

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40665
Docket No. MW-40106
10-3-NRAB-00003-070300
(07-3-300)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

(Brotherhood of Maintenance of Way Employees 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 (E-80 Company) to perform Maintenance of Way and Structures Department work (remove/replace concrete risers and related work) at the bridge at Mile Post 44.80 near Waverly, Nebraska beginning on April 19 and continuing through April 23, 2004 [System File C-04-C100-96/10-04-0270(MW) BNR].
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out said work or 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.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Anderson, P. Waldron, L. Watson and T. Schutz shall now each be compensated for fifty (50) hours at their respective straight time 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.

Following a March 1, 2004, inspection, the Carrier determined bridge 44.8 LS2 near Waverly, Nebraska, needed repair, including concrete restoration. Based on the conclusion of its inspection Structural Engineer that repair required epoxy injection and polymer repair, the Carrier wrote the Organization on March 29:

“Referring to original letter dated 12/16/03 concerning the ongoing program of bridge and culvert repair at various locations across the Burlington Northern Santa Fe system.¹

In addition to the locations/structures listed in the 12/16/03 letter, we plan to contract concrete restoration repairs to our Bridge 44.82 on line segment 2 near Lincoln, NE. This work will consist of epoxy injection and polymer concrete placement. The Carrier does not possess all the necessary equipment nor do BNSF employees possess

¹The 2003 letter stated that concrete work would be subcontracted system wide because the Carrier lacked necessary special equipment and materials and its employees lacked necessary expertise. The Organization objected, contending the notice was not specific and concrete work is within the scope of its regular and routine work. The parties met and discussed their differences on February 11, 2004, but were unable to agree. The current status of the disagreement is unclear in this record.

all the necessary skills to perform this work. Work is scheduled to begin approximately May 3, 2004 and be complete in two weeks.

This letter is intended to inform you of our maintenance 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 BMW E.

Should you desire to discuss this matter, Mr. Ron Michelbook can be available for a conference call at his office in Kansas City at 10:00 AM Central Daylight Time on Friday, April 16, 2004. . . ."

On April 13, the Organization stated (1) its schedule did not permit participation in a proposed April 16 meeting or conference call (2) the matter appeared the same as one discussed on February 11 (3) a mutual meeting could be arranged if there were differences, but (4) otherwise, the positions expressed on February 11 should be repeated in this claim. No meeting was held.

E-80 Plus Constructors, an outside contractor, performed the concrete restoration repair work between April 19 and 23, 2004. At some point, apparently after the contractor began its work and as part of its assessment responsibility, it was decided that epoxy was not needed. Polymer was used for the repair. Epoxy repairs have been subcontracted by the Carrier since at least 1976. Polymer uses different equipment, material, and skill and is less difficult to perform. It has been done by BMW E-represented employees in the past.

The Organization grieved, citing Rules 1, 2, 5, 55, the Note to Rule 55 and Appendix Y. It submits no proper advance notice and meeting required by the Note to Rule 55 occurred because the notice listed polymer and epoxy, whereas only polymer was used.

The Organization claims polymer repairs are contractually reserved as its work. It contends the Carrier's defenses lack merit. At the same time, the Organization tacitly acknowledges the Third Division, as well as on-property Public Law Boards have held that epoxy and polymer work can be performed by outsiders

under the special work exception in the Note to Rule 55. However, it argues that those cases all involve some epoxy work and are inapplicable to repairs, like the present dispute, where only polymer is used.

The Carrier essentially argues (1) it has the right to subcontract bridge reconstruction using epoxy injection and polymer concrete and it properly did so (2) the Organization did not prove a violation and (3) no damages to the Claimants were proven. More specifically, it asserts (1) polymer alone involves similar specialized skills as when both epoxy and polymer are used together (2) it is not required to piecemeal functions performed by E-80 and (3) although BMW-represented employees have done some, but not exclusive, concrete restoration with polymers only, the results have not always been successful. The Carrier cites one Third Division decision involving the Union Pacific Railroad and three on-property Public Law Board decisions holding that epoxy/polymer work may be subcontracted. See Third Division Award 31170; Public Law Board No. 4768, Award 10; Public Law Board No. 4768, Award 29 and Public Law Board No. 4402, Award 36.

The Organization's complaint about lack of proper notice is without merit. The March 29 letter was correct when written. The Carrier believed its notice remained true when it contracted with E-80 and when E-80 began the disputed work. Only after the contracted work started was the repair method modified from epoxy/polymer to polymer alone. Nothing indicates the Carrier engaged in subterfuge or acted in bad faith, without due diligence or for any other improper reason regarding the notice.

The same considerations apply to the work itself. Appendix Y provides the Carrier will attempt to reduce subcontracting in good faith "to the extent practicable." On these facts, it would not be practicable to negate the E-80 contract during a five-day project to begin the job again with Carrier forces. Moreover, the on-property Public Law Board Awards cited by the Carrier involve epoxy/polymer bridge repairs, and, therefore, strongly bolster its position. The Organization provides no arbitral decisions directly requiring assignment of polymer only bridge repairs to its members.

Indeed, seen in its best light, the Organization's evidence regarding bridge repairs reflects a mixed practice. Moreover, acceptance of its position would require that E-80's function be piecemealed in mid-performance and at a stage when the

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disputed portion (polymer repair) followed E-80's unchallenged duty to analyze the proper material it would use. Either mixed practice or piecemealing are sufficient to allow this particular subcontract.

Accordingly, the claim is denied.

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 1st day of November 2010.