

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40680
Docket No. MW-40143
10-3-NRAB-00003-070381
(07-3-381)**

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 switches and related work) on the Orin and Reno Subdivisions of the Powder River Division on July 6, 9, 11, 12, 13, 14, 19, 21, 23, 28, August 1, 10 and 16, 2005 [System File C-05-C100-124/10-05-0283(MW) BNR].**
- (2) The Agreement was violated when the Carrier assigned outside forces (Hulcher) to perform Maintenance of Way and Structures Department work (remove/install track and switch panels and related work) between Mile Posts 117 and 61.9 on the Orin Subdivision of the Powder River Division on August 22, 25, 29, 31, September 6, 7, October 3, 4, 5 and 10, 2005 [System File C-06-C100-16/10-06-0026(MW)].**
- (3) 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.

- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, the hereinafter listed Claimants shall be compensated at their respective straight time rates for the 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, J. Manzaneres, J. Kramer, J. Hutson, C. McCormick, T. Mills, V. Havorka, G. Witt, D. Lohr and S. Jensen shall each be compensated for an equal proportionate share of one thousand four hundred forty-six (1,446) man-hours, Claimants R. Webster, D. Casey, D. Powers, D. Penfield, M. Larson, J. Schulte, D. Boyer, J. Uehling, T. Miller, R. Larsen, L. Claussen, J. Creeden, T. Cox, P. Mulhern, M. Knapp, M. McDonald, T. Wickham, A. Weingart, M. Weingart and C. Adamson shall each be compensated for an equal proportionate share of one thousand eight hundred sixty (1,860) man-hours and Claimants M. Shadley and D. Gonzales shall each be compensated for an equal proportionate share of three hundred sixty-one (361) man-hours.
- (5) As a consequence of the violations referred to in Parts (2) and/or (3) 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, J. Manzaneres, J. Kramer, J. Hutson, C. McCormick, T. Mills, V. Havorka, G. Witt, D. Lohr and S. Jensen shall each be compensated for an equal proportionate share of seven hundred twenty (720) straight time man-hours and five hundred thirty-two (532) overtime man-hours and Claimants R. Busskohl, D. Casey, C. Bullock, D. Powers, J. Johnson, T. Cox, W. Hartwig, J. Schulte, J. Creeden, C. Puskarich, J. Gibson, P. Mulhern, J.

Uehling, S. Halouska, T. Miller, R. Larsen, L. Claussen, M. Shadley and D. Gonzales shall each be compensated for an equal proportionate share of five hundred forty-four (544) straight time man-hours and three hundred eighty-eight (388) 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 and switch panels and related work 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 the work to BMW-employees. Many Awards have found that Rule 55 is a reservation of work Rule. (See Third Division Awards 19924, 20338, 20412, 20633, 21534 and Award 34 of Public Law Board No. 2206.)

Carrier employees have a contractual right to be assigned to and perform work encompassed within the scope of the Agreement before the Carrier resorts to

employ forces from outside the Agreement. 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 remove and install switches and perform related work, the available and fully qualified Claimants suffered a loss of work opportunities.

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. Commitments in the Note to Rule 55 and Appendix Y - carried forward from the 1982 and 2002 Agreements - are applicable to the Carrier.

Failure to give notice effectively precludes any good-faith attempt to reach an understanding and failure to comply with the notice provisions 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 claim dates by outside forces. Contractor employees used no special skills or special 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 two 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 knows that dirty ballast will destabilize any track structure and certainly the most heavily traversed track structure in America. 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. Given these conditions the emergency pretext was offered in bad faith.

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. This is not a piecemeal claim. Rather each claim on the Orin Subdivision was for different work, but all work was ordinary track maintenance. This 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.

Proper advance notice was issued 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. Nevertheless, the Carrier is not adequately equipped or skilled to handle all aspects of this work.”

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 when two derailments occurred in May 2005 that impeded the flow of coal between coal facilities and electrical plants.

The 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 have qualified operators for side booms because it does not own that equipment. Heavy trucks to haul equipment could not be rented without using the contractor's drivers. The Organization's second claim (C-06-C10016) is a piecemeal claim for very little of the work performed under the first claim (C-05-C100-124); the Carrier is not required to piecemeal this project because that is impractical and inefficient.

Having considered the record, the Board finds that the contractor removed and replaced switch and track panels and related work on 23 dates over a four month period. Carrier forces customarily and historically perform routine track maintenance encompassing the removal and installation of track panels and switches; this work falls within the scope of the Agreement.

The Carrier notified the Organization of its plan to contract out this work. Its 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 Note to Rule 55 and Appendix Y require the Carrier to meet in conference with the Organization; the totality of circumstances shows that each party entered conference adamant about their intent and proposals. Although a good-faith attempt to reach an understanding was

undertaken, no resolution was reached. Thereafter the Organization filed two claims which were consolidated for purposes of this proceeding.

The Carrier's equipment - which is similar and/or identical to the contractor's equipment - is not adequate to perform work of this magnitude on the coal loop on the Orin and Reno Subdivisions. Special equipment was needed to move the large track material for placement on the sub-grade for the new switches. Without special equipment, there could be extensive damage to the heavy track material. Proper placement using side booms prevented damage to the heavy track material. In this regard, the Carrier does not have side booms (sidewinders) crawler track hoes and large loaders.

The Claimants were fully employed and working considerable overtime; there were no Carrier forces on seasonal furlough. These are indicia that the work present in these claims was beyond the capacity of the Carrier's forces.

As for the weather, it was a complicating factor exerting a sense of urgency on the Carrier, but it did not rise to an emergency situation. The 25 statements from Carrier employees assert deferred maintenance as the cause of the expanded maintenance repair work faced by the Carrier. In response the Carrier notes the increased number of employees hired over the past three years and the capital expenditures dedicated to maintaining and enhancing the track. Without more from the Organization, the Board is unable to resolve the conflict concerning deferred maintenance in the Organization's favor.

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.

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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.