shipments increased 7000% between 2008 and 2012. In order to help meet this increased demand, the Carrier has undertaken a number of large-scale capacity expansion projects in recent years. One such project was in the Williston (North Dakota) Yard on the Glasgow Subdivision. On August 20, 2012, the Carrier sent a contracting notice to the Organization:

> **"… BNSF is continuing to experience high traffic volume in the Bakken Shale region. In order to accommodate the increased volume, sustain traffic velocity, and meet the needs of our customers, BNSF plans to increase yard capacity by constructing two new tracks between MP 121 and MP 123 in the Williston Yard on the Glasgow Sub-Division. BNSF plans to contract for all dirt work associated with the construction of new embankments, bridge, drainage structures, and modifications to existing customer-owned structures. [The notice describes in detail the work that will be performed by the contractor, including "furnish/haul/unload approx. 9,000 c.y. new sub-ballast material" and "assist BNSF forces with additional heavy equipment (including load/unloading panels, switches, OTM) .]**
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> **The work to be contracted is anticipated to begin September 6th, 2012. BNSF forces will be on-hand performing associated track work...."**

In October 2012, the Carrier and the Organization participated in a contracting conference but did not reach agreement. The Organization filed this claim on November 14, 2012, alleging that an outside contractor (RJ Corman) had performed bargaining unit work on the Williston Expansion Project beginning September 19, 2012, and continuing. According to the Claim, the Carrier had said during the conference that its forces would do the work involved with moving ballast; loading, unloading, and laying out material; and moving and tearing out switches—but the work was done instead by the contractor. The Carrier denied the Organization's representation of the parties' discussions during conference and asserted that the work performed by the contractor was consistent with that specified in the August 2012 notice.

According to the Organization, the work of transporting ballast, loading, unloading and laying out track material and transporting and replacing switches has customarily, historically and traditionally been performed by Maintenance of Way forces and is contractually reserved to them under the parties' Agreement. As such, the work is subject to the Note to Rule 55, which requires the Carrier to give the Organization advance written notice of any intent to contract out work. The Note also limits the Carrier's right to contract subject to three exceptions: specialized equipment or skills, the Carrier and its forces are "not equipped" to handle the work; and emergencies. Here, the Carrier failed to give proper notice of the work that it assigned to the contractor. Moreover, the work at issue does not fall under any of the exceptions that permit the Carrier to contract out what would otherwise be the work of MoW forces. In addition, the parties reached agreement during conference that MoW forces would perform all of the work in dispute. The Carrier's defenses are not persuasive: Claimants were capable of performing the work and were available. There was no piecemealing involved—Carrier forces should have been assigned all of the work in dispute.

The Carrier responds that prior arbitral precedent has recognized that construction of complex, large-scale projects is not work that is reserved to BNSF employees. The contracting of all, or significant portions, of capacity expansion projects has been an ongoing practice across BNSF's system for many years. The Carrier does not have adequate forces or equipment to undertake such massive projects. Nor is it sensible to expect the Carrier to maintain a huge workforce to handle these periodic large-magnitude projects only to lay off employees until the next large project comes along. The Carrier provided proper notice to the Organization of its intention to contract out the work associated with the Williston Yard expansion project. Prior arbitral precedent has already recognized that Carrier forces do not perform new

construction projects on the magnitude and type found in this project and that the work may be contracted out. Nor does the Carrier have an obligation to piecemeal portions of large projects. The Organization has failed to meet its burden of proof and the Claim should be denied.

The Note to Rule 55 applies here: the work in dispute is certainly work that Carrier forces have customarily performed in the past. The difference here is in the size of the project at issue. While the Notice may not have been as artfully drafted as some—it does not expressly state which of the exceptions to Rule 55 the work falls under—it is not fatally defective because it lacks the "magic words" from the text of Rule 55. Such notices do not occur in a vacuum. The Organization has to have known that the Williston Yard expansion project was a large one, of the type that the Carrier normally needed contractors to complete in a timely manner. The lengthy list of tasks to be undertaken by the contractor clearly signifies that the project is one where "the Company is not adequately equipped to handle the work." The parties conferenced over the notice, and the Organization had an opportunity then to ask any questions about the basis for the contracting.

Moreover, the work in dispute was addressed in the Notice, which specified as one of the tasks to be performed by the contractor to "furnish/haul/unload approx. 9,00.y. new sub-ballast material." The Notice also indicated that the contractor would "assist BNSF forces with additional heavy equipment (including load/unloading panels, switches, OTM)." This is precisely the work that the Claim alleges was improperly performed by the contractor. As for the Carrier having "committed" to its forces doing "all the dirt work," one would expect such a significant departure from the original Notice to have been memorialized in writing between the parties, and there is no such document.

The evidence in the record is sufficient to establish that the work in dispute fell under the "not adequately equipped" exception to the Note to Rule 55. Accordingly, the Carrier did not violate the Agreement when it assigned it to a contractor.

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.