

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44291
Docket No. MW-43533
20-3-NRAB-00003-200435**

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 (remove pine needles at Merritt Section and clean around Winton and Chumstick tunnels) on the Scenic subdivision beginning October 6, 2014 and continuing through October 10, 2014 (System File S-P-1952-G/11-15-0190 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 K. Day, S. Hunter and A. Arndt shall now be allowed forty (40) hours of straight time and all other benefits that Claimants did not receive because of the Carrier’s violation of the Agreement.”**

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 the Carrier's Maintenance of Way Department. On October 6, 7, 8, 9 and 10, 2014 the Carrier assigned outside forces (Hulcher) to remove pine needles at Merritt Section and clean around Winton and Chumstick tunnels on the Scenic subdivision.

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 this work has customarily and historically been assigned to the Carrier's Maintenance of Way forces and is contractually reserved to them under the parties' collective bargaining agreement. Because the work is scope-covered, the Organization contends, it may only be contracted out under certain conditions expressed in the Note to Rule 55 and only after the Carrier has notified the Organization and provided an opportunity for the parties to discuss the matter.

The Organization further contends that the letter dated December 17, 2013, which the Carrier asserted served as advance notification, was exceedingly vague and not in compliance with the Agreement.

The Organization contends that although the Carrier asserted that it was not adequately equipped to perform this work with its own forces, in fact, the Carrier has a plethora of equipment allowing it to remove pine needles or clean its property.

Further, the Organization contends that it has shown that equipment was available for rental in the area which could have been operated by the Organization's members.

The Carrier contends that the Organization has failed to carry its burden of showing that the work occurred as claimed. Further, the Carrier contends that the Organization has failed to show that the work was performed exclusively by the Organization's members. The Carrier contends that the Organization must show that its members have performed the work, systemwide, to the exclusion of others.

The Carrier contends that even if the work was scope-covered, it had the contractual right to contract out the work, because it met one of the specific exceptions under the Note to Rule 55. Specifically, the Carrier contends, the company did not have the type of equipment necessary to perform this work. Further, the Organization did not prove that any company had this equipment available for rent at this particular time and in sufficient quantity to complete this project.

There is no dispute that the work took place as alleged. Furthermore, the Organization has demonstrated that this work, use of a vacuum truck to remove pine needles and clean, is work customarily performed by the Organization's members. As has been reiterated by numerous Boards on too many occasions to repeat, the term "customary" does not mean "exclusively," but rather what is usual or ordinary. Third Division Award 43962. As the Organization has satisfactorily shown a *prima facie* violation, the burden of proof shifts to the Carrier. Third Division Award 43970.

On December 17, 2013, the Carrier provided the following notice to the Organization, with a tentative schedule attached:

"As information the Carrier plans to continue the ongoing program of contracting the use of yard cleaners and vacuum trucks on the BNSF system in 2014.

Three yard cleaners will be provided in 2014 and each will include a contractor's technician to assist with the operation and maintenance of the machine. Six to eight vacuum trucks will be used at various locations this year. Each vacuum truck will have one contract technician and one contract operator/driver.

This year we plan to have three yard cleaners working a total of 450 days. We will also have six to eight vacuum trucks working 250 days. We plan to use these yard cleaners and vacuum trucks over the entire BNSF system.

Attached is a tentative copy of the 2014 Yard Cleaning and Vac Truck work locations. Obviously these locations are subject to change as the work season progresses.

This letter is intended to inform you of our trackwork programs, and keep you and your membership abreast of our plans to accomplish this work, in the spirit of open dialogue between BNSF and the BMWED. If you would like to confer on this issue, I can meet with you in our Fort Worth offices...”

The parties held a contracting conference but were unable to reach agreement regarding this proposed work.

The Carrier demonstrated that it provided specific notice to the Organization of its intention to contract this work to outside forces. The notice contained detailed information regarding the places and times that contractors would be used. However, the Carrier also bears the burden of showing that the work falls into one of the exceptions expressly identified in the Note to Rule 55:

“However, such 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.”

Here, the Carrier has asserted that it does not own the equipment required to complete this work with its own forces. But the Organization points out that in Appendix Y, the Carrier assured the Organization that it would make good-faith effort to reduce the incidence of subcontracting, including by the procurement of

rental equipment. In this regard, the Organization provided information regarding rental resources available to the Carrier.

The Carrier responded that the Organization has failed to show that “any company had this equipment available for rent at this particular time and in sufficient quantity to complete this project.” However, the Carrier made no assertion as to how the nature of this work meant that the Carrier was not adequately equipped to handle the work. The Carrier admitted that it owns vacuum trucks and it has not shown that it was unable to rent the equipment to be operated by its own forces.

If the conference required by the Note to Rule 55 and Appendix Y is to be productive, the Carrier should make this information available to the Organization, and, in the event that the parties do not reach an understanding on the contracting, that information should be included in the record in defense of the Carrier’s argument that it met its obligations under the Note to Rule 55 and Appendix Y. On this record, the Carrier has failed to demonstrate that it met the “not adequately equipped” exception to justify contracting the work at issue.

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.