

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44277
Docket No. MW-43524
20-3-NRAB-00003-200427**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Rail Pros) to perform Maintenance of Way and Structures Department work (flagging work) in connection with the construction of a second mainline and siding, switch installations, fence installations, backtrack construction and at public grade crossings between Mile Posts 66.100 and 79.2 on the Ravenna Subdivision of the Nebraska Division beginning on October 27, 2014 and continuing (System File C-15-C100-34/10-15-0074 BNR).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing in advance of its intent to contract out this work or to make a good-faith attempt to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces or reach an understanding concerning such contracting as required by the Note to Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in parts (1) and/or (2) above, Claimants T. Behrens, T. Meyer, W. Pohlmeier, C. Mazanec, C. Bullock, D. Richardson, M. Muirhead, C. Hoard, D. McKeon, D. Obermiller, O. Thompson and P. Walton shall now each be compensated for all straight time and overtime hours worked by Rail Pros in the performance of the claimed work.”**

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.

By letter dated October 28, 2014, the Carrier sent an amended notice of intent to contract to the General Chairwoman., reminding her that:

“BNSF advised by letter dated December 5, 2011 of its plans to contract all work associated with the additional expansion project for approximately 5 miles of 2nd Main and setout tracks between MP 66.16 (CP 666) and MP 73.11 on the Ravenna Sub-division. BNSF is not adequately equipped with the necessary specialized equipment . . . necessary to perform this volume of work. Moreover, BNSF forces do not possess the necessary dirt work skills for projects of this type and magnitude.”

The notice went on to detail the specific work that the project would involve and to note that “this additional project scope will begin on approximately November 14, 2014.” The parties conferenced about the matter without resolution, the work began and the above-noted timely claim was filed and progressed on the property with no agreement reached. Thereafter, the claim was advanced to the National Railroad Adjustment Board for final adjudication.

The Organization insists that the claim should be sustained because the Carrier contracted out flagging work that has been performed “historically, customarily and traditionally” by Maintenance of Way forces. Additionally, the amended notice of intent to contract was issued after the work began and omitted mention of flagging. The improper notice violated the Note to Rule 55 and Appendix Y and evidenced the Carrier’s lack of good faith. The Carrier has not shown the

existence of an exception that would allow the contracting and, moreover, had sufficient time to schedule BNSF forces to perform the work. The claim provided details of the work of the outside forces and the Carrier has not denied their use. That some of the Claimants were on approved leave or vacation does not relieve the Carrier of the obligation to comply with the Note to Rule 55 and Appendix Y. The Organization has the right to name the Claimants. Compensation is appropriate for lost work opportunities and to protect the integrity of the Agreement.

The Carrier insists that the claim should be denied, explaining in the second and final declination that the “contract employees in this case were not flagmen, but rater (sic) employees in charge of their individual workgroups” and that the flagging was done by BNSF forces. Additionally, the Carrier contends that the Organization has not proved that the disputed work was scope work reserved to BNSF forces by past exclusive, system-wide performance. Appendix Y neither prohibits contracting nor applies on BNSF property. The notice of intent to contract met contractual requirements and the Organization has not documented any of the disputed work, which the Carrier does not have to piecemeal. In essence, this is a factual dispute that requires the Board to dismiss or deny the claim. Some of the Claimants are invalid because scheduled vacation or approved leave left them unavailable for work. The Organization has not shown damages as all of the Claimants were fully employed at times relevant.

At the hearing, the Board was informed that the Organization was withdrawing the claim.

AWARD

Claim dismissed.

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 23rd day of October 2020.