

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BROTHERHOOD OF MAINTENANCE OF WAY)	
EMPLOYES DIVISION/IBT)	
)	
Plaintiff,)	
v.)	Civil Action No.
)	
BNSF RAILWAY COMPANY,)	
)	
Defendant.)	
)	

COMPLAINT

The Brotherhood of Maintenance of Way Employees Division/IBT (“BMWED” or “Union”) brings this complaint against Defendant BNSF Railway Co. (“BNSF” or “Carrier”) alleging that the Carrier has violated the Railway Labor Act, 45 U.S.C. § 151 et seq. (“RLA”). BMWED seeks a declaratory judgment that by reducing its maintenance of way workforce by 19% since 2016, while increasing its contracting-out of maintenance of way work, BNSF has failed to exert every reasonable effort to maintain its agreements with BMWED, and failed to deal with the Union in good faith, in violation of Section 2 First of the RLA (45 U.S.C. §2 First).

PARTIES

1. BMWED is an unincorporated labor association that maintains its headquarters in Novi, Michigan. On January 1, 2005, the BMWED became an autonomous division of the International Brotherhood of Teamsters. Prior to that date, BMWED was an international union founded in 1887 that went by the name Brotherhood of Maintenance of Way Employees (“BMWE”). BMWED is the representative for collective bargaining under Section 1 Sixth of the RLA, 45 U.S.C. §151 Sixth, of all employees of BNSF working in the class or craft of maintenance of way employee.

2. BNSF is a rail carrier as that term is defined in Section 1 First of the RLA, 45 U.S.C. §151 First. BNSF conducts rail operations in various States in the Western half of the United States, including Nebraska. BNSF is the product of control and merger transactions that combined the rail lines and properties of the former Burlington Northern Railroad (“BN”), the former Atchison Topeka and Santa Fe Railway (“ATSF”), the former St. Louis and San Francisco Railroad (Frisco), and other formerly separate railroads.

JURISDICTION AND VENUE

3. This Court has jurisdiction to hear BMWED’s complaint pursuant to 28 U.S.C. §§ 1331 and 1337 because it arises under the RLA, an act of Congress regulating interstate commerce; and because BMWED seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

4. Venue is proper in this Court pursuant to 28 U.S.C. §1391 (b) and (c) because BNSF owns and operates lines of railroad within this District.

STATEMENT OF THE CLAIM

5. Among other things, BNSF maintenance of way employees represented by BMWED are responsible for constructing, repairing, rehabilitating, upgrading, renewing, inspecting and maintaining BNSF’s track and right of way, as well as bridges, buildings, and other structures.

6. BMWED and BNSF are parties to several collective bargaining agreements that establish the rates of pay, rules and working conditions of BNSF maintenance of way workers, and establish certain rules concerning the performance of maintenance of way work on BNSF.

7. One of the agreements between BMWED and BNSF is the agreement applicable on the former Burlington Northern portion of BNSF that was updated and republished in 2002 (“North CBA”); that agreement also applies to Regional and System Production Gangs that

traverse the entire BNSF system.

8. The North CBA identifies the type of work that is maintenance of way employee work and covered by the North CBA in its Scope Rule (Rule 1) which provides:

A. These rules govern the hours of service, rates of pay and working conditions of all employees not above the rank of track inspector, track supervisor and foreman, in the Maintenance of Way and Structures Department, including employees in the former GN and SP&S roadway equipment repair shops and welding employees.

B. The Maintenance of Way and Structures Department as used herein means the Track Sub-department, the Bridge and Building Sub-department, the Welding Sub-department, the Roadway Equipment Sub-department and the Roadway Machinery Equipment and Automotive Repair Sub-department of the Maintenance of Way Department as constituted on date of consummation of this Agreement.

9. The North CBA also defines all the job classifications of positions covered by that agreement in its Rule 55. Rule 55 further provides that work within the Scope of that agreement customarily performed by those job classifications will be performed by BNSF employees in those classifications, and that such work will not be contracted-out, except in certain specified situations: when the work requires "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". Rule 55, Note, provides:

By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees described herein, may be let to contractors and be performed by contractors' forces. However, such 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 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" cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible.

10. Another agreement between BMWED and BNSF is the agreement that applies on the former ATSF and Frisco portions of BNSF that was updated and republished in 2004 ("South CBA").

11. The South CBA identifies the type of work that is maintenance of way employee work and covered by the South CBA in its Scope Rule (Rule 1) which provides:

RULE 1 – SCOPE

This Agreement governs the hours of service, wages and working conditions of employees of the following classes in the Maintenance of Way and Structures Department: Track Supervisors and Motor Track Inspectors, to the extent set forth in Appendix No. 23; Bridge and Building Foremen; Paint Foremen; Bridge Inspectors; Assistant Bridge and Building Foremen; Steel Bridgemen (not including Steel Bridge or Assistant Steel Bridge Foremen); Bridge and Building Mechanics; Bridge and Building Painters; Bridge and Building Helpers; Welder Gang Foremen; Welders; Heat Treaters; Welder Helpers; Extra Gang Foremen; Fence Gang Foremen; Section Foremen; Assistant Extra Gang Foremen and Assistant Section Foremen; Trackmen; System Rail and Plow Gang Employees; Fuel Foremen; Pumpers and Water Treaters; Machine Operators; Bridge and Building and Water Service Laborers; Fuel Station and Sand House Helpers and Laborers; Track, Bridge, Tunnel and Crossing Watchmen and Flagmen and such other classifications as may be shown in the appended wage scale or which may hereafter be added thereto.

12. Under the South CBA, work that has been traditionally and customarily performed by

maintenance of way employees covered by that agreement will be performed by those employees; and if BNSF wants to contract-out such work, it must provide advance notice to the Union, meet and discuss the plan with the Union, and, if the parties cannot agree, BNSF may proceed subject to the Union filing claims and grievances contesting the contracting-out of that work. Appendix 8 of the South CBA provides, in pertinent part:

CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith. Existing rules with respect to contracting out an individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement.

LETTER OF UNDERSTANDING DATED SEPTEMBER 28, 1956

In connection with the application of the above, the Carrier may, without conference with the General Chairman, arrange for the use of equipment of contractors or others and use other than Maintenance of Way employes of the Carrier in the performance of work in emergencies, such as wrecks, washouts, fires, earthquakes, landslides and, similar disasters.

13. BMWED and BNSF are also parties to a December 11, 1981 national agreement that commits BNSF to make good faith efforts to reduce the amount of contracting-out of maintenance of way work. That agreement provides:

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent

practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

Notwithstanding any other provisions of the December 11, 1981 National Agreement, the parties shall be free to serve notices concerning the matters herein at any time after January 1, 1984. However, such notices shall not become effective before July 1, 1984.

14. BNSF currently has about 5,760 active maintenance of way employees as of February of this year. That is down from 6,446 maintenance of way employees in 2019 and 7,122 maintenance of way employees in 2016. BNSF's maintenance of way work force has been reduced by 19% since 2016, and 11% since 2019.

15. The amount of trackage and the number of bridges and structures owned and maintained by BNSF has not materially changed since 2016.

16. About 81% of the 2016 maintenance of way work force is now responsible for inspecting, maintaining, repairing and rehabilitating and renewing about 100% of BNSF's 2016 infrastructure.

17. Since 2016, BNSF has significantly increased its amount of contracting-out of maintenance of way work, with the amount of contracting-out increasing each year thereafter. In 2016, BNSF contracted-out 263 projects; in 2019, it contracted-out 495 projects; in 2022, it contracted-out 595 projects; as of June 2023, it had contracted-out 275 projects. Below is a chart showing the amount of BNSF contracting-out by year and by portion of the railroad, shown by the BMWED Federation and Divisions responsible for providing BMWED representation to BNSF maintenance of way employees (Atchison Topeka & Santa Fe Frisco System Federation;

Burlington System Division; and Burlington Northern System Federation), as well as system-wide contracting-out. The chart shows that, since 2016, the amount of contracting-out has nearly doubled, to more than doubled, on different portions of the railroad.

	AT&SFF	BURL	BURNOR	SYSTEM
2016	101	75	67	20
2017	199	95	135	19
2018	255	143	173	20
2019	226	117	131	21
2020	223	137	111	21
2021	266	123	105	18
2022	272	132	134	21
2023	136 (end of June)	65 (end of June)	55 (end of June)	19(Set prior Nov.)

18. BNSF's contracting-out notices frequently attempt to justify the use of contractor forces by claiming that BNSF does not have enough employees and other resources for it to do the work it plans to contract-out.

19. The increase in BNSF's contracting-out has come after a 19% reduction of the maintenance of way work force since 2016.

20. BNSF claims to be trying to increase its maintenance of way work force by hiring, but it has failed abysmally. In 2023 BNSF has only hired 222 new employees (29 of whom did not stick with the jobs); and the maintenance of way work force is actually lower in 2023 (5760) than it was at the end of 2022 (5,849).

21. Other industries had difficulty hiring after the start of the pandemic, but they have aggressively recruited and increased their work forces. The aviation industry now employs more workers than it did prior to the pandemic. BNSF has not made serious efforts to hire and increase its maintenance of way work force.

22. Currently there are about 625 vacant positions, positions for which BNSF bulletined

available jobs but there were not enough bidders to fill the positions.

23. Because of the workforce shortages, BNSF has taken actions like abolishing regional and system production gangs and returning employees who bid to those gangs pursuant to BNSF job bulletins, and who were assigned to those gangs, to their local seniority districts; requiring district gangs to work with regional and system production gangs; and denying the right of employees to request assignment to and bid to vacant positions from their current positions because there are not enough employees in their current positions to allow the employees to leave. All of these actions have given rise to objections and protests by BMWED.

24. Because of the work force shortages, BNSF has delayed or deferred planned track, rail, and right of way renewals; and it has deferred needed maintenance and correction of track, rail, and right of way defects.

25. When BNSF delays or defers planned track, rail, and right of way renewals, and defers needed maintenance and defect correction, that results in “slow orders” on the tracks, which means train speeds are reduced and rail cars are not picked up from or delivered to shippers as fast as they could be, and as fast as the shippers expect them to be picked up or delivered.

26. When BNSF delays or defers planned track, rail, and right of way renewals, and defers needed maintenance and defect correction, that increases the likelihood of derailments.

27. For fiscal year 2021, BNSF reported an operating income of nearly \$8.8 billion and a net income of nearly \$6 billion, a 14% and 16% increase from 2020, respectively. Those increases were accompanied by a 7% increase in total volume of freight compared to 2020. BNSF’s parent company, Berkshire Hathaway, announced that BNSF’s 2021 net income was the highest ever for the railroad.

28. As of the end of the third quarter of 2022, BNSF had reported an operating income of \$6.5 billion and a net income of \$4.5 billion, a 2% increase and 4% increase compared to the same period in 2021, respectively, despite total volume of freight decreasing 5% compared to the same period in 2021. As of the end of the first quarter of 2023, BNSF had reported an operating income of \$1.8 billion and a net income of \$1.2 billion.

CAUSE OF ACTION
(Violation of the Railway Labor Act, 45 U.S.C. § 152 First)

29. The allegations set forth in paragraphs 1 through 28 above are incorporated by reference pursuant Fed. R. Civ. P. 10(c).

30. Section 2 First of the RLA (45 U.S.C. § 152 First) provides:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

31. Section 2 First is “more than a mere statement of policy or exhortation to the parties; it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis.” *Chi. & N.W. Ry. v. Transportation Union*, 402 U.S. 570, 577 (1971). “Congress intended the enforcement of §2 First to be overseen by appropriate judicial means.” *Id.* at 581.

32. Under Section 2 First, BNSF is obligated to exert every reasonable effort to maintain its agreements with BMWED, and to deal with the Union in good faith. *See Chi. & N.W. Ry.*, 402 U.S. at 575-78.

33. BNSF’s duty under Section 2 First to exert every reasonable effort to maintain its

agreements with BMWED, and to deal with the Union in good faith, includes being adequately staffed to perform regular and reasonably anticipated inspection, maintenance, repair and renewal of its track, right of way, and bridges and buildings with its own employees in order to comply with its commitments in its agreements with BMWED.

34. BNSF's duty under Section 2 First to exert every reasonable effort to maintain its agreements with BMWED, and to deal with the Union in good faith, includes being adequately staffed to comply with its contractual commitments not to contract-out work except in the circumstances recognized in its agreements with BMWED, and to comply with its contractual commitment to assert good-faith efforts to reduce the incidence of contracting-out, and to increase its use of its maintenance of way forces to perform its maintenance of way work to the extent practicable.

35. By reducing its maintenance of way workforce by 19% since 2016 while increasing its contracting-out of maintenance of way work, BNSF has failed to exert every reasonable effort to maintain its agreements with the Union and has therefore violated Section 2 First of the RLA.

36. By reducing its maintenance of way workforce by 19% since 2016 while increasing its contracting-out of maintenance of way work, BNSF has in bad-faith attempted to evade its contractual obligations with BMWED and has therefore violated Section 2 First of the RLA.

REQUEST FOR RELIEF

WHEREFORE, BMWED respectfully requests that the Court:

- A. DECLARE that by reducing its workforce by since 2016, while increasing its contracting-out of maintenance of way work, BNSF has violated Section 2 First of the RLA.
- B. GRANT BMWED any other relief that the Court deems just and proper
- C. GRANT BMWED reasonable attorneys' fees and the costs of this action.

Respectfully submitted,

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/s/John Corrigan
John Corrigan
NE Bar No. 21242
Attorney for Plaintiff
Dowd & Corrigan, LLC
6700 Mercy Road
Suite 501
Omaha, NE 68106
(402) 341-1020
Fax (402) 341-0254
jcorrigan@dowd-law.com

/s/ Richard S. Edelman
Dist. of Columbia Bar. No. 416348
(Admitted in Dist. of NE)
Richard S. Edelman
Aaron S. Edelman
Attorneys for Plaintiff
Mooney, Green, Saindon, Murphy &
Welch, P.C.
1920 L Street NW, Suite 400
Washington, DC 20036
(202) 783-0010
Fax (202) 783-6088
Redelman@MooneyGreen.com
Aedelman@mooneygreen.com

Attorneys for Plaintiffs Brotherhood of Maintenance of Way Employees Division/IBT