

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43712
Docket No. MW-42610
19-3-NRAB-00003-140295**

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

**(Brotherhood of Maintenance of Way Employees 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 (LG Pike) to perform Maintenance of Way and Structures work (load, transport and unload track panels and equipment) from downtown to Carling at the Hobson Yard at Lincoln, Nebraska on August 27, 28, 29, 30 and 31, 2012 (System File C-12-C100-448/10-12-0701 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 work referred to in Part (1) above 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 violation referred to in Parts (1) and/or (2) above, Claimants R. Brennan, S. Hrenchir and J. Lyons shall now each ‘... be paid forty (40) straight time hours and ten (10) hours overtime at the appropriate rate of pay as settlement of this claim.’.”**

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 August 2012 after the Carrier used a contractor, LG Pike Construction, to load, transport and unload track panels from downtown to Carling at the Hobson Yard at Lincoln, Nebraska. According to the Organization's initial appeal, dated December 13, 2012:

"The facts surrounding this case are that on the above-cited dates [August 27, 28, 29, 30 and 31, 2012], the Carrier contracted with LG Pike Construction Company of Arkansas City, Kansas, for one (1) Foreman and one (1) Crawler Hoe/Excavator with an Operator to work with gang TCGX0157 to move track panels from downtown Lincoln, Nebraska to Carling at the Hobson Yards in Lincoln, Nebraska. The outside contractors also utilized one (1) Lowboy with an Operator to transport the machine used by the outside contractors to perform the claimed work. On the above-cited dates the outside contractors worked eight (8) straight time hours and two (2) overtime hours each day, for a total of forty (40) straight time hours and ten (10) overtime hours each...."

This is the second of two claims related to the Hobson Yards improvement project in which the Organization challenges both the adequacy of the Carrier's notice, which was dated October 20, 2011, and the Carrier's right to contract out the work at issue. The Board has already ruled in the first case (See, Award 43701) The issues raised by the Organization and the arguments made by the parties are the same as in Award 43701, but the facts are different and require individualized analysis.

The Claimants submitted a statement as part of the proceedings below:

"The hours and dates are correct and true.

These machines are permanently assigned to this gang and should be put up for bid with BMW forces. No specialized equipment is utilized with this contractor that BMW employees run every day.

This was also NOT part of the Hump project which the notice to contract was attached, the company uses this notice for any work that a contractor does in the Lincoln Yards.”

In Award 43701, the Board held that the October 20, 2011, Notice was generally adequate to inform the Organization about proposed contracting related to the Hobson Yards improvement project. In this case, the statement from Claimants alleges that the work in dispute was “NOT part of the Hump project which the notice to contract was attached [sic],” and that the Carrier “uses this notice for any work that a contractor does in the Lincoln Yards.” On the face of the facts, the work would appear to be covered by the Notice, which specified “installation of new track, crossovers, crossings and pavement” as the work to be done. Such installations require new track panels, which must be picked up somewhere and transported to the job site. As in Award 43701, the contractor worked in conjunction with Carrier forces—in fact, the same gang, TCGX0157. The facts of the prior case are slightly different, in that the Organization claimed that the work was done in an area not identified in the Notice. The Board found that the Notice was broad enough to cover the area where the work was done. In this case, the Organization again contends that the work was not covered by the Notice, but for a different reason: the Carrier was using the Notice in the Hobson Yards improvement project to justify any contractor work at the Yards, the implication being that the work in dispute was not connected to the larger improvement project. There is no evidence in the record to support that allegation, however, and as this Board has held numerous times before, allegations alone are not evidence. As noted in Award 43701, the “multi-year, multi-phase” nature of the project implies that large areas of the Hobson Yard would be affected. Absent any objective evidence that the work was not part of the Yards improvement project, the Board has no basis on which to conclude that the work was not covered by the broad terms of the Notice or that the Notice was otherwise inadequate in relation to the work under consideration.

Looking at the disputed work as it occurred, the contractor’s employees were working in conjunction with Carrier forces, specifically gang TCGX0157, to pick up, deliver and unload the track panels. The work was of the type identified in the notice, or at least closely related to it. It appears that part of the claim alleges that contractor forces were using their own equipment to perform some of the work; it is no violation

of the Agreement for contractor forces to use or move their own equipment, and there is no allegation that they were using or moving Carrier equipment.

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.