

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40672
Docket No. MW-40114
10-3-NRAB-00003-070328
(07-3-328)

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

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(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 (grading right of way roads, clearing fire lines, leveling for switch preparation and related work) at Mile Post 550.2, between Moorcroft, Wyoming and Mile Post 578.9 and at Mile Post 567.0, all on the Black Hills Subdivision beginning on August 25 and continuing through August 30, 2005 [System File C-06-C100-22/10-06-0033(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 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. Nairn for twenty-four (24) hours straight time and twenty-six (26) hours overtime, R. Sandness for eight (8) hours straight time and two (2) hours overtime, C. Hoffer for eight (8) hours straight time and two (2) hours overtime, C. Willey for twenty-four (24) hours straight time and twenty-six (26) hours overtime, J. McDill for twenty-four (24) hours straight time and sixteen (16) hours overtime and T. Piscioti for twenty-four (24) straight time and twenty-six (26) hours overtime.”

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 customary practice is to assign Carrier forces to perform routine grading and right-of-way roadbed work with Carrier equipment or similar equipment obtained by rental or lease arrangement. This work is an integral part of track maintenance and is historically performed by Carrier forces rather than outside forces.

This work is contractually reserved to the Claimants under Rule 1 - Scope, Rule 2 - Seniority Rights and Sub-Department Limits, Rule 5 - Seniority Rosters, Rule 55 - Classification of Work and is encompassed within the scope of the

Agreement which reserves it to BMW-represented employees. The exclusivity doctrine is not applicable in contracting disputes.

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 advance notice to use outside forces to perform maintenance-of-way work. The notice and conference provisions in 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.

With or without proper notice, the Carrier has the burden of proving that the exceptions (special skills, special equipment, inadequately equipped, emergency, undertakings not contemplated by Agreement and beyond capacity of forces) within the Note to Rule 55 apply. The work was performed by contractor forces using no special skills and only ordinary tools and/or equipment. 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 made no attempt to rent or procure equipment for Carrier forces.

The Organization presented a prima facie claim wherein it provided the pertinent provisions from the Agreement and the contractor's daily work sheets to prove a violation. The Carrier never denied the essential facts in the claim. This is not a piecemeal claim; the work claimed was different in each instance, and there is no duplication proven by the mere listing of claim numbers.

The Organization further asserted that the Carrier's defenses are without merit. There was no "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 more than 100 rail miles away on a different main line track and more than three months after May 11 and 14, 2005. These 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. 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 claim should be sustained.

According to the Carrier, the claim must be denied. The Carrier was faced with critical slowdowns in the nation's coal supply due to ground saturation from record precipitation in the months leading up to two derailments in May 2005. During this time of derailments and continued wet conditions, the Carrier called "all hands on deck" and that included the limited contracting of vacuum trucks.

The Organization failed to prove a contractual basis for its claim that the work is reserved to BMWE-represented employees and/or Structures Department work. Rule 1 is a general Scope Rule and Rule 55 is classification and not reservation of work. Appendix Y is a statement of the parties' intent to establish a forum to reduce contracting and improve communications.

The Carrier provided notice on June 8, 2005 of "Heavy Equipment to assist Carrier Forces" stating no Carrier equipment was available because of the service recovery and expansion efforts on the Orin Subdivision. All forces were fully employed and were not available to handle this increase in work. The notice indicated the Carrier would use special equipment to assist its forces in replacing switches and rehabilitating sub-grade, as well as to deal with the volume of work by contracting for other heavy equipment in addition to that equipment and work identified in prior notices (May 24 and June 6, 2005). This was a means to supplement and assist forces in these projects including the Black Hills Subdivision between MP 475 – 599, among others.

The Organization failed to prove that the work is reserved customarily or exclusively to its members. The grading of roads involves dirt work and the Organization failed to provide evidence that the road work or fire lanes were on the

Carrier's right-of-way. The Organization failed to mention dirt work in the claim, because arbitration Awards conclusively find that dirt work is not exclusively or customarily performed by BMW-represented employees. There is no requirement to piecemeal a project where it is inefficient and or impractical.

The Claimants were fully employed and working overtime or on annual leave; they could not have performed additional duties due to overtime or their absence from work due to leave. Their monetary claims are excessive.

The Board finds that the Carrier issued a notice on June 8, 2005, which was followed by a conference with no resolution. Thereafter, the Organization filed a timely claim, which was duly handled on the property. When the parties remained deadlocked the Organization referred this dispute to the Board.

The evidence shows that the claim is about equipment use and dirt work. Arbitral precedent, including Third Division Award 34041, Public Law Board No. 4768, Award 14, and Public Law Board No. 4748, Award 71, referring to the type of equipment and dirt work in this claim is not customarily performed by MofW forces.

More persuasive is the Roadmaster's unrefuted statement:

"The grading of fireguards was done to allow access to the switch areas as there were no roads in. The leveling for material had to be done so we could unload the switches and have a place to set up and get them welded. It is not safe nor feasible to try to do work on 20' high uneven embankments. Large cranes had to have access to the area and could not travel the so called right of way roads. Because of overhead obstructions we had to bring the crane in at locations where there were no roads. We used fire lines and built roads when necessary. This was all done to have an area for the railroad crews to piece together, put rail and ties on, and make welds so the switches could put in after the subgrade had been removed. There are cuts and ditches in these locations that required the work to be done for the switch projects."

Weather was a contributing and complicating factor although it did not rise to an “emergency” situation. Nevertheless, 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 parties’ Agreement. The Carrier met that exception because BMW-represented employees do not customarily do this dirt work and are not qualified to operate large cranes.

In sum, the Organization received advance written notice of the Carrier’s reasons for contracting out the disputed work, and the Organization has not proven that the Carrier’s reasons for its actions constituted a breach of the parties’ Agreement, including the Note to Rule 55 and Appendix Y. Therefore, the claim is denied.

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.