

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40561
Docket No. MW-40110
10-3-NRAB-00003-070321
(07-3-321)**

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

(Brotherhood of Maintenance of Way Employes 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 (R. J. Corman) to perform Maintenance of Way and Structures Department work (remove/install switch and related work) at Mile Post 550.2 on the Black Hills Subdivision beginning on August 29 and continuing through September 4, 2005 [System File C-06-C100-29/10-06-0046(MW) BNR].
- (2) The Agreement was violated when the Carrier assigned outside forces (R. J. Corman) to perform Maintenance of Way and Structures Department work (haul Carrier Maintenance of Way equipment for use at Mile Post 550.2) on August 31 and September 1, 2005 [System File C-06-C100-28/10-06-0045(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 identified Claimants shall each be compensated at their respective and applicable rates of pay for a total of straight time hours and overtime hours as follows: W. S. Nairn for twenty-four (24) straight time hours and twenty-six (26) overtime hours, D. W. Crinklaw for sixteen (16) straight time hours and four (4) overtime hours, R. S. Martens for eight (8) straight time hours and two (2) overtime hours, N. O. Dodson for twenty-four (24) straight time hours and six (6) overtime hours, R. L. Bruce for twenty-four (24) straight time hours and four and one-half (4.5) overtime hours, L. G. Paulson for sixteen (16) straight time hours and four (4) overtime hours, M. A. Roloff for twenty-four (24) straight time hours and twenty-six (26) overtime hours, T. A. Pisciotti for twenty-four (24) straight time hours and six (6) overtime hours, J. W. Bates for twenty-four (24) straight time hours and six (6) overtime hours, J. E. McDill for twenty-four (24) straight time hours and sixteen (16) overtime hours, P. D. Bratt for sixteen (16) straight time hours and four (4) overtime hours, F. E. Zemit for sixteen (16) straight time hours and four (4) overtime hours, D. M. Johnson for sixteen (16) straight time hours and four (4) overtime hours, R. L. Rainbolt, C. A. McCoy and N. L. Bell for sixteen (16) straight time hours and four (4) overtime hours.
- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants T. D. Ratigan, M. D. Burke, D. W. Bell and T. L. Anderson shall now each be compensated for twelve (12) hours at their respective straight time rates of pay and for two (2) 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.

This dispute was initially filed and processed as two separate claims [Carrier's File Nos. 10-06-0045 and 10-06-0046]. Because both claims involve the same issues (contracting out) with the same outside forces (R. J. Corman) at the same location (Mile Post 550.2, Black Hills Subdivision) they have been consolidated for presentation to the Board.

The dispute involves the Carrier's decision to contract for side booms and other heavy equipment and movement of that equipment to assist Carrier forces in repairing switches and rehabilitating sub-grade in the Powder River Basin.

On June 7, 2005, the Carrier issued a notice to the Organization. The notice stated that due to constrained logistics for many subdivisions in the Powder River Basin, the Carrier needed special equipment to assist its forces to renew switches and rehabilitate sub-grade by contracting for side booms with operators to assist Carrier forces in removing and replacing ten switches each on the Black Hills Subdivision (Mile Post 550.2) among other locations. The Carrier stated that its forces were not available to perform this work even if the equipment were rented or leased and, historically, the Carrier has contracted to supplement its work force on similar projects given the prodigious amount of work to be accomplished. On June 9, 2005, the Organization notified the Carrier that it disagreed and requested a conference.

Another notice was issued by the Carrier on June 8, 2005. It stated that the Carrier was engaged in emergency efforts to restore service levels impacted by unprecedented and sudden volume growth and wet winter and spring weather. To overcome these matters the Carrier needed other heavy special equipment, besides the side booms, to assist its forces in replacing switches and rehabilitating sub-grade at Mile Post 550.2 in the Black Hills Subdivision. The notice stated that all Carrier forces were fully employed and not available to perform this work even if the equipment were rented or leased and, historically, the Carrier has contracted to supplement the work force because it is not adequately equipped with equipment or staff to handle this volume of work.

The Organization responded on June 9, 2005. It disagreed with contracting for "other heavy equipment" and requested a conference. A conference was held to address the June 7 and June 8 notices. No resolution was forthcoming; appeals were filed by the Organization and denied by the Carrier. Thereafter claims were filed with the Board; each party submitted numerous Awards, including Third Division Awards, in support of their positions and arguments.

According to the Organization, this routine maintenance work performed by outside forces is encompassed within the scope of the Agreement and customarily performed by Carrier forces. In this regard, paragraphs 1 and 2 of the Note to Rule 55 stipulate that employees included within the scope of this Agreement perform work in connection with the "... construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service." Twenty-five statements from employees with up to 30 years of experience reflect their performance of this maintenance work.

Carrier forces are skilled, trained and were available for this work on August 29 - September 4, 2005, to remove and/or install track switches, including hauling Maintenance of Way equipment (or similar equipment obtained by rental or lease agreement) which falls within Rules 1, 2, 5 and 55 (a reservation of work Rule, i.e., reserved to employees.) [See Third Division Awards 20412, 21534 and Award 34 of Public Law Board No. 2206.] In other words, exclusivity to this type of work need

not be proven for employees have a contractual right to be assigned this work and to perform it before outside forces may be used.

The work was performed in August and September 2005 which was at least three months prior to the May 2005 "emergency" alleged by the Carrier. Also, the work performed was at a location more than 100 miles away on a different main line track. Twenty-five statements from employees prove that the derailments were caused by the Carrier's deferred maintenance and not the weather. The alleged "emergency" presented by the Carrier shows bad faith in using outside forces rather than Carrier forces.

The Note to Rule 55 and Appendix Y (December 11, 1981 Letter of Understanding) are threshold requirements before Maintenance of Way work can be assigned to outside forces. The Carrier made no effort to obtain rental equipment and its argument that Carrier equipment was not available is not relevant because the contract is for work and not equipment. Third Division Award 34216 held that where the Carrier fails to provide advance written notice and there is no good-faith discussion at a conference, a violation occurs and the Claimants are entitled to be paid for the work.

The Carrier violated the provisions of the Note to Rule 55 and Appendix Y because it failed to give advance notice to the General Chairman of its plans to assign outside forces to handle routine maintenance work and it does not have good faith reasons for (1) contracting-out this work or (2) why the work could not have been assigned to the Claimants. Deferred maintenance is not one of the criteria in the Note to Rule 55. Plus, Appendix Y is applicable as reflected in scores of arbitration Awards. Moreover there were no special skills required or not possessed by the Claimants and no special equipment not owned or readily available to the Carrier; the Carrier did not refute the Organization's positions so they must be accepted as accurate. Because the Carrier did not identify this routine maintenance work in its June 7 and June 8 notices issued to the Organization, those notices are not valid.

The Claimants lost their rightful opportunity to perform this work so they are entitled to a monetary claim notwithstanding their full employment. [See Third

Division Awards 19924 and 20338.] Full employment is not a deterrent to an award of damages. (See Third Division Awards 19898, 19899, 20042, 20412, 20633 and 21340.)

According to the Carrier, it contracted with R. J. Corman to transport heavy equipment to the work site and for outside forces to use the equipment only to assist Carrier forces in dirt work and switch installation. The notices of June 7 and 8, 2005, advised the Organization that the Carrier did not have qualified employees to operate the heavy equipment (the Carrier does not own side booms) that all qualified employees were fully employed and the Carrier did not have the crawler excavators, loaders and large graders needed for the lifting and moving of track material and for use in working the sub-grade problems. Also, the Carrier did not have a sufficient number of heavy trucks to haul the track material. Contractors haul their equipment with their trucks using their operators. The Carrier forces, however, did perform the majority of the work.

Additionally, the Carrier argues that "emergency" conditions were present caused by snowfall on May 11 and derailments on May 14 and 15, 2005, on the Orin Subdivision Main Line track between Wright and Douglas, Wyoming.

The Board finds that the claims were timely presented and processed by the Organization and the Carrier at all stages of appeal. The dispute involves the assignment of track maintenance work to outside forces. Specifically, outside forces removed and installed a switch and performed related roadbed and dirt work at Mile Post 550.2 on the Black Hills Subdivision beginning August 29 and continuing through September 4, 2005. On August 31 and September 1, 2005, outside forces hauled heavy equipment for use at Mile Post 550.2.

The burden of proof resides with the Organization to demonstrate that the work performed is reserved to BMWE-represented employees. In this regard the Carrier stated that the majority of work was performed by its own forces; that point is not disputed by the Organization. Rules 1, 2, and 5 establish classes of Foreman and Sectionman within the Track Sub-department. Paragraphs 1 and 2 in the Note to Rule 55 state that employees included within the scope of this Agreement perform work in connection with the "... construction and maintenance or repairs of and in

connection with the dismantling of tracks . . . located on the right of way and used in the operation of the Company in the performance of common carrier service[.]” The Note specifies that this work is typically, customarily, and historically performed by employees.

By having its forces perform the majority of the work, the Carrier’s action is indicia that the work is typically, customarily, and historically performed by these employees. “Typically” and “customarily” mean that the work is usually and normally performed by these employees in accord with Rules 1, 2, 5 and 55. Under these Rules the Organization is not required to establish its exclusivity to this maintenance work. Exclusivity is not the bright line test for Rules coverage when considering employees and outside contractors. See Third Division Awards 29007 and 29033. If this was not Maintenance of Way work, then the Carrier would not issue advance notice and participate in conference with the Organization and assert the emergency conditions as prerequisites for its actions. The Board finds that there is sufficient probative evidence to support the Organization’s claim to this work.

“Typically” and “customarily” also mean that it may be routine to assign the work to these employees, but implicit within the normal and usual routine is the notion that there are exceptions to the routine. In other words, there are situations or circumstances that arise which necessitate the use of outside forces. The parties recognize the non-routine circumstances because, pursuant to the Note to Rule 55, this work may be subcontracted when one criterion of several criteria is met.

The evidentiary burden is on the Carrier to prove that its employees did not possess the “special skill” required to perform the work; that it did not own the “special equipment” required to do the work; that it was not adequately equipped to handle the work; or “that emergency time requirements” existed which made the undertaking beyond the capacity of the Carrier’s own forces. Satisfying one of the exceptions enables and authorizes the Carrier to assign maintenance work to outside forces yet remain compliant with the Rules and Agreement.

The findings are that the Carrier provided written notice to the Organization at least 15 days prior to commencing the work. The Carrier issued its notice on June 7; the work began on August 29, 2005. The notice concerned the use of side

booms - equipment not owned by the Carrier. The Note to Rule 55 of the Agreement sanctions the use of outside forces when special equipment not owned by the Carrier is necessary for this kind of work.

On June 8 the Carrier issued another written notice (other heavy equipment) when it notified the Organization at least 15 days prior to commencing the work that from August 29 through September 4 the Carrier would assign outside forces to perform related switch repair and dirt work at Mile Post 550.2 on the Black Hill Subdivision. During conference the Carrier discussed heavy equipment with the Organization such as not having large trucks/trailers to haul the heavy track material.

Outside forces hauled Group 2 equipment (machines) for a switch pull and replacement. The Organization remarks that no special equipment was required to assist Carrier forces in replacing switches and rehabilitating sub grade; however, the Carrier's lowboy trucks and forces to operate them were not available to support the project because the equipment and forces were in use in the service recovery and expansion effort on the Orin Line. The Carrier did not have the equipment to lift and move the heavy switches to place on the dirt work. The Carrier was compliant with Appendix Y because contractors informed the Carrier that it would not rent or lease any excavators without one of the contractor's employees operating it. The Note to Rule 55 allows the Carrier to contract out when the Carrier is not adequately equipped to repair the track.

In sum the Organization has not proven that the Carrier's reasons for its actions are a breach of the Rules and Agreement, including the Note to Rule 55 and Appendix Y. Therefore, the Board concludes that it will deny the claim.

AWARD

Claim denied.

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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 29th day of June 2010.