

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44302  
Docket No. MW-43683  
20-3-NRAB-00003-200446**

**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 (Strupp Trucking) to perform Maintenance of Way and Structures Department work (haul Maintenance of Way equipment) from Lacrosse, Wisconsin to Genoa, Wisconsin on March 6, 7 and 9, 2015 (System File C-15-C100-82/10-15-0204 BNR).**
- (2) The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions and failed 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, Claimant R. Jarvis shall now be paid at his appropriate rate of pay for twenty-four (24) hours' straight time and for six (6) hours' overtime.”**

**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 Claimant has established and holds seniority within various classifications of the Carrier's Maintenance of Way Department, including Group 2 Machine Operator. On March 6, 7 and 9, 2015, the Carrier assigned outside forces (Strupp Trucking) to haul equipment (track hoes and end loaders) from Lacrosse, Wisconsin to Genoa, Wisconsin on the Chicago Division. On the claim dates, the outside contractor utilized one lowboy with driver, who worked a total of 24 straight time hours and six overtime hours.

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 work of transporting machines used in the construction, repair and maintenance of tracks is typical Maintenance of Way work and that such work has customarily and historically been assigned to and performed by the Carrier's Maintenance of Way forces and is contractually reserved to them.

The Organization further contends that the Carrier failed to comply with the Note to Rule 55 and Appendix Y by failing to provide proper advance notification of its plan to use outside forces and failing to make good faith efforts to reduce the incidence of subcontracting. The Organization contends that the Carrier's letter dated December 19, 2014 was nothing more than a vague blanket notice.

The Carrier contends that the Organization has failed to demonstrate that the work took place as claimed, or that the Organization's members have performed this work to the exclusion of others on a system-wide basis. Therefore, the Carrier contends that the Organization has failed to show that the work was reserved to its members.

The Carrier contends that by its letter dated December 19, 2014, it provided proper advance notice of its intention and thus, did not violate the Note to Rule 55 or Appendix Y. That notice reads, in part:

"As information. BNSF plans to continue the ongoing program of contract flatbed trucks and trailers to supplement our lowboy service. These trucks and trailers will be used to haul various roadway machines, vehicles and Gang support trailers throughout the BNSF system in 2015 for Region/System, Division and Sickles gangs on an as needed basis per the attached 2015 RSG work program. This schedule is subject to change without notice.

This letter is intended to inform of our trackwork programs, and you and your membership abreast of our plans to accomplish this work, in the spirit of open dialogue between BNSF and the BMWED.

Attached is the tentative 2015 system gang schedule, Obviously, this schedule is subject to change as the work season progresses."

The Carrier offered only a general denial that this work took place as alleged. Furthermore, the Organization has demonstrated that this work, hauling equipment, is work customarily performed by the Organization's members. The Carrier's notice that it intended to use outside contractors "to supplement our lowboy service" conceded as much. 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 shown a *prima facie* violation, the burden of proof shifts to the Carrier. Third Division Award 43970.

Therefore, the Carrier must show 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.”**

**On-property Third Division Award 43572 addressed the use of contractors to operate flatbed trucks and trailers on July 26, 27 and 28, 2013. The Board sustained the claim, finding that where the Carrier’s notice identified the reason for the use of outside forces was “to supplement our lowboy service,” it failed to identify any of the specific reasons in the Note to Rule 55 that may justify contracting out. That Board concluded,**

**“The notice in this case does not identify a reason to justify contracting under the Note to Rule 55, and the Carrier did not submit any evidence that would support any contractual justification. On this record, the claim shall be sustained.”**

***See also, Third Division Awards 43667, 43668, 43669, and 43969.***

**This Board finds the on-property precedent persuasive, especially as each addressed the same facts and arguments presented in the instant dispute. We see no reason to depart from this well-reasoned precedent.**

**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.**