

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44290
Docket No. MW-43532
20-3-NRAB-00003-200434**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employes 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 (Corman) to perform Maintenance of Way and Structures Department work (relocate rail, ties and plates from Gavin Yard to Old Minot Yard and disassembled old panels in Gavin Yard stacking the used material on the KO Subdivision) on the Twin Cities Division beginning October 13, 2014 and continuing through October 27, 2014 (System File T-D-4585-E/11-15-0216 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 B. Miller, J. Simpkins, K. Brandt, T. Hanson, D. Wald and W. Wilson shall now be compensated for an equal share of four hundred eighty-eight and one-half (488.5) hours at their straight time rates of pay and one hundred ninety-seven and one-half (197.5) hours at their respective 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. Beginning on October 13, 2014 and continuing through October 27, 2014, the Carrier assigned outside forces (Corman) to relocate rail, ties and plates from Gavin Yard to Old Minot Yard and disassemble old panels in Gavin Yard stacking the used material on the KO Subdivision on the Twin Cities Division. In addition to the foremen and two laborers, the outside contractors utilized three Group 2 machines in performance of said work.

In accordance with the Note to Rule 55 of the Labor Agreement, the Carrier provided contracting notices to the Organization on October 9, 2012, March 26, 2013, April 26, 2013 and October 16, 2014 covering the claimed work, including the Carrier's intention to contract all work associated with the capacity expansion project located in Gavin Yard in Minot, N.D.

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, relocating rail, ties, plates disassembling old panels and stacking used material is typical Maintenance of Way work, which has customarily and historically been assigned to and performed by the Carrier's Maintenance of Way forces. The Organization further contends that this work is contractually reserved to them under Rules 1, 2, 5, 6, 29, 55 and the Note to Rule 55.

The Organization contends that scope-covered work may only be contracted out under certain unique, express conditions and only after: (1) the Carrier has asserted good-faith efforts to use its own forces; (2) the Carrier has notified the General Chairman, in writing, of its intent to contract out; and (3) the Carrier has provided the General Chairman the opportunity to discuss the matters surrounding the contracting out transaction in a good-faith attempt to reach an understanding.

The Organization further contends that the notice letters dated October 9, 2012, March 26, 2013, June 5, 2013, and October 16, 2014 did not meet the Agreement requirements. The Organization contends that these letters did not apply to the claimed work and also that said letters were exceedingly vague and thus were not in compliance with the Agreement. Further, the Organization contends that even if the Carrier had established that one of the exceptions applied, it was still obligated to notify and confer in good faith with the Organization.

The Carrier contends that it gave proper notice and an opportunity to confer in good faith to the Organization. The Carrier further contends that the Organization was unable to satisfy its burden of proving otherwise. The Carrier contends that it clearly provided advance notice which adequately described its reasons for contracting out this work.

Although the Carrier denied that this work was customarily performed by the Organization's members, it offered only a general denial. Previous awards have established that relocating rail, ties, and plates, disassembling old panels, and stacking used material is work generally performed by those in the unit. See, *e.g.*, Third Division Award 43662. Therefore, the burden shifts to the Carrier to show that it properly notified the Organization that one of the exceptions to the Note to Rule 55 applies to this work.

Each of the notices provided by the Carrier to the Organization explained that the intended work was part of the Capacity Expansion Project at the Old Yard in Minot, North Dakota. Each one contained statements similar to this one:

"As information, BNSF advised by letters dated May 24, 2011 and May 18, 2012, of its plans to contract all work associated with the capacity expansion project located in Gavin Yard in Minot, N.D. This multi-phase project will include extensive track, utility, and dirt work. BNSF is not adequately equipped to handle all aspects of a project with this magnitude, nor do BNSF forces possess the specialized dirt work skills necessary for this portion of the project, nor does BNSF possess the necessary equipment with operators. The contractor will provide all the necessary heavy equipment,

with operators, to perform the specialized dirt work for this capacity expansion.”

Among those reasons included in the Note to Rule 55 are that the Carrier is not adequately equipped to handle the work and that the work involves special skills not possessed by the Carrier’s employees. Here, due to the size and magnitude of the capacity expansion project in Gavin Yard, the Carrier intended to contract out all the work associated with the project. As a result, the Carrier’s notice and intention have been previously reviewed by this Board and found to satisfy the Agreement requirements.

In Third Division Award 43662, the Board wrote,

“Previous on-property awards have held that the Carrier did not violate the Agreement when it contracted out such projects. Third Division Awards 37433, 37434, 38383, and 41222. Furthermore, the Carrier is not required to piecemeal the project to give the work to existing Maintenance of Way forces. Third Division Awards 43258 and 43259. The rationale behind these awards is that large-scale construction or capacity expansion projects that ordinarily involve unit work cannot realistically be performed by Carrier forces.”

In that case, as here, the Carrier determined that it would need additional forces to undertake a project of this nature and magnitude, and thus it could not be completed using only its own forces. The Board found no violation of the Agreement. This precedent is persuasive, and we again find no violation of the parties’ 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 23rd day of October 2020.

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