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

Award No. 44395
Docket No. MW-42997
21-3-NRAB-00003-190376

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 (BN Logistics) to perform Maintenance of Way and Structures Department work hauling Gang RP03 equipment from Murray, Iowa to Pacific Junction, Iowa on November 1, 2013 (System File C-14-C100-50/10-14-0083 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces (BN Logistics) to perform Maintenance of Way and Structures Department work hauling Gang RP03 equipment from Pacific Junction, Iowa to Creston, Iowa on November 8, 2013 (System File C-14-C100-52/10-14-0084).

(3) The Agreement was further violated when the Carrier failed to properly notify and confer with the General Chairman regarding the work referred to in Parts (1) and/or (2) above 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.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants D. Ficke, S. Conradt, R. Jarvis, T. Brent, S.

Thomas, M. Portenier, T. Ogie and G. Nichols shall now each '... be paid (3) three hours straight time and (6.5) six and one half hours overtime at the appropriate rate of pay as settlement of this claim.'

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants D. Ficke, S. Conradt, R. Jarvis, T. Brent, S. Thomas, M. Portenier, D. Rockenbach and C. Wilson shall now each be compensated for five (5) hours overtime at their respective 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 are Group 1 and 2 Machine Operators in the Roadway Equipment Sub-department. The Organization filed this claim to protest the Carrier's use of contractors to haul gang equipment from Murray, Iowa, to Pacific Junction, Iowa, on November 1, 2013, and from Pacific Junction to Creston, Iowa, on November 8, 2013. The Organization contends that the work of transporting equipment used in the construction, maintenance and repair of tracks is typical Maintenance of Way work that has customarily, historically and traditionally been performed by the Carrier's forces. As such, it is reserved to them and the Note to Rule 55 on contracting applies. The December 17, 2012, notice sent by the Carrier was inadequate because it failed to provide any contractually valid reason for contracting out the work. The notice also lacked the requisite specificity as to details of the work, dates, duration or the number of contractor employees to be utilized. The Carrier's defenses are not convincing: both equipment and employees were available to do the work.

According to the Carrier, the notice it provided the Organization on December 17, 2012, was adequate. It stated: "As information, BNSF plans to continue the ongoing program of using 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 2013 for Region/System, Division and Sickles gangs, on an as needed basis per the attached 2013 RSG work program…" The Board has held that similar system notices are sufficient. The Carrier's production gangs can consist of more than 80 positions. They are heavily mechanized and mobile, and they work on strict schedules because the track they are working on is impassable. If the Organization were to prevail, the entire process would hinge on the timely delivery of the production equipment by the scant few local lowboy operators who would have to make several back-and-forth moves to transport the large number of machines involved. Moves often take place on weekends and the work must be completed by Monday morning, so that the equipment is in place and ready to operate when the gang reports for work. The other option would be for the Carrier to substantially increase the size of its lowboy fleet and lowboy positions. The Organization has failed to prove that BNSF is currently adequately equipped to handle moves of this nature, which is why the Carrier has used contract forces to supplement its own for many years.

With respect to whether blanket notices like the one issued on December 17, 2012, are sufficient under Rule 55, the Board rulings go both ways. Ideally, a notice will give the Organization enough information about the proposed contracting to make an informed decision whether it wants to conference with the Carrier and to be able to engage in productive discussions about alternatives to contracting. On the one hand, the notice here does not specify the basis for the contracting out (specialized equipment or skills or the Carrier is not adequately equipped to perform the work). On the other hand, the notice indicates that using a contractor to help move gang equipment is an "ongoing program," which suggests that the Organization already has knowledge of the program and would be familiar with why the Carrier was desirous of contracting the work.

It is not necessary for the Board to parse this particular notice, however, because of a larger defect in the Carrier's case. The Organization established that the work of moving equipment is covered by Rule 55 as work that is customarily, historically, and traditionally performed by Maintenance of Way forces. Accordingly, the burden shifts

to the Carrier to establish that it is permitted to contract out the work pursuant to one of the exceptions listed in Rule 55:

> **[S]uch work may only be contracted provided that special skills not possessed by the Company's employes, 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.**

In its submission, the Carrier argues that it was "not adequately equipped" to perform the work with its own forces and equipment. The record does not include any evidence in support of that argument, however. The notice says nothing about the Carrier not be adequately equipped. None of the Carrier's responses to the Organization on the property reference "not adequately equipped." The Carrier's record fails to document any history of having to use contractors because it was not adequately equipped. The record includes an e-mail dated December 13, 2013, from a Supervising Engineer, to MOW Claims in which he states:

> **Consider this response to claim—gang movements have been using the precedent for contracted hauling for several years. The letter of intent Notice 23-13 continues to follow this precedent for gang movements for the Region and System gangs in which the gang in question applies.**
> **"In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization 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, except in "emergency time requirements."**
> **Gang involved meets this criteria.**

The e-mail fails to indicate the basis for the Carrier's decision to contract the work. Instead, it references "the precedent for contracted hauling." Pursuant to Rule 55, the Organization is entitled to notice of intended contracting and an explanation from the Carrier as to why contracting is permitted under Rule 55. The fact that the Carrier has

contracted the work before is *not* one of the bases for contracting out that is recognized in Rule 55.[1]

The Organization made a *prima facie* case under Rule 55. The Carrier did not provide sufficient evidence in rebuttal. The Claim is sustained, and Claimants shall be compensated for the equivalent hours spent by contractor forces in moving Gang RP-03's equipment on November 1 and November 8, 2013.

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 13th day of April 2021.

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[1] **The Board recognizes that the Carrier may well have good reason under Rule 55 for contracting out the work at issue here. But it must substantiate the basis for its decision in order to rebut the Organization's *prima facie* case, and that it has not done on the record before the Board.**