

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40671
Docket No. MW-40113
10-3-NRAB-00003-070327
(07-3-327)**

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 (B&W Crane Services) to perform Maintenance of Way and Structures Department work (haul switch panels, ties and track material) from Casper, Wyoming to Mile Post 49 on the Orin Subdivision on October 17, 18, 20, 25, 27, 28, November 1 and 3, 2005 [System File C-06-C100-58/10-06-0087(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 B. Prickett, M. Rodriguez, G. Prosenick, Z. Mader and L. Yerton shall now each be compensated for sixty-four (64) hours at their respective straight time rates of pay and Claimants M. Gettert, D. Bell, M.**

Burke and T. Anderson shall now each be compensated for sixty-four (64) hours at their respective straight time rates of pay and for forty-eight (48) 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 argues that the work performed by the contractor's employees is routine track maintenance work customarily and historically performed by the Carrier's forces, such as the Claimants, and is contractually reserved to them pursuant to Rule 1 - Scope, Rule 2 - Seniority Rights and Sub-Department Limits, Rule 5 - Seniority Rosters, Rule 55 - Classification of Work, the Note to Rule 55 (advance notice to contract out work) and the December 11, 1981 Letter of Understanding (Appendix Y).

Hauling Carrier-owned switch panels, ties and other track material and unloading it and stockpiling it on Carrier property for installation is basic, fundamental maintenance work falling within Rules 1, 2, 5 and 55. The scope of the Agreement reserves this work to Maintenance of Way forces. The customary practice is to assign forces to perform this work using Carrier equipment or similar equipment obtained by rental or lease arrangements; the exclusivity-of-work doctrine is not applicable in contracting disputes.

The Carrier's notice of June 8, 2005 states heavy equipment was needed to perform the switch projects and sub-grade rehabilitation, but this claim involves hauling, unloading and stockpiling Carrier-owned switch and track material and related work. The notice does not mention contracting for trucks to haul Carrier material or for a crane to unload this material and stockpile it for later use.

Outside forces hauled the Carrier's track material from Cheyenne, Wyoming, using four flatbed trucks with operators and unloaded and stockpiled it on Carrier property at MP 49 on the Orin Subdivision for installation at a later date. This occurred without notice to the General Chairman - a violation of the Note to Rule 55 and Appendix Y.

Notice and conference provisions of the Note to Rule 55 and Appendix Y are threshold requirements that must 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 Organization further asserted that the Carrier's defenses are without merit. The Carrier has the burden to prove that the exceptions within the Note to Rule 55 apply; it provided no documentation to support an exception. The Carrier does not deny that the work was performed by outside forces on the dates in question; it made no attempt to lease equipment it viewed as necessary to perform the work. The Carrier acknowledged during conference that it made no attempt to rent or procure equipment for Carrier forces. The equipment was already on the property, and the work started before the notice was issued to the Organization.

There is no proof of an emergency as alleged by the Carrier because there is no reasonable connection between the May 11 snowfall or the May 14, 2005, main line derailments between Wright and Douglas, Wyoming. The routine track maintenance at issue was many rail miles away and more than five months after May 11 and 14, 2005. Track conditions were not sudden occurrences, unforeseen by the Carrier, given its deferred maintenance creating unstable track 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. Third Division Awards 19898, 20042, 20412, 20633, 21340 and 21808 establish that full employment by the Claimants on the claim dates is not a deterrent to an award of damages. For all of the foregoing reasons, the Organization argues the claim should be sustained.

According to the Carrier, the claim must be denied. The Organization failed to prove that the work is reserved to its members. The Carrier does not own 150-ton off-track cranes and does not have qualified Operators for such equipment. Trucks could not be rented without using the contractor's drivers. A 150-ton off-track crane and heavy trucks are special equipment not available to the Carrier without contractor operators. This is a piecemeal claim for very little of the work. On-property Awards support the Carrier's view that it is not required to piecemeal a project which would be impractical and/or inefficient.

The Organization failed to prove that the Carrier violated any duty to give notice of contracting the work, or that the Carrier was adequately equipped to meet the magnitude of work. Although notice was not required because employees do not exclusively perform this work, notice was not only provided to the Organization on June 8, 2005, but also was followed by conference. This work is not customarily maintenance-of-way work because BMWE-represented have not operated off-track heavy cranes. The claim is not about maintenance of track; it is about heavy equipment use and operators. The Claimants were fully employed and working substantial overtime; they could not have performed additional duties. There is no evidence the Claimants suffered any damages.

The Board finds that the Carrier issued an advance notice dated June 8, 2005, which was followed by a conference with no resolution. Thereafter, the Organization filed a claim on December 11, 2005. This claim was duly handled on the property and, when the parties remained deadlocked, the Organization referred this dispute to the Board.

The record evidence shows that the Carrier contracted with B&W Crane Services to assist Carrier forces in the movement and unloading of heavy switch packages, switch panels, switch ties and other track material. Special equipment, e.g., a 150-ton off-track crane not owned by the Carrier, was used for safety reasons to lift the 34,000 lb. track panels and switch packages. Carrier forces, however, performed the majority of the track maintenance work, as is the custom and historical practice.

The Organization has not established that large trucks were available for the Carrier's use and/or that Carrier forces were available to perform this work because they were engaged in repair of the track and could not perform additional duties. There are three heavy-truck positions on Seniority District 400; they were fully employed on the claim dates and thus were not available. Consequently, heavy-trailer equipment was not available for the Carrier to haul 68,000 lb. loads. The Note to Rule 55 allows the Carrier to contract out work when it is not adequately equipped to perform the work.

Weather was a contributing and complicating factor, although it did not rise to an "emergency situation." Employee statements submitted by the Organization focus on deferred maintenance, but the claim is about special equipment (off-track cranes and large trucks). Satisfying one of the exceptions in the Note to Rule 55 enables and authorizes the Carrier to assign maintenance work to outside forces yet remain compliant with the Rules and the parties' Agreement. The Carrier met that exception.

In sum, the Organization received advance written notice of the Carrier's reasons for contracting and the Organization failed to prove that the Carrier's reasons for its actions constituted a breach of the Agreement, including the Note to Rule 55 and Appendix Y. Therefore, the Board denies 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 1st day of November 2010.