

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40678
Docket No. MW-40141
10-3-NRAB-00003-070378
(07-3-378)**

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 Employees 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 (Hulcher) to perform Maintenance of Way and Structures Department work (remove/install track panels and related work) on the Orin Subdivision of the Powder River Division on September 12, 13, 19, 20, 23, 26, 27 and October 17, 2005 [System File C-06-C100-37/10-06-0059(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 listed Claimants shall be compensated at their respective and applicable rates for the straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work as follows: Claimants T. Anderson, B. Kutschara, K. Brandt, C. Lynn, C. Martinek, G. Griffee, J. Manzaneres, J. Kramer, J. Hutson, C. McCormick, T.

Mills, V. Havorka, G. Witt and D. Lohr shall each be compensated for an equal proportionate share of three hundred seventy-six (376) straight time man-hours and one hundred eighty-two (182) overtime man-hours and Claimants R. Busskohl, D. Casey, C. Bullock, D. Powers, J. Johnson, T. Cox, W. Hartwig, J. Schulte, J. Creeden, C. Puskarich, J. Gibson, P. Mulhern, J. Uehling, S. Halouska, T. Miller, R. Larsen and L. Claussen shall each be compensated for an equal proportionate share of four hundred sixty-eight (468) straight time man-hours and two hundred twenty-four (224) overtime man-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 panel installation 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 pursuant to 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 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 proper advance notice to use outside forces. 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 failed to identify the most basic information - equipment - that the Carrier intends to lease. With or without proper notice, the Carrier has the burden of proving that the exceptions in the Note to Rule 55 apply. The Carrier did not deny that the work was performed on the dates in question by outside forces. Contractor employees used no special skills and only ordinary tools and/or equipment. The Carrier made no attempt to rent or lease equipment for use by Carrier forces.

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 track on May 14 and 15, 2005. The work at issue was performed by contractors more than three 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 dates in the claim. 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. It provided proper advance 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 Powder 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 Carrier was faced with 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 to pose perilous conditions by inhibiting the ability of the ballast to drain properly. Complications arose with two derailments in May 2005 that impeded the movement of coal between coal facilities and electrical plants.

This extreme moisture, combined with coal dust and waste debris, caused sub-grade degradation/instability which required replacement of switches, ballast, rail and crossovers. This expanded and unexpected maintenance caused a spike in work not contemplated by the Agreement. During these derailments and wet conditions, the Carrier called "all hands on deck" which provided full employment for Carrier forces. The Claimants were fully employed and working overtime on the dates in the claim; they were not available and could not have performed additional duties. Their monetary claims are excessive.

The work is not reserved to the Organization because Rule 1 is a general Scope Rule and Rule 55 is a work classification and not a work reservation Rule. The Carrier does not own side booms and does not have qualified operators for such equipment. Heavy trucks to haul 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.

The Board finds that the contractor used side boom Caterpillars, front end loaders, track-type excavators and earth scrapers, which are Group 2 machines in the Roadway Equipment Sub-department, as well as similar or identical equipment currently in the Carrier's roadway equipment inventory. The 45 pictures and the 59 vacancy bulletins in the record confirm that this type of equipment is owned by the Carrier and has been operated by Carrier forces. Statements submitted by 11 employees further attest to their operation of equipment similar or identical to the equipment used by outside forces. Based on that evidence, the work in this claim has been customarily and historically performed by BMWE-represented employees. As for the weather, it was a complicating factor but did not rise to an "emergency" situation.

Nevertheless, the Organization did not establish that the Carrier violated the notice to contract. Two notices issued - June 7 and 8 - are sufficient in form and content. The Carrier's forces were fully employed and all Claimants were working overtime during the dates in the claim. The Carrier did not have a sufficient quantity

of heavy trucks to haul the track material; contractors haul their own equipment with their trucks. 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. Carrier forces performed track work; however, the present undertakings were not contemplated by the Agreement and were beyond the capacity of the Carrier's forces. The Note to Rule 55 allows the Carrier to contract in this situation.

Therefore, the Board will deny 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.