

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44422  
Docket No. MW-43421  
21-3-NRAB-00003-200402**

**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 (Rail Pros) to perform Maintenance of Way and Structures Department work (flagging work) at the siding at Beaverhill, Montana between Mile Posts 187.300 and 189.500 on the Dickinson Subdivision, Montana Division beginning on August 18, 2014 through September 4, 2014 (System File B-M2774-EN/11-15-0055 BNR).**
- (2) The Agreement was violated when the Carrier assigned outside forces (Rail Pros) to perform Maintenance of Way and Structures Department work (flagging work) at the siding at Hodges, Montana between Mile Posts 196.700 and 198.000 on the Dickinson Subdivision, Montana Division beginning on August 18, 2014 through September 4, 2014 (System File B-M2775-EN/11-15-0056).**
- (3) The Agreement was violated when the Carrier assigned outside forces (Rail Pros) to perform Maintenance of Way and Structures Department work (flagging work) at the siding at Judson, North Dakota between but not limited to Mile Posts 21.5 and 23. 7 on the Dickinson Subdivision, Montana East Division beginning on August 10, 2014 through September 4, 2014**

(System File B-M-2776-EN/11-15-0057).

- (4) The Agreement was further violated when the Carrier 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'.
- (5) As a consequence of the violations referred to in Parts (1) and/or (4) above, Claimant J. Haas shall now be compensated '... forty eight (48) hours straight time and twenty eight (28) hours overtime as worked by the contractor, with pay to be at his respective rate of pay.'
- (6) As a consequence of the violations referred to in Parts (2) and/or (4) above, Claimant R. Zimmerman shall now be compensated ' ... eighty (80) hours straight time and seventy one and one half (71.5) hours overtime as worked by the contractor, with pay to be at his respective rate of pay.'
- (7) As a consequence of the violations referred to in Parts (3) and/or (4) above, Claimant J. Boehm shall now be compensated ' ... one hundred forty-four (144) hours straight time and ninety-eight (98) hours overtime as worked by the contractor, with pay to be at his respective rate 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.

Periodically the Carrier embarks upon large-scale expansion projects, and the Board has been called upon to decide numerous contracting out claims that have arisen in conjunction with such projects. This case involves three such claims, which have been combined for submission to the Board because they involved similar issues and facts.

These claims arose in August 2014. Starting August 18, 2014, through September 4, 2014, the Carrier assigned an outside contractor (Rail Pros) to provide track protection (flagging) at Beaverhill, Montana, between Mile Posts 187.300 and 189.500, and at Hodges, Montana, between Mile Posts 196.700 and 198.00. Similarly, beginning August 10, 2014, through September 4, 2014, the same contractor (Rail Pros) provided track protection (flagging) at Judson, North Dakota, between Mile Posts 21.5 and 23.7. All three locations are on the Dickinson Sub-division. The Organization filed these claims, alleging that the Carrier violated the parties' Agreement when it contracted out scope-covered work without a permissible basis under the Note to Rule 55.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of what would ordinarily be bargaining unit work. If the disputed work is work that is "customarily, historically or traditionally performed" by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

[S]uch 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.

In addition, if the Carrier plans to contract out work on one of these bases, the Note requires the Carrier to notify the Organization "as far in advance of the date on the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases."

The discovery of the Bakken Shale crude oil accumulation in the Carrier's Montana Division, coupled with advances in crude oil and gas extraction, resulted in an oil boom in the region, and the Carrier decided to embark upon a large-scale expansion project that would significantly increase its capacity to service its customers. To that end, by letter dated June 5, 2013, the Carrier notified the Organization of its intention to contract out a significant portion of the work.<sup>1</sup>

By letter dated June 21, 2013, the Carrier amended its earlier notification, to add "Contracted Flagging":

As you are aware, BNSF advised by letter dated June 5, 2013 that it is faced with tremendous growth in freight volume due to the recently discovered oil and gas reserves, known at the Bakken Shale, located between BNSF's Montana and Twin Cities Divisions. That letter, in addition to the attached previous notifications, detailed the Company's struggle to meet the sudden surge in capacity, as well as, the reasons for contracting associated work. Insomuch, BNSF advised your office that in order for the Company to continue to meet its customer needs, as well as provide for the global demand of this vital energy product, expansion to existing capacity with additional mainlines, yard tracks, and sidings is needed on an urgent basis. Consequently the need to protect men and equipment by providing the proper track authority protection would increase significantly with the increase of construction projects adjacent to live tracks and right-of-way.

*The unwillingness of a sufficient number of qualified employees to accept and retain assignments as flagmen in key areas of District 200 and 300 will result in a mounting backlog of capacity expansion work that is not possible to complete without resorting to outside help. To avoid endangerment to the safe and efficient operation of freight and commuter rail traffic, to prevent projects from not being completed, and to prevent the BNSF from failing to meet both the public and our shippers' needs, BNSF must act quickly on this matter.*

*As you know, BNSF has attempted to maintain flagging positions at sufficient levels to handle this work by accepting employee (Rule 19) requests, continued bulletining of flagmen positions that go no-bid, and hiring additional personnel on the Montana and Twin Cities Divisions.*

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<sup>1</sup> That notice is not in the record before the Board.

*However, employees have avoided exercising seniority to flagging positions, even though such jobs simply require Maintenance of Way Operating and Safety Rules training. BNSF is unable to force employees under the rules to the vacant positions due to the broad scope of work taking place among a vast geographical area. Fundamentally, the Company would be robbing itself of section and mobile forces to ensure a few positions were filled, while the essential day-to-day maintenance duties would suffer tremendously.*

**Please consider this notice that BNSF proposes to contract for 15 track authority flagmen for various milepost locations on the following Sub-divisions, including necessary yard tracks: [list omitted]**

**Any additional sub-divisions or milepost locations will be included in amended notice at a later date. [Emphasis added.]**

**The Carrier sent another notification, dated February 19, 2014, to the Organization, providing further detail on contracting that it proposed to engage on the Zap Sub, Glasgow Sub, and the Dickinson Sub (Hebron Extension and Judson). The Carrier also sent a notification dated June 24, 2014, that again addressed flagging:**

**As information, BNSF advised by letters dated December 10, 2013, February 19, 2014, February 23, 2014 and April 25, 2014, of capacity expansion projects to occur on BNSF's Montana Division. In addition to those letters, BNSF is notifying the Organization of its intent to contract for up to 7 flagmen to provide protection for the outside contractors performing the dirt work for new siding construction or extensions related to these ongoing projects....**

*As you are already aware, BNSF has posted nine Sectionman positions, under the gang ID TFLX1791, with five of those positions established on March 28, 2014, and the remaining four positions established on June 19, 2014. Of those positions established in March, only two have been filled and the three remaining positions have gone unfilled on every subsequent bulletin....*

*In short, employees continue to avoid exercising seniority to the flagging positions, even though those jobs only require Book-of-Rules qualifications. And, force-assigning employees under Rule 17 is not an option because a Sectionman is the lowest rank on the roster. Even if Rule 17 was an option,*

**the Company would be fundamentally robbing itself of section and mobile forces necessary to perform the essential day-to-day maintenance which is a requirement to ensure safe transport of crude oil by rail.... (Emphasis added.)**

**The three claims at issue here all arose at locations identified in the June 24, 2014, notification.**

**The Organization contends first, that the June 24, 2014, notice was inadequate, in that it did not sufficiently identify the locations where the work would be performed, nor did it proffer a basis under the Note to Rule 55 for contracting the work. Second, that the Carrier assigned outside forces to perform routine non-emergency Maintenance of Way track protection work—specifically, flagging in connection with a track construction project on the claimed dates. The work involved here—track protection for track construction—is contractually reserved to and has customarily, historically and traditionally been performed by MoW employees. Such work may only be contracted out under certain specific conditions, which the Carrier failed to establish exist here. The work was not an emergency. Flagging requires no specialized skills or equipment. The Carrier’s position that it could contract out the work because a number of bulletined flagging positions remained unfilled is misleading. The problem is a direct result of the Carrier’s conscious decision to understaff its Maintenance of Way workforce. The Carrier attempted to justify its contracting on the basis that it was “not adequately equipped” to perform the claimed work. But the Note to Rule 55 does not contain a manpower exception. Any alleged lack of forces was based on a deliberate decision not to maintain an adequate workforce and its failure to allow existing employees the ability to become qualified as flagmen. The Carrier cannot intentionally keep a workforce that is inadequate to perform the workload and then contract out the performance of reserved work based on a lack of manpower. The Carrier then failed to make a good-faith effort to reduce the incidence of subcontracting. The Carrier contends that due to the Bakken Oil Shale boom, the amount of flagging work had unexpectedly soared and that the Carrier could not get qualified flagmen to exercise their flagman seniority. The Carrier is in error. The record shows that BNSF has known for years that it does not have a sufficient workforce to perform all work within the Scope of the Agreement and that it intends to disregard the Agreement and use contractors on a regular basis rather than maintaining a sufficient qualified workforce of BMWF-represented employees. The Bakken Shale boom began in 2008. The Carrier has had adequate time to hire a workforce sufficient to meet its needs in regard to the workload occasioned by the boom. The Carrier cannot hide behind the assertion that it cannot**

get enough employees to fill the vacant positions: if you have enough employees to fill the vacant positions, there would not be positions going unfilled upon being bulletined. Finally, the Carrier's defense that the Claimants were unavailable to perform the work is wrong. Carrier forces work at the direction of the Carrier. The employees were not assigned to perform this work simply because the Carrier chose not to assign them to it.

The Carrier argues that the contracting of all, or significant portions of, capacity expansion projects has been an ongoing practice across BNSF's system for many years. Here, the Carrier employed contractors to perform a task associated with a large-scale capacity project. With these claims, the Organization ignores the arbitral history on this issue. Moreover, the disputed work of flagging is not scope-covered, so it is not subject to the Note to Rule 55; at best, there is a mixed practice on flagging. Finally, even if the Board finds that the work in dispute is scope-covered and subject to the Note to Rule 55, it was properly contracted out. The Carrier issued a notice to the Organization of its intent to contract out the flagging in dispute, and the work was properly contracted out as a capacity expansion project. The Organization's claim to the flagging is an attempt to piecemeal part of a large complex project, which the Board has repeatedly held that the Carrier is not required to do. Finally, the Carrier is "not adequately equipped" to handle all aspects of this capacity expansion project, including the track protection. The Organization has failed to rebut all of these positions.

The initial burden of proof is on the Organization to establish that the work in dispute is scope-covered. In arguing that flagging is not scope-covered, the Carrier points to the fact that employees from other crafts, such as BRS, are routinely assigned to flagging duties. While that is true, the analysis is more complex than that fact alone. Some Boards have held that the Organization must show exclusive performance of a task before it can be considered scope-covered. This Board adheres to the alternate interpretation, which is that in order to be scope-covered, the Organization must show that the work in dispute has traditionally, customarily and historically been performed by MoW employees.

MoW forces have certainly traditionally, customarily and historically provided track protection *for track maintenance and construction*. Other crafts are assigned to provide track protection when it is required *in association with their work*. An example of this was presented in the lawsuit *BNSF Railway Company v. Brotherhood of Maintenance of Way Employes*, (U.S.D.C. So. Dist. Texas, Case No. 4-10-CV-102A (2010)). The lawsuit involved a jurisdictional dispute between BMWE

and the Brotherhood of Railway Signalmen over use of a contractor to provide track protection (flag) for PTC installation. The record includes a Declaration submitted in that lawsuit by William Osborne, who was then General Director of Labor Relations for BNSF. In Paragraph 7, Osborne stated: “Although flagging is sometimes performed by BMWED-represented maintenance of way employees, it is not exclusively reserved to those employees in the parties’ collective bargaining agreement. BNSF has long allowed various rules-qualified employees to perform flagging.” In Paragraph 12, Osborne stated: “Generally, *the nature of the project determines which craft has a more direct claim to any flagging work.*” (Emphasis added.) Osborne concluded that because “PTC is primarily a signalization project... BRS arguably has the more direct claim to the work.”

Osborne’s Declaration is important because while he stated that flagging did not “belong” to any single craft, he nonetheless acknowledged that “the nature of the project” determined which craft had a better claim to any flagging work. In other words, flagging to provide track protection for track construction and maintenance would ordinarily be assigned to MoW forces; the Carrier would not indiscriminately assign, say, a BRS-represented employee to flag a track maintenance project.

Against this background, the Board finds that flagging for track-related work is within the scope of the parties’ Agreement, and the Note to Rule 55. The capacity expansion project at issue in these claims is track-related construction, and the flagging in dispute is accordingly scope-covered.

Under the Note to Rule 55, the Carrier is first required to give notice to the Organization of its intent to contract out any scope-covered work. Here, the Carrier gave notice of its specific intent to contract flagging associated with the Bakken Shale capacity expansion project in the geographic area by letters dated June 5, 2013, and June 24, 2014. The Board finds that the notices were proper under the Note to Rule 55. They identified the work at issue sufficiently for the Organization to be able to engage in a meaningful dialogue with the Carrier in conference.

The larger issue is whether the Carrier identified an acceptable basis under the Note to Rule 55 for contracting the work. The Note to Rule 55 identifies several specific exceptions to the general rule that scope-covered work may not be contracted out: special skills, equipment or materials; emergency requirements; or “when work is such that the Company is not adequately equipped to handle the work.”

There is no claim that any emergency was involved here.



Flagging does not require any special skills, equipment or materials. Basic rules book training will suffice.

This leaves the “not adequately equipped” and piecemeal exceptions. The Organization asserts that problem has arisen due to the Carrier’s failure to maintain adequate staffing for its needs. The Board is not in a position to make that judgment; it is up to the Carrier to determine its staffing needs. The Organization makes the point that if the Carrier can contract out scope-covered work whenever there is a shortage of personnel, it would be an incentive for the Carrier to continue to understaff its operations, and would eventually result in the loss of all Maintenance of Way work. That might be true in a different case, but the record here shows that the Carrier bulletined over some months for a number of basic Sectionman positions, including those that it contracted out, and that it was unsuccessful in attracting candidates for them.<sup>2</sup> The problem here is the capacity expansion that was in process in the Bakken Shale region. The scope of that project was beyond the capacity of the Carrier to manage with its existing forces. But the Board has previously recognized that such large-scale projects may be contracted out. *See*, Third Division Award 41223. The Bakken Shale expansion project involved construction of new tracks, with the need for additional track protection that such construction would entail. In that sense, the flagging at issue is part of the larger capacity expansion project.

The Organization argues that the flagging for the project was separate from the rest of it, because flagging was addressed in separate notices. But the number of notifications does not determine the scope of an expansion project. The notices here explained that the Carrier had bulletined for new Sectionmen in order to meet its flagging needs (and the record supports that assertion by the Carrier), which would have avoided having to contract out the work. But when its efforts to secure more personnel failed, the Carrier made the decision to contract out the flagging. The record in this case does not support the Organization’s concern that the Carrier was deliberately undermining its own Maintenance of Way forces in order to contract out the work in dispute. To the contrary, the record demonstrates that the Carrier made good faith efforts here to increase the number of its own forces and only added flagging to the scope of the larger project when it was unsuccessful in attracting bidders, for whatever reason or reasons.

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<sup>2</sup> At the arbitration hearing, the Carrier suggested that competition from higher-paying oil industry jobs in the region made it hard for the Carrier to compete, and that may be true, although there may also have been other reasons for its inability to attract candidates.

The Board finds that track protection was inherently part of the Bakken Shale capacity expansion project, which the Carrier was permitted to contract out. In that regard, the Carrier's decision to contract out the flagging at issue here was similarly permissible. In effect, the Carrier attempted to avoid contracting out the flagging when it tried to attract bidders to open Sectionman positions. When the Carrier was unsuccessful in increasing the number of Sectionmen, it was not inappropriate for it to fold track protection back into the larger project. At that point, the Carrier could not be required to piecemeal part of the larger project.

**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.