

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43713
Docket No. MW-42611
19-3-NRAB-00003-140301**

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 Carrier violated the Agreement when it assigned outside forces (Hulcher) to perform Maintenance of Way and Structures Department work (clean switches) in the Hobson Yards in Lincoln, Nebraska, on August 23, 24, 28, 29, and 30, 2012 (System File C-12-C100-449/10-12-0703 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a 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 D. Mohnike, M. Sailors, J. Butcher and M. Lane shall now each be compensated for forty (40) hours at their respective straight time rates of pay and for ten (10) hours at their respective time and one-half 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 traditional and historic 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 employees, 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 work customarily performed by bargaining unit employees—cleaning switches—to an outside contractor in the Hobson Yards in Lincoln, Nebraska, on August 23, 24, 28, 29, and 30, 2012, and when it failed to provide proper advance notice as required by Rule 55. According to the Organization, the outside contractor used a foreman, a truck driver and two laborers to remove dirt and rocks from various switches in the Hobson Yards.

There is no dispute between the parties that cleaning switches is routine maintenance work customarily, historically and traditionally performed by bargaining unit employees, such that Rule 55 applies. Nor is there a dispute that the contractor performed at least some of the work at issue: the Carrier produced a statement from the contractor that it did not work on all of the days cited in the Claim.

As for the Organization's allegation that there was no proper notice, the Carrier responds that it did provide notice, by letter dated October 20, 2011, to the General Chairman of the Organization. The notice carries the heading "Re: Yard Improvements — Hobson Yard — Lincoln, NE." It states:

"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 installation of new track, crossovers, crossings and pavement. BNSF is not adequately equipped with the necessary equipment to perform all aspects of this project. 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. . . ."

The Organization contends that the notice was inadequate under Rule 55, in that it addresses a heavy construction project, not routine maintenance work. In other words, the Carrier's October 20, 2011, letter did not provide the General Chairman with advance notice of its intent to assign outside forces to perform the work involved here. After reviewing the October 20, 2011, letter, the Board concludes that the Organization is correct. The letter addresses specialized work on a large "multi-year, multi-phase project, requiring installation of new track, crossovers, crossings and pavement." It says nothing about routine switch maintenance or cleaning.

The notice having been inadequate, the Board must sustain the claim. Regarding the remedy, there is a dispute between the parties as to how many hours the contractor's forces worked. Claimants are entitled to be paid only for the hours actually worked by the outside forces, as determined by the contractor invoices for the project.

AWARD

Claim sustained in accordance with the Findings.

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.