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

Award No. 45189
Docket No. MW-43954
24-3-NRAB-00003-230225

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 (unload, haul and remove ties) between Mile Posts 210 and 255 on the Ottumwa Subdivision beginning on May 11, 2015 and continuing through June 18, 2015 (System File C 15-C100-136/10-15-0340 BNR).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairperson in writing in advance of its plans to contract out this work and failed to make a good-faith attempt to reduce the incidence of subcon-tracting 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, Claimant J. Sutcliffe shall be paid two hundred twenty-four (224) hours at his regular rate of pay and Claimants R. Anderson, Jr. and J. Six shall each be paid seventy-two (72) hours at their regular rate of pay and fifty-eight (58) hours at their time and one-half 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.

The Claimants have established and hold seniority within various classifications of the Carrier's Maintenance of Way and Structures Department.

On July 27, 28, 29 and 30, 2015, the Carrier assigned outside forces to perform concrete prep work for the erection of steel building at the Hobson Yards in Lincoln, Nebraska.

In a letter dated August 20, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated October 19, 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 the work of concrete prep work for the erection of a steel building is typical Maintenance of Way ("MOW") work and is contractually reserved to them under Rules 1, 2, 5, 6, 29, 55 and the Note to Rule 55 to the parties' Agreement.

The Organization contends that the Carrier did not factually dispute that the claimed work is basic MOW work that has customarily been performed by MOW forces. The Organization contends that the Carrier's assertion that the work has been subject to a "mixed practice" performed by both MOW forces and contractors is not supported in the record.

The Organization contends that it has presented a *prima facie* case of the Carrier's violation, so the burden shifts to the company to prove that the claim is not

valid. The Organization contends that the Carrier violated the Note to Rule 55 and the National Letter of Agreement when it failed to notify the Organization in writing in advance of its plans to assign outside forces to perform the claimed work. Furthermore, the parties set forth specific criteria under which reserved work may be contracted out and that these are the only criteria under which the Carrier may assert justification for its desire to contract out work customarily performed by MOW employes.

The Organization contends that there is no question that the Carrier failed to comply with the advance notification and conference provisions of the Agreement. The Organization contends that the Carrier's alleged April 10, 2015, letter notice is nothing more than a "blanket notice" that covers all MOW work done at this location. There is no question that the Carrier failed to comply with the advance notification and conference provisions of the Agreement.

The Organization contends that the Carrier failed to prove its affirmative defense that it did not possess adequate equipment and skilled employees to perform the claimed work. The Organization contends that the Carrier owns equipment capable of handling this work and its forces have performed this same work in the past. Therefore, the Organization contends that the Claimants are entitled to a sustaining award and the remedy sought.

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 this work was properly contracted out pursuant to the Note to Rule 55 which permits the Carrier to contract out work which is reserved to the BMWED "provided that special skills not possessed by the Company's employes"…are required…or when work is such that the Company is not adequately equipped to handle the work…"

The Carrier contends that the record shows that the claimed work is part of a larger project at Hobson Yard and that it is not required to piecemeal the work in order to provide some claimed part to the Organization. *See,* Third Division Awards 34213 and 34217.

We find that even if in this case the Organization provided sufficient evidence of a customary and historical practice of performing this type of work, *cf.* Award 2 of Public Law Board 6538, the Carrier has sufficiently established that the claimed work was part of a larger project of the type that it has previously contracted out. The Carrier was not obligated to piecemeal a project of this magnitude.

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 22nd day of February 2024.