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

Award No. 45175
Docket No. MW-43858
24-3-NRAB-00003-230211

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 (Fenton Construction, Inc.) to perform Maintenance of Way and Structures Department work (transporting a loader from Sioux Falls, South Dakota to Clara City, Minnesota) on the Twin Cities Division on September 19, 2014 (System File T-D-4555-M/11-15-0165 BNR).

(2) The Agreement was violated when the Carrier assigned outside forces (Fenton Construction, Inc.) to perform Maintenance of Way and Structures Department work (transporting a road grader from Sioux City, Iowa to Willmar, Minnesota) on the Twin Cities Division on September 21, 2014 (System File T-D-4557-M/11-15-0167).

(3) The Agreement was violated when the Carrier assigned outside forces (Fenton Construction, Inc.) to perform Maintenance of Way and Structures Department work (transporting a loader from Utica, South Dakota to Chancellor, South Dakota) on the Twin Cities Division on October 13, 2014 (System File T-D-4571-M/11-15-0197).

(4) The Agreement was violated when the Carrier assigned outside forces (Fenton Construction, Inc.) to perform Maintenance of Way and Structures Department work (transporting a loader

from Sioux City, Iowa to Merrill, Iowa) on the Twin Cities Division on October 22, 2014 (System File T-D-4588-M/11-15-0219).

(5) The Agreement was violated when the Carrier assigned outside forces (Fenton Construction, Inc.) to perform Maintenance of Way and Structures Department work (transporting a loader from Merrill, Iowa to Sioux City, Iowa) on the Twin Cities Division on November 7, 2014 (System File T-D-4615-M/11-15-0260).

(6) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing in advance of its intent to contract out the aforesaid work or to 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.

(7) As a consequence of the violations referred to in Parts (1) and/or (6) above, Claimants W. Thompson and L. Aichele shall now each be compensated for eleven (11) hours at their respective time and one-half rates of pay.

(8) As a consequence of the violations referred to in Parts (2) and/or (6) above, Claimants W. Thompson and L. Aichele shall now each be compensated for fourteen (14) hours at their respective time and one-half rates of pay.

(9) As a consequence of the violations referred to in Parts (3) and/or (6) above, Claimants W. Thompson and R. Walker shall now each be compensated for eleven (11) hours at their respective time and one-half rates of pay.

(10) As a consequence of the violations referred to in Parts (4) and/or (6) above, Claimants W. Thompson and R. Walker shall now each be compensated for fourteen (14) hours at their respective time and one-half rates of pay.

(11) As a consequence of the violations referred to in Parts (5) and/or

(6) above, Claimants W. Thompson and R. Walker shall now each be compensated for fourteen (14) hours at their respective time and one-half 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 in the Carrier's Maintenance of Way and Structures Department.

The Carrier contracted with Fenton Construction, Inc. to transport the following:

- **a loader from Sioux Falls, South Dakota to Clara City, Minnesota on the Twin Cities Division on September 19, 2014;**
- **a loader from Utica, South Dakota to Chancellor, South Dakota on the Twin Cities Division on October 13, 2014**
- **a loader from Sioux City, Iowa to Merrill, Iowa on the Twin Cities Division on October 22, 2014;**
- **and a loader from Merrill, Iowa to Sioux City, Iowa on the Twin Cities Division on November 7, 2014.**

On the claimed dates, the contractor utilized lowboys with drivers.

In letters dated November 17 and 19, December 1 and 18, 2014 and January 6, 2015, the Organization filed claims on behalf of the Claimants. The Carrier denied the claims in letters dated January 13 and 27, February 9, and March 2, 2015. Following discussion of these disputes in conference, the positions of the parties remained

unchanged, and the parties agreed to combine the five claims for presentation to the Board. This dispute is now properly before the Board for adjudication.

The Organization contends that the work of transporting machines used in the construction, repair and maintenance of tracks 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 the Carrier's letter dated December 17, 2013, was nothing more than a vague blanket notice.

The Carrier contends that the Organization has failed to meet its burden of proof and has failed to show that its members have performed this work to the exclusion of others on a system-wide basis. Therefore, the Carrier contends that the Organization has failed to show that the work was reserved to its members.

The Carrier contends that by letter dated December 17, 2013, it provided proper advance notice of its intention to use outside contractors. It reads, in part:

> **"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 2014 for Region/System, Division and Sickles gangs, on an as needed basis per the attached 2014 RSG work program. This schedule is subject to change without notice.**
>
> **This letter is intended to inform you of our trackwork programs, and keep you and your membership abreast of our plans to accomplish this work, in the spirit of open dialogue between BNSF and the BMWED.**
>
> **Attached is the tentative 2014 system gang schedule. Obviously, this schedule is subject to change as the work season progresses."**

The Organization has demonstrated that this work, hauling equipment, is work customarily performed by the Organization's members. The Carrier's notice that it

intended to use outside contractors "to supplement our lowboy service" conceded as much. As has been reiterated by numerous Boards on too many occasions to repeat, the term "customary" does not mean "exclusively," but rather what is usual or ordinary. Third Division Award 43962. As the Organization has shown a *prima facie* violation, the burden of proof shifts to the Carrier. *See,* Third Division Award 43970.

The Carrier was required to show that the work falls into one of the exceptions expressly identified in the Note to Rule 55:

> **"However, such 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."**

On-property Third Division Award 44302 cited Third Division Award 43572 when it addressed the use of contractors to operate flatbed trucks and trailers. The earlier Board held that where the Carrier's notice identified the reason for the use of outside forces was "to supplement our lowboy service," it failed to identify any of the specific reasons in the Note to Rule 55 that may justify contracting out. That Board concluded,

> **"The notice in this case does not identify a reason to justify contracting under the Note to Rule 55, and the Carrier did not submit any evidence that would support any contractual justification. On this record, the claim shall be sustained."**

***See also*, Third Division Awards 43667, 43668, 43669, and 43969.**

This Board finds the on-property precedent addressed the same facts and arguments presented in the instant dispute. We see no reason to depart from this well-reasoned precedent.

The record before us is insufficient to determine the proper remedy. As such, we remand the issue to the parties for a joint check of the Carrier's records to determine the number of hours worked by the contractors to transport graders and

loaders. The eligible Claimants shall be compensated at their respective rates of pay for their portion of the total hours actually worked by the contractors.

AWARD

Claim sustained in accordance with the Findings.

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.