

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40765
Docket No. MW-40146
10-3-NRAB-00003-070391
(07-3-391)**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way 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 Carrier violated the Agreement when it assigned outside forces (Prime Power Company) to perform Maintenance of Way and Structures Department work (clean out coal dust from switches) at the switches in the area of Nacco Junction on the Orin Subdivision beginning on June 13, 2005 and continuing through June 28, 2005 [System File C-05-C100-102/10-05-0245(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 D. Penfield and M. McDonald shall now each be compensated for ninety-six (96) hours at their respective straight time rates of pay and for twenty-four (24) hours at their respective time and one-half 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.

The Organization claims that two employees of the contractor each worked ten hours daily, Monday through Friday, operating a vacuum truck to remove coal dust from switches at Nacco Junction on the Orin Subdivision. According to the Organization, the practice is to assign Carrier forces to perform routine maintenance, such as cleaning coal dust from switches that blows onto them from passing trains transporting coal, 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 vacuum the coal dust from switches, the available and fully qualified Claimants suffered a loss of work opportunities.

Commitments in the Note to Rule 55 and Appendix Y - carried forward from the 1982 and 2002 Agreements - are applicable to the Carrier. 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 contracted out. The Note to Rule 55 and Appendix Y were violated when the Carrier failed to give the General Chairman proper notice to use outside forces.

Specifically, the notice of May 24, 2005 makes 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 Organization requested a conference on May 25, but the Carrier did not conference until June 13, 2005 which was the day the contractor's employees began this work. 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.

With or without proper notice, the Carrier has the burden of proving that the exceptions in the Note to Rule 55 apply. The Carrier acknowledges that the work was performed on the claim dates by outside forces. This work requires no special tools or training. The Carrier has found vacuum trucks to be efficient in this cleaning, removal process; it needs to purchase or lease these trucks for Carrier forces to use. There was no attempt to rent or lease equipment for Carrier forces.

The Organization further argues the Carrier's defenses are without merit. No emergency existed because there is no nexus between the snowfall (May 11, 2005) the two derailments (May 14 and 15, 2005) that occurred in the general vicinity of where this work was performed and the removal of coal dust at Nacco Junction. In an authentic emergency the Carrier would continue repairs non-stop until service to the affected area was no longer disrupted. In this case it waited almost one month - from the date of notice to the beginning of work - to commence maintenance.

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 to defer 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 or on vacation on the dates in the claim; full employment is not a deterrent to an award of damages. (See Third Division Awards 19898, 20042, 20412, 20633, 21340 and 21808.) 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. The Organization does not customarily or exclusively perform this work; the Carrier does not have qualified operators for vacuum trucks because it does not own the equipment.

Proper advance notice was issued on May 24, 2005:

“Subject: Vacuum Trucks on the Black Hills, Campbell, Reno and Orin Subdivision and Gillette, WY Yard

The Carrier will contract out for a vacuum truck to remove coal spills and other environmentally sensitive materials spilt in and around the switches in the Gillette Yard, Wyoming, and on the Black Hills, Campbell, Reno and Orin Subdivisions. The spilled coal is considered an environmental waste and must be cleaned up and disposed of by qualified personnel. Moreover, the Carrier does not have the type of equipment that will be used to perform this work. It is critical this spillage be cleaned up as soon after the incident as possible, because coal is highly flammable and past coal fires have quickly escalated to tie fires.

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.”

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. Complications arose when two derailments occurred in May 2005 that led to a ten to 15 percent decrease in coal shipments to electrical plants. The extreme moisture, combined with coal dust and waste debris, required immediate remediation.

This unexpected and expanded 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/or on vacation on the dates in the claim; they were not available and could not have performed additional duties. Their monetary claims are excessive.

Having considered the record, the Board finds that the contractor removed coal dust from switches as well as other environmentally sensitive material or spillage on the claim dates. Cleaning or removing coal dust from switches is a routine maintenance activity on the Orin Subdivision of the Power River North Division where the mines are located and where the transport of coal occurs, almost exclusively, all day. This is dense, concentrated use of a dedicated line for coal transport. Carrier forces deal with coal dust and related spillage when maintaining tracks and switches because the coal dust that blows from passing coal trains settles into the track switches and must be cleaned out. Carrier forces customarily perform coal dust removal using the Carrier's equipment. Nevertheless, the Carrier has found that vacuum trucks are efficient in this process although it does not own them and did not lease or rent them in this claim.

In addition to removing coal dust this situation involved "other environmentally sensitive materials spilt in and around the switches[.]" The "materials spilt" was coal from the derailments. The record evidences that in September 2001 the Carrier's forces used a vacuum truck to handle this situation. Specifically the parties engaged in good faith discussions involving use of a vacuum truck and reached an understanding that it would be leased for operation by Carrier forces. The truck was driven to the work site by the contractor's employee and the Carrier's forces used the equipment with assistance, as needed, from the contractor's employee. This is evidence that Carrier forces can operate this equipment when it is made available to them. There is little, if any, explanation why the "materials spilt" - coal - would be beyond the ability of Carrier forces. In this

regard, the Award relied upon by the Carrier as resolving this issue is not on point; it focuses on salvage work while this work is routine coal dust removal and related clean up. (See Award 58 of Public Law Board No. 2206.)

Issuance of notice was appropriate. On May 24, 2005 the Carrier notified the Organization of its plan to contract this work at Nacco Junction. The Organization requested a conference; the conference was held on June 13, 2005 which is the date that the contractor's forces began the work. Having the contractor commence work on the date of the conference inevitably derails the intent and purpose of the good-faith effort in the Note to Rule 55 and Appendix Y. The Carrier sidestepped its obligation to promptly meet with the General Chairman by conferencing on June 13, 2005 - the date that the contracted out work began at Nacco Junction.

Moreover, this simultaneous commencement of work by the contractor on the day that good-faith efforts are initiated for the intent and purpose of reducing the incidence of subcontracting requires a sustaining award. Numerous Awards involving similar if not identical notice/conference provisions and circumstances where a carrier let the work to outside forces before conferring with the organization have resulted in sustained Awards. (See Third Division Awards 28943, 29312, 29512, 29513, 29979, 30823, 30943, 30970, 31346.)

The Carrier is fully aware that a decision to contract work, which is customarily performed by Carrier forces, may result in an award of compensation. In contracting out this work, the Carrier denied the Claimants work opportunities. Compensation is appropriate to preserve and protect the integrity of the Agreement and Appendix Y. The Claimants shall be made whole for the actual number of hours of contractor-performed work at the Claimants' respective rates of pay. (See Third Division Awards 30661, 31521, 36093, and 37470.)

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2010.