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

Award No. 45166
Docket No. MW-43808
24-3-NRAB-00003-230202

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 Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (load, haul and unload concrete crossing planks) from Old Yard, Minot, North Dakota to Lone Tree, North Dakota on March 2 through 7, 2015 (System File T-D-4658-E/11-15-0371 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, Claimants B. Miller, D. Dahm and G. Neset shall now each receive forty (40) hours= straight time and thirty-two (32) 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 have established and hold seniority within various classifications of the Carrier's Maintenance of Way and Structures Department, including foreman and truck driver.

On May 24, 2011, the Carrier provided a Notice to the Organization of its intention to use outside forces in connection with a Capacity Expansion Project in Gavin Yard in Minot, North Dakota. Additional contracting notices were sent on April 13, 2012; May 18, 2012; August 20, 2012; October 9, 2012; March 26, 2013; April 26, 2013; May 2, 2013; May 15, 2013; and May 16, 2013. On June 5, 2013, the Carrier provided a Notice to the Organization of its intention to conduct Capacity Expansion at Various Locations on the Montana and Twin Cities Divisions from June 21, 2013 to December 31, 2015. The Notice identifies two multi-phase projects and gives two reasons for the use of outside forces: "The contractor will be using necessary specialized equipment" and "BNSF forces do not possess the necessary specialized dirt work skills for projects of this type."

Beginning on March 2, 2015 and continuing through March 7, 2015, the Carrier assigned outside forces (R. J. Corman) to perform loading, hauling, and unloading concrete crossing planks from the Old Yard in Minot, North Dakota to Lone Tree, North Dakota.

In a letter dated April 24, 2015, the Organization filed a claim on behalf of the Claimant(s). The Carrier denied the claim in a letter dated June 22, 2015. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Organization contends that loading, hauling, and unloading concrete crossing planks is typical Maintenance of Way ("MOW") work and that such work has customarily and historically been assigned to and performed by the Carrier's MOW 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 notice of its plan to use outside forces and failing to make good faith efforts to reduce the incidence of subcontracting. The Organization contends that during the on-property handling, the Carrier offered its December 19, 2014, letter as proof that it complied with the requirements of the Note to Rule 55. The Organization contends that this letter did not apply to the claimed work and thus, did not meet the Agreement requirements. The Organization contends that regardless of whether the Carrier failed to provide any notification letter or the provided letters are fatally flawed by virtue of having been deemed vague or "blanket" letters, the Carrier's failure to comply with the advance notification and conference provisions of the Agreement requires a sustaining award.

Additionally, the Organization contends that the Carrier failed to demonstrate that an exception under the Note to Rule 55 applied, as the work performed by the outside contractors did not require special equipment or any special skills that were not already possessed by the Carrier's MOW forces.

The Organization contends that the Carrier's assertion that it was inadequately equipped or staffed to address this large capacity project necessitated by the Bakken Shale oil boom should be rejected. The Organization contends that it is not requesting the Carrier to piecemeal this project, which is really several small projects grouped together in one contracting notice. The Organization contends that the work claimed here is not part of a single large capacity expansion project.

The Carrier does not deny that the work took place as alleged but contends that it was performed as a portion of the capacity expansion projects that have been ongoing for many years. The Carrier contends that on-property precedent has established that its forces do not perform new construction projects of this magnitude and type. Further, many on-property awards have held that the Carrier is not obligated to piecemeal out small portions of more complex projects simply because its own employes might occasionally perform some of the work.

The Carrier contends that it notified the Organization that it was contracting a capacity expansion project involving the installation of new track, relocating buildings, dirt work and drainage installation at the Gavin Yard. The Carrier contends that in advance of this complex project, it sent a contracting notice to the Organization on May 24, 2011, with additional letters sent covering this location on April 13, 2012; May 18, 2012; August 20, 2012; October 9, 2012; March 26, 2013;

April 26, 2013; May 2, 2013; May 15, 2013; and May 16, 2013. The Carrier contends that it was not adequately equipped to handle all aspects of this project nor did the Carrier's forces possess the specialized skills required for all aspects of these installations, and that this work is not within the Scope of the Agreement.

The Carrier contends that the Agreement's general Scope Rule does not reserve the work to the BMWED, so the Organization must show that its members exclusively performed this work on a system-wide basis, which it failed to do. The Carrier contends that if the MOW forces have performed similar work in the past, this would suggest no more than a "mixed practice" on the property, which defeats the Organization's claim to exclusive rights to perform the work.

The Carrier contends that even if the Organization's claim possessed merit, the claim for damages is excessive. The Claimants are not entitled to any damages, as they were fully employed and suffered no monetary loss.

The Organization has established that this work is customarily and historically performed by its members. In the on-property correspondence, the Carrier conceded that the loading and moving of materials and equipment has been performed by the MOW employes.

The Carrier's March 2015 contracting notice was insufficient with respect to the claimed work performed at this location. The Carrier initially asserted that its December 19, 2014, notice satisfied its obligation under the Agreement. While this notice did refer to "loading and unloading" and "handling of switch ties, crossing timbers, cross ties, tie plates, rail and various other material" in 2015, it alerts the Organization to the contracting to Herzog, not RJ Corman, whose employees performed the claimed work. It does not refer to hauling materials. The June 5, 2013, notice reads, in part, "[B]e advised that BNSF plans to contract for additional dirt and track work on both the Glasgow Sub-Division and in Gavin Yard located in Minot, N.D." Therein, the Carrier asserts, "BNSF is not adequately equipped for projects of this magnitude which require both specialized equipment not possessed by BNSF forces and specialized skills not possessed by BNSF employees. The contractor will be using necessary specialized equipment…necessary to perform this volume of dirt and track work. Moreover, BNSF forces do not possess the necessary specialized dirt work skills for projects of this type." The notice refers to hauling and unloading rip-rap, but not concrete crossing planks.

In other words, the contracting notices placed into the record by the Carrier

cannot serve as Notice under the Rule to Note 55 of the Carrier's intention to contract out the work of loading, hauling and unloading concrete crossing planks from Old Yard, Minot, North Dakota to Lone Tree, North Dakota on March 2 through 7, 2015. Where the Carrier failed to provide adequate notice of the claimed work, the claim will be sustained.

In accordance with prior precedent, the named Claimants are entitled to be compensated for the number of hours actually worked by the contractors on the dates cited in the original claim.

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 22nd day of February 2024.