

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 44391  
Docket No. MW-42992  
21-3-NRAB-00003-190372

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Buel/Pavers) to perform Maintenance of Way and Structures work (replace switches) at the Hobson Yard in Lincoln, Nebraska on October 29 and 31, 2013 (System File C-14-C100-40/10-14-0079 BNR).
- (2) The Agreement was further violated when the Carrier failed to properly notify and confer with the General Chairman 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 R. Brennan, R. Hetherington and S. Hrenchir shall each now be compensated for sixteen (16) hours at their respective straight time rates of pay and four (4) 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.

Beginning in 2011, the Carrier embarked a substantial renovation of the Hobson Yard in Lincoln, Nebraska. It sent notice to the Organization first on October 20, 2011, indicating its intention to contract out substantial portions of the project due to its magnitude and the need for specialized equipment and skills:

This is a multi-year, multi-phase project requiring installation of new track, crossovers, crossings and pavement. BNSF is not adequately equipped with the necessary equipment to perform all aspects of this project. Moreover, BNSF forces do not possess the necessary specialized dirt work or hot-mix paving skills for this project.

The Carrier subsequently amended its notices on October 23, 2012, and again on January 15, 2013, to add more components of the project. Removing and replacing switches was one of the tasks to be done by the contractor.

This claim arose when contractor Buel/Pavers replaced two switches at the Hobson Yard on October 29 and 31, 2013. According to the Organization, the large Hobson Yard renovation project ended on July 23, 2013. The work performed by Buel on October 29 and 31, 2013, was not part of that project. It was routine work of the sort customarily performed by Maintenance of Way forces and fell under the Note to Rule 55. Accordingly, the Carrier should have sent a new notice, which it did not. The Carrier contends that the Organization has not met its burden of proof: there is no evidence that the work was performed as alleged, nor any credible evidence that the Hobson Yard project was completed. The work was part of the ongoing Hobson Yard renovation, which the Carrier had properly contracted out.

The critical decision for the Board is whether the Hobson Yard project was completed on July 23, 2013, or if it was ongoing. If the project had ended, the Carrier needed to provide the Organization with a new notice. If the project was ongoing, the Carrier had already noticed the work, and it fell within the exceptions for contracting set forth in the Note to Rule 55.

In contract cases, the Organization has the initial burden of proof. Here, the Organization's position is based on its claim that the Hobson Yard project was completed on July 23, 2013. The evidence for that is a single e-mail from one of the Claimants, dated March 11, 2014, stating in part: "On July 23, 2016, the Hobson Yard improvement project was completed. The Switches replaced at Hobson Yards had nothing to do with the yard improvement project." While an employee statement can be sufficient to establish a prima facie case, it must include either content that gives it credibility, or sufficient information to enable the Carrier to verify it, as when employee statements attest to specific work done by a specific contractor, at specific locations, on specific dates. The e-mail that the Organization cites as proof that the Hobson Yard improvement project was completed on July 23, 2013, does not meet those standards. It is nothing more than a bald assertion, without any factual basis or context. Why does the author believe that the project ended on that date? Is he someone in a particular position to know? Is there any supporting documentation? Is there corroborative evidence elsewhere in the record? Without more content, there is no way to evaluate the truth of the statement. This is why the Board has held on numerous occasions that assertions "are not evidence and cannot take the place of probative evidence." (Third Division Award 20745, Quinn) That single statement is not supported by any other evidence in the record. If anything, the Carrier indicated from the beginning of the Hobson Yard project that it was a "multi-year, multi-phase project." Following the original October 20, 2011, notice, the Carrier had already sent two additional notices, one in October 2012 and another in January 2013. The January 15, 2013, notice referenced a substantial amount of work in addition to that already noticed:

Those earlier letters are hereby amended to include the following work, with the addition of 150-ton off-track crane, and for the same reasons stated on October 20, 2011, and October 23, 2012: install erosion control measures; excavate/grade/compact prep for foundations; install new yard storm drain inlets (including drain pipe and protection); grade/build-up/compact new sub-grade material (to existing hump embankment); pave hot-mix asphalt roadway and adjacent sidewalk; load/haul/set pre-cast foundations; load/haul/set new modular buildings; and debris removal.

Considering the amount of work set forth, it would not be surprising if the Hobson Yard project continued into July 2013 and beyond.

In the absence of any support for the one statement that the Hobson Yard renovation was completed on July 23, 2013, the Organization has not met its burden of proof regarding a critical element of its case. The original Hobson Yard project was properly noticed at least three times, and the work properly contracted pursuant to Rule 55. The Organization has not established that the Hobson Yard project was completed on July 23, 2013. Accordingly, the Carrier was not required to provide another, separate notice for the work in dispute, and it did not violate the Agreement when it contracted the work to Buel/Pavers.

**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 13th day of April 2021.