

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44289  
Docket No. MW-43531  
20-3-NRAB-00003-200433**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 (Hulcher) to perform Maintenance of Way and Structures Department work (clean tracks and winterize switches) in the Northtown Yard, Twin Cities Division on October 3, 2014 (System File T-D-4579-M/11-15-0202 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 the aforesaid work or 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 R. Fitzgerald, III, T. Lom, B. Johnson, K. Johnston and R. Bernier shall now each be compensated for twelve (12) hours at their overtime 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.

The Claimants have established and hold seniority within various classifications of the Carrier's Maintenance of Way Department, including foreman, machine operator truck driver and laborer. On October 3, 2014, the Carrier assigned outside forces, (Hulcher) to perform the work of cleaning tracks and winterizing switches in the Northtown Yard at the Diesel Shop on the Twin Cities Division, a process which involved cleaning ballast and debris from switches to keep them operating freely and to ensure proper drainage to prevent freeze up. The four contractor employees utilized a vacuum truck to remove accumulated debris and ballast, etc. from switch components.

The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Organization contends that the disputed work, cleaning tracks and winterizing switches, is typical Maintenance of Way work. The Organization contends that this work has customarily and historically been performed by the Carrier's Maintenance of Way forces. Further, the Organization contends that the Carrier failed to give sufficient notice of its intent to contract out this work, as the notice only vaguely described the proposed work and made no reference to environmental concerns. At best, the Organization contends that the Carrier provided a vague blanket notice.

The Carrier contends that even if this work was customarily performed by Maintenance of Way forces, there is no dispute that it may contract out the work when it meets certain exceptions. The Carrier contends that it has satisfied one of the exceptions because the work here consisted of removal of contaminated materials and thus, required special handling. The Carrier contends that contaminated ballast and dust removal requires specialized knowledge of handling procedures in compliance with federal environmental regulations not possessed by its forces. Removal of environmental contaminant material is not a duty delegated exclusively to the BMW-employees.

Contrary to the Carrier's assertion, this Board finds that using a vacuum truck to clean tracks and winterize switches is work reserved to the Carrier's Maintenance of Way forces and should have been assigned to the Claimants, rather than to outside forces. The Carrier argued that it provided adequate notice of its intention to assign this specialized work to outside forces. Before this Board, the Carrier argued that the work at issue was environmentally sensitive and was therefore, not customarily performed by the Maintenance of Way. However, there is no evidence of this defense having been raised on property and there is no notice in the record that describes the work in this way. As that argument was never made on property, it may not be considered by this Board.

The Carrier did not submit any evidence showing that it contracted for specialized vacuum trucks which could not be rented or operated by Carrier forces or that it presented a contracting notice which informed the Organization of same. Where notice of contracting out is insufficient, it prohibits a meaningful contracting conference from taking place. "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." Third Division Award 40798. Under similar circumstances, this Board has held that a claim should be sustained where the notice is insufficient. This Board finds the reasoning of those awards to be persuasive. On this record, it cannot be determined that the Carrier met the "specialized equipment" exception to justify contracting the work at issue. The Claimants are entitled to the monetary remedy requested.

### **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 23rd day of October 2020.**