

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40679
Docket No. MW-40142
10-3-NRAB-00003-070379
(07-3-379)**

The Third Division consisted of the regular members and in addition Referee Patrick Halter 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 (Hulcher) to perform Maintenance of Way and Structures Department work (remove/install track panels related work) on the Orin Subdivision of the Powder River Division on November 8, 10, 15, 17, 21, 28, 30, December 1 and 2, 2005 [System File C-06-C100-67/10-06-0101(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, the hereinafter listed Claimants shall be compensated at their respective and applicable rates for the straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work as follows: Claimants T.**

Anderson, B. Kutschara, K. Brandt, C. Lynn, C. Martinek, G. Griffee, D. Bell, J. Kramer, J. Hutson, C. McCormick, M. Burke, V. Havorka, D. Lohr and T. Heusman shall each be compensated for an equal proportionate share of four hundred eight (408) straight time man-hours and two hundred eighty-three (283) overtime man-hours and Claimants K. Rager, P. Conklin, R. Buskohl, T. Mills, G. Himle, J. Johnson, J. King, D. Boyer, M. McDonald, J. Sisneros, M. Narramore, P. Ruble and W. Stockwell shall each be compensated for an equal proportionate share of four hundred eighty-eight (488) straight time man-hours and three hundred thirty-two (332) overtime man-hours.”

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 Organization states that the practice is to assign Carrier forces to perform routine track maintenance such as removing and installing track panels using Carrier equipment or similar equipment obtained by rent or lease. This work is customarily and historically performed by the Carrier's forces under Rule 1 - Scope, Rule 2 - Seniority Rights and Sub-Department Limits, Rule 5 - Seniority Rosters and Rule 55 - Classification of Work, which is covered by the scope of this Agreement reserving this work to BMW-employees.

The Organization is not required to prove that Carrier forces exclusively perform this work because the exclusivity test does not apply in contracting disputes. When the Carrier contracted with outside forces to install track panels, the available and fully qualified Claimants suffered a loss of work opportunity.

The Note to Rule 55 and the December 11, 1981 Letter of Understanding (Appendix Y) were violated when the Carrier failed to give the General Chairman proper notice to use outside forces. Notice and conference provisions in the Note to Rule 55 and Appendix Y are threshold requirements to be met in good faith before maintenance-of-way work can be assigned to outside forces. Failure to give notice effectively precludes any good-faith attempt to reach an understanding and failure to comply with the notice provisions of the Agreement requires a sustaining award. The notices of May 24 and June 8, 2005, make a mockery of the Carrier's obligation to show a good-faith reason to contract and why the work could not be assigned to the Claimants. The Carrier made no attempt to rent or lease equipment for use by Carrier forces.

With or without proper notice, the Carrier has the burden of proving that the exceptions in the Note to Rule 55 apply. The Carrier does not deny that the work was performed on the dates in question by outside forces. Outside forces used no special skills or equipment.

The Organization further argues that the Carrier's defenses are without merit. No emergency existed because there is no reasonable connection between the snowfall on May 11 and the two derailments on the Orin Subdivision Main Line on May 14 and 15, 2005. The work at issue was performed by contractors more than five months after May 2005. The conditions were not sudden occurrences, unforeseen by the Carrier, given its deferred track maintenance creating unstable conditions on America's highest density coal lines. The Carrier's negligent lack of managerial foresight in deferring maintenance caused the challenges faced by the Carrier. Malfeasance by the Carrier is not a justification for contracting.

The Claimants are entitled to receive compensation even if fully employed on the dates in the claim. Third Division Awards 19898, 20042, 20412, 20633, 21340

and 21808 establish that full employment by the Claimants is not a deterrent to an award of damages. The claim should be sustained.

According to the Carrier, the claim must be denied. The work is not reserved to the Organization because Rule 1 is a general Scope Rule and Rule 55 is a work classification Rule and not a work reservation Rule. It provided proper advance notice on May 24, 2005:

“Subject: Heavy Equipment to assist Carrier Forces in Switch Replacement Projects

Access on the Orin subdivision especially between Bridger Junction mile post 127 and Donkey Creek Junction, mile post 0.4, including the yards in this area, is difficult. Due to the constrained logistics in the area, the Carrier needs special equipment to assist Carrier forces renewing switches. Therefore the Carrier will contract for side booms, with operators, to assist Carrier forces in removing and replacing switches during switch projects between Bridger and Donkey Creek Junctions.

This work may begin as soon as June 8, 2005.

Currently, there is no available Carrier equipment to support these projects, and Carrier forces are not available to perform this work even if the equipment were rented or leased. Historically, when faced with the amount of work that the Carrier is currently facing it has contracted to supplement its work force on projects like that herein described[.]”

A second notice issued on June 8, 2005:

“Subject: Heavy Equipment to assist Carrier Forces

As the Carrier has previously notified the Organization, it is currently engaged in emergency efforts to restore service levels on

the Powder River Division that have been severely impacted by unprecedented and sudden volume growth and very wet winter and spring weather. To overcome these challenges the Carrier has previously notified the Organization that it will use special equipment to assist Carrier forces working in the area to help replace switches and rehabilitate sub-grade. That work will continue, however, to adequately deal with the spike in its volume of work, the Carrier may also need to contract for other heavy equipment in addition to that specified in . . . May 24 and June 6, 2005 notices to supplement this effort and Assist Carrier forces in these projects. The switch projects are on the Orin Subdivision between Bridger Junction and mile post 127.3, and Donkey Creek Junction to mile post 0.4 and the Blackhills, Butte and Sandhills Subdivisions between mile post 476-599, 366-476, and 127-365 respectively; the sub-grade rehabilitation will be on the Butte Subdivision.

Currently, no Carrier equipment is available to support these projects because, for the most part, it is otherwise occupied in the service recovery and expansion effort on the Orin Line. Moreover, all Carrier forces are fully employed and are not available to perform this work even if the equipment were available to be rented or leased. Historically, when faced with the amount of work that the Carrier is currently dealing with it has contracted to supplement its work force because the Carrier is simply not adequately equipped with either equipment or staff to handle this spike in its work volume.”

The Carrier faced critical slowdowns in the movement of the nation’s coal supply due to extreme moisture (rain, spring thaw, heavy snowstorm) combined with coal dust and other waste debris. This posed perilous conditions by inhibiting the ability of the ballast to drain properly. Complications arose with two derailments in May 2005 that impeded the flow of coal between coal facilities and electrical plants.

This extreme moisture, combined with coal dust and waste debris, caused sub-grade degradation\instability which required replacement of switches, ballast, rail and crossovers. This expanded and unexpected maintenance caused a spike in work not contemplated by the Agreement. The Carrier called "all hands on deck" which provided full employment for Carrier forces. The Claimants were fully employed and working overtime on the dates in the claim; they were not available and could not have performed additional duties. Their monetary claims are excessive.

The Carrier does not own side booms and does not have qualified operators for such equipment. Heavy trucks to haul equipment could not be rented without using the contractor's drivers. This is a piecemeal claim for very little of the work; the Carrier is not required to piecemeal a project which would be impractical and/or inefficient.

The Board finds that the contractor used side boom Caterpillars, front end loaders, track-type excavators and earth scrapers, which are Group 2 machines in the Roadway Equipment Sub-department, as well as similar or identical equipment currently in the Carrier's roadway equipment inventory. The 45 pictures and the 59 vacancy bulletins in the record confirm that this type of equipment is owned by the Carrier and has been operated by Carrier forces. Statements submitted by 11 employees further attest to their operation of equipment similar or identical to the equipment used by outside forces. Based on that evidence, the work in this claim has been customarily and historically performed by BMW-represented employees. As for the weather, it was a complicating factor but did not rise to an "emergency" situation.

The Carrier's two notices - May 24 and June 8 - are sufficient in form and content to conform to the Note to Rule 55 and Appendix Y. The Claimants were fully employed and working overtime during the dates in the claim; they were not available. The Carrier has three heavy truck positions on Seniority District 400 and all were fully employed on the claim dates; this equipment was not available. Because the Carrier did not have a sufficient quantity of heavy trucks to haul the track material, it deployed contractors to haul track material with their own equipment and operators.

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Carrier forces performed the track work in accord with custom and history; however, the present undertakings were not contemplated by the Agreement and were beyond the capacity of the Carrier's forces. The Note to Rule 55 allows the Carrier to contract in this situation.

Therefore, the Board will deny the claim.

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.