

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40673
Docket No. MW-40115
10-3-NRAB-00003-070345
(07-3-345)**

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 (R. J. Corman) to perform Maintenance of Way and Structures Department work (remove/install switches and related work) at Mile Posts 539.7 and 539.9 on the Black Hills Subdivision on September 26, 27 and 29, 2005 [System File C-06-C100-55/10-06-0084(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: R. Martens for nineteen (19) straight time hours and five (5)**

overtime hours, R. Sandness for sixteen (16) straight time hours and five (5) overtime hours, P. Bratt for nineteen (19) straight time hours and five (5) overtime hours, M. Roloff, T. Piscioti, J. Bates, C. Sieber, F. Zemit and D. Johnson for sixteen (16) straight time hours and five (5) hours overtime, N. Bell and M. Miller for sixteen (16) straight time hours and five (5) overtime hours and C. McCoy for sixteen (16) straight time hours and five (5) overtime 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 customary practice is to assign Carrier forces to perform routine track maintenance such as removing and installing a switch and related work using Carrier equipment or similar equipment obtained by rental or lease arrangement. Although available and fully qualified for this work, the Claimants suffered a loss of work opportunity when the Carrier contracted with outside forces.

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 encompassed within the scope of this Agreement reserving this work to BMW-represented employees. The exclusivity test 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 of its intent to use outside forces for this work. The 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. 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 notice of June 8, 2005 is flawed because it fails to identify the most basic information, i.e., the equipment that the Carrier intends to lease. With or without proper notice, the Carrier has the burden to prove that the exceptions in the Note to Rule 55 apply. The Carrier does not deny that the work was performed by outside forces on the dates in question. Contractor forces used no special skills and only ordinary tools and/or equipment. The Carrier made no attempt to rent or lease 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 worksheets to prove a violation. 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 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 more than 100 rail miles away on a different Main Line track and it was performed by contractors more than four 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'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 on the claim dates. 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. The claim should be sustained.

According to the Carrier, the claim must be denied. The Carrier was faced with critical slow downs in the nation's coal supply due to ground saturation from record precipitation in months leading up to two derailments in May 2005. A document submitted by the Organization supports the Carrier's position, that is, a heavy snowstorm on May 11, icy water and coal dust merging into thick, dirty slurry and oozing across large swaths of a 100-mile section of track. The derailments decreased coal shipments ten to 15 percent to Power Plants functioning in a just-in-time environment.

This extreme moisture, combined with coal dust and waste debris, led to sub-grade instability and caused the need for expanded and unexpected maintenance. During this time of wet conditions and derailments, the Carrier called "all hands on deck" which provided full employment for Carrier forces. The Claimants were fully employed and working overtime on the claim dates; they were not available and could not have performed additional duties. Their monetary claims are excessive.

The Organization failed to prove that the work is reserved to its members because Rule 1 is a general Scope Rule and Rule 55 is work classification and not work-rule reservation. The Carrier does not own side booms and does not have qualified operators for such equipment. Heavy trucks to haul 68,000 lb. equipment could not be rented without using the contractor's drivers. 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.

Appendix Y places no burden on the Carrier regarding the commitments therein because the Carrier's contracting Rule is not from the 1968 National Agreement. No notice to the Organization is required where it fails to show the

work is exclusively reserved to its members. Nevertheless the Carrier provided a notice on June 7, 2005:

“Subject: Heavy Equipment to assist Carrier Forces

Track access on many of the subdivisions . . . have limited access, this coupled with recent challenges . . . makes it imperative that the Carrier take actions that will increase the productivity of Carrier forces working in the area. Because of the constrained logistics in the area, the Carrier needs special equipment to assist forces renewing switches and rehabilitating sub-grade . . . the Carrier will contract for side booms with operators to assist . . . forces in removing and replacing 10 switches each on the Blackhills, Butte and Sandhills Subdivisions between mile post 476-599, 366-476, and 127-365 respectively. Additionally on the Butte Subdivision the side booms will assist carrier forces in sub-grade rehabilitation.”

A second notice issued the next day - 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 Power 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, 399-476, and 127-365 respectively; the sub-grade rehabilitation will be on the Butte Subdivision.”

The Board finds that the claim dates are for heavy equipment used in dirt preparation to assist Carrier forces at Mile Post 539.7. The Organization did not establish that dirt work is customarily performed by its members; prior Awards have reached the same conclusion. (See Third Division Award 37466 and Public Law Board No. 4768, Award 22.) Also, there is no evidence that Carrier forces have customarily operated side booms or crawler track hoes or excavators.

The Organization did not establish that the Carrier violated the notice to contract. In this regard, notice was not required because BMW-represented employees do not customarily perform dirt preparation and are not qualified to operate equipment not owned by the Carrier. Nevertheless, two notices were issued.

The Carrier contracted with R. J. Corman to assist Carrier forces at the site for dirt preparation and switch installation. Special equipment was needed for dirt preparation (compaction, proper drainage) to repair the failing sub-grade and movement of heavy track material into proper place with side booms which prevented damage to the heavy track material.

The Carrier did not have the equipment, i.e., large hydraulic crawler excavators, large loaders (crawler and tire) and motor graders, available to perform the work of lifting, moving track material and working on the sub-grade problems. The Carrier did not have a sufficient number of heavy trucks to haul the track material; contractors haul their own equipment with their trucks. The Carrier does not own side booms (sidewinders) to handle and line heavy switches for replacement and heavy equipment was needed at the location to place the heavy switch without damage. The Carrier has three heavy truck positions on Seniority District 400 and all were fully employed on the claim dates; this equipment was not available. The Note to Rule 55 allows the Carrier to contract out given these findings.

Weather was a complicating factor although it did not rise to an “emergency” situation. Employee statements submitted by the Organization focus on deferred maintenance. The Board finds that forces performed the track work; however, the Carrier met several of the exceptions in the Note to Rule 55 that authorized it to assign this work to outside forces. Therefore, the Board denies the claim.

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.