Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44385
Docket No. MW-42963
21-3-NRAB-00003-190366

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division (IBT Rail Conference
(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 (Miller Trucking and Excavating) to perform Maintenance of Way and Structures Department work (removal and replacement of grade crossings, switch ties, insulated joint ties and general track maintenance) assisting District Gangs TP 07 and TP 09 starting at Montgomery, Illinois and working westward on the Mendota Subdivision, Chicago Division beginning on September 16, 2013 and continuing (System File C-14-C100-29/10-14-0048 BNR).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman ¬in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding the aforesaid work or 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 J. Stultz, E. Wolfe, J. Smith, J. Dieterich, L. Niedziela and J. Pearce shall each be paid all straight time and

overtime hours worked by the contractor forces at their appropriate rates of pay beginning on September 16, 2013 and continuing until the violation ceases."

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.

Beginning on September 16, 2013, and continuing for some period after, the Carrier assigned an outside contractor, Miller Trucking and Excavating, to assist District Gangs TP 07 and TP 09 in removing and replacing grade crossings, switch ties, and insulated joint ties, along with other track maintenance work. The work started at Montgomery, Illinois, on the Mendota Subdivision, Chicago Division, and moved west from there.

The Organization contends that the work performed by the contractor was work historically, customarily and traditionally done by the Carrier's Maintenance of Way forces and, as such, falls within the Scope Rule of the Agreement and is subject to Rule 55, which provides for advance notice of proposed contracting. Rule 55 also establishes the parameters under which the Carrier may properly contract out work that would otherwise belong to BMWE-represented employees. The Carrier failed to provide adequate notice: the December 17, 2012, notice it sent does not reference the work performed in this case. Moreover, the Carrier failed to meet its burden of proving an exception existed under the Note to Rule 55 that would have justified its decision to contract out the work at issue.

According to the Carrier, the Organization has not met its burden of proof. The Organization has not established that the work in dispute falls within the Scope Rule. Moreover, the Carrier provided proper notice by letter dated December 17, 2012. Additionally, the work falls within one of the exceptions to Rule 55: Carrier forces were not adequately equipped to perform all aspects of the disputed work. Finally, the remedy sought by the Organization is excessive. Claimants were fully employed and should not be compensated a second time.

The Organization has established, through employee statements, that the work occurred as alleged. The statements are sufficiently specific and factual to give the Carrier the information it needs to determine if the work occurred, when it took place, and what work the contractor did. The Carrier argues that employees' self-interested statements are not enough to prove the Organization's case. That would be true if the statements were blanket statements without information on the nature of the work, its location or how many contractor employees were involved, or if the statements were from individuals who were not present actually to witness what happened. The fact is, it is the Carrier, not individual employees or the Organization, that has access to records of work performed by contractors on its property.

The Organization has also established that the work assigned to the contractor was work historically, traditionally and customarily performed by MoW forces, and the Note to Rule 55 applies.

This means that the Carrier was obligated to provide 15 days' advance notice of its intent to contract out the work. The Carrier sent the Organization a notice dated December 17, 2012, that stated:

> **As information the Carrier plans to continue the ongoing program of placing asphalt at grade crossings to restore the running surface of the roadway approaching the tracks. As in the past this work will be accomplished by outside forces that are properly equipped to handle the placement and rolling of asphalt.**
> **Attached is a tentative list of locations where asphalt work is expected to occur in 2013. Obviously, this list is subject to change as the work season progresses.**

It is well-established through prior Board awards that the Carrier has the right to contract out asphalt work, which requires specialized equipment that it does not have and specialized skills that its employees do not have. The problem in this case is that the record does not establish that the work in dispute that Miller Trucking did was asphalt work or asphalt-related. As one employee statement put it: "I watched them everyday replace and take out crossings, replace switch ties, change out insulated joint ties, and just other basic maintenance." Once the Carrier invokes an exception to Rule 55, such as asphalt work, it has the burden to establish that the work occurred as it claimed. There is no such evidence in the record. Accordingly, the December 17, 2012, Notice was flawed. It did not cover the work at issue in this case.

Defective notice requires the Board to sustain the underlying claim. The Carrier objects to any monetary compensation being awarded to the Claimants because they were fully employed. As this Board has held before, however: "While it may seem unfair to compensate an individual who already received pay for the time claimed, it would be more of a miscarriage of justice to permit an employer to violate the terms of the parties' agreement with impunity." (Third Division Award 40567) There was some question about how many hours Claimants should be compensated for. The Board has determined that the six Claimants should each be compensated 147 hours each at their applicable straight time rates.[1]

AWARD

Claim sustained in accordance with the Findings.

---

[1] **This is the first of two claims relating to the same contracting, the other being NRAB 3-190368. The Board cannot consider duplicative claims and has dismissed the second claim in a separate Award.**

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 13th day of April 2021.