

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41164
Docket No. MW-40341
11-3-NRAB-00003-080142**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 work (remove switch and frog panel and install track panels and related work) at Mile Post 547.2 on the Black Hills Subdivision on March 31, 2006 [System File C-06-C100-143/10-06-0243(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 the aforesaid 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 R. Martens, W. Nairn, R. Sandness, M. Roloff, J. Bates, C. Sieber, R. Rainbolt, M. Miller and N. Bell shall now each be compensated for seven and one-half (7.5) 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.

By letter dated March 16, 2006, the Carrier informed the Organization of its intention to contract out switch renewal work at various locations in the Black Hills and P. R. North Sub-Divisions. According to the letter, the Carrier needed to contract for specialized equipment that it did not have to assist its forces in replacing the old switches with new ones: "The contractor will provide specialized equipment such as side booms, crawler hoes, large front-end loaders, and dozer to assist with the removal and placement of new #20 switches that weigh approximately 80,000 pounds each. The Carrier does not possess the necessary specialized equipment, nor are its forces skilled in its operation. The work to be performed by the contractor includes, but is not limited to the removal of existing switches; removal of fouled ballast; placement of new ballast; and debris installations." One of the locations noted where switch renewal would occur was Mile Post 547.2. The Carrier indicated that contracting out the work was consistent with historical practice and that it was anticipated to start on approximately March 31, 2006. The Organization requested a conference to discuss the proposed contracting out.

On March 31, 2006, employees for R. J. Corman Derailment Services removed a No. 20 switch and frog panel at Mile Post 547.2. They did not install a new switch, however, but instead effected a temporary repair by replacing the switch with straight rail. In a June 15, 2006, e-mail included in the on-property record, the Roadmaster stated: "We removed a concrete switch from the track and put in panels as Mr. Varmer stated. We did this because the switch condition was so deteriorated that we were in danger of the switch completely failing or worse having a derailment. We had a letter of intent in place to replace the switch but signal was not able to make the

changes necessary to complete the job. This was due to material that had not been delivered and manpower issues. We will be replacing the switch when the material need[ed] by signal is in place.” The contractor’s employees used equipment ordinarily used by Maintenance of Way employees to make the temporary repair and the work they did is ordinarily performed by BMW-represented employees. The contractor’s employees worked seven and one-half hours each.

The Organization contends first that the work in dispute is ordinary, routine - “quintessential” - track work and is thus covered by the Note to Rule 55. The Carrier’s Notice was improper, in that it did not mention the work that is in dispute: the Notice referenced switch replacement using specialized equipment necessary to lift the new switches, not a temporary repair using ordinary equipment and materials of the sort handled every day by Maintenance of Way employees. Nor has the Carrier met its heavy burden to prove that one of the established exceptions under the Note to Rule 55 applies. The equipment and material used for the temporary repair were not specialized. Nor was this an emergency situation. The deterioration of equipment over time is normal and to be expected. The work in dispute is normal track maintenance that should not have been performed by outside contractors, but by the Carrier’s employees. A failure to perform necessary maintenance and repair work does not amount to an emergency.

The Carrier asserts several defenses. First, the work in dispute does not belong exclusively to BMW-represented employees. Switch replacement has historically been “shared” or “common” work by both contractor and BNSF forces. The determining factor, in most cases, is the territory of the railroad involved: through merger, BNSF is comprised of several former railroads, and the use of contractor employees to perform certain types of work, including that involved here, has also been continued. In this territory, switch replacement has been performed by contractors as well as Carrier employees. Thus the Note to Rule 55 does not apply. The Organization was informed of this historical practice in the original Notice. The original Notice included the removal of the switch involved in this case. In addition, the Carrier’s use of contractor employees to perform the work was permissible under the provisions of the Note to Rule 55, under both the “specialized equipment” and “emergency” exceptions. The Notice explained that the contractor would provide specialized equipment to assist with “the removal” and placement of new switches weighing “approximately 80,000 pounds each.” The Notice further stated that the work to be performed by the contractor included “the removal of existing switches.” Furthermore, due to not possessing the specialized equipment needed or operators

skilled in its operation, the contractor was not adequately equipped to handle the work involved. Thus, the use of contractor employees, assisted by the available BMW-represented employees, was entirely permissible. Nor is the Carrier required to piecemeal work. Finally, use of the contractor employees was permissible under the emergency circumstances involved. The Carrier had planned to remove and replace the switch involved, but it was determined that the condition of the switch was such that it was no longer safe for the passage of trains and it needed to be removed and/or replaced immediately. Continuing to operate over the switch could have resulted in a major derailment or injury to employees. The new switch was not ready, and the decision was made to remove the switch for a temporary period. Inasmuch as the Carrier did not have the needed equipment to perform the work, contractor equipment, and employees were used, along with Carrier forces, including four of the Claimants. The Organization produced no proof that BMW-represented employees have been used to perform switch removal work of the nature here involved at any precise location on the entire BNSF, much less on the territory in this case. Numerous Awards have already determined that where there is a factual dispute over an essential element of a claim, the Board must either dismiss the case or rule against the moving party. As for any potential damages, the claim is excessive and seeks a windfall payment for the Claimants. All of the Claimants were fully employed during the entire claim period, and four of the Claimants actually worked with the contractor employees, working the exact same hours they did.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out bargaining unit work. If the disputed work is work "customarily performed" by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

“. . . [S]uch work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces”

In addition, if the Carrier plans to contract out work on one of these bases, the Note requires the Carrier to notify the Organization “as far in advance of the date on

the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases."

Switch removal and replacement is routine work for Maintenance of Way employees, so the Note to Rule 55 applies in this case. The Carrier alludes to an historical mixed practice in the territory where the work occurred, but there is no evidence in the record of such a mixed practice, only allegations – which are insufficient as proof of a mixed practice.

The Notice involved here indicated that specialized equipment was needed "to assist with the removal and placement of new #20 switches that weigh approximately 80,000 pounds each." The implication of this statement is that it is the weight of the new switches that requires the specialized equipment that the Carrier uses to justify contracting out what would otherwise be bargaining unit work. The Notice continues: "The work to be performed by the contractor includes, but is not limited to the removal of existing switches; removal of fouled ballast; placement of new ballast; and debris removal." Those tasks are normally routine track maintenance work, and relative to contracting out bargaining unit work can only be understood as tasks incidental to the primary task of lifting and installing the heavy new switch panels using special equipment.

If the job had gone as anticipated, the case before the Board would require a different analysis. But it did not. As sometimes happens, certain materials needed to do the work were delayed, and the Carrier decided to make a temporary repair to the track until the new switch could be permanently installed. The temporary repair removed the old switch and installed straight track, eliminating the switch for the time being. The claim before the Board is for the temporary repair, not the permanent switch replacement.

Removing old switches and installing 40-foot sections of straight track is work routinely performed by Carrier forces. The Carrier contends that "special equipment" was needed for the interim repair, but that is not supported by the record. According to the claim, the contractor used equipment of the type already owned by the Carrier and operated by its employees to remove the old switch and lay the temporary track. The explanation provided by the local Roadmaster makes no reference to the need for any specialized equipment in making the temporary repair. It states that "the switch condition was so deteriorated that we were in danger of the switch completely failing or worse having a derailment," and cites "material that had

not been delivered and manpower issues” as the reasons why the job could not be completed. The original Notice cited “specialized equipment” as the reason for the contracting out. Without the use of any specialized equipment, the work did not fall under the exceptions to the restrictions on contracting that are set forth in the Note to Rule 55.

The Carrier also contends that the severely deteriorated condition of the switch constituted an “emergency,” as that term is used in the Note to Rule 55, which would also justify the use of outside forces. An emergency is a sudden and unforeseen combination of circumstances that calls for immediate action. Here, the Carrier determined that the switch was dangerously deteriorated, to the point where a temporary repair needed to be made until such time as the new switch could be installed. The new switch could not be installed because of a delay in obtaining necessary materials. Considering the evidence in the record, the Board concludes that the situation was not an emergency as that term was intended in the Note to Rule 55. The old switch at Mile Post 547.2 was being replaced because the Carrier was aware that it was worn. Routine track maintenance will encompass regular replacement of switches over time, as they deteriorate from normal use and exposure to the elements. Individual switches may be in better or worse shape than expected, but it is hardly unforeseen that switches will deteriorate over time and need replacing. Nor can it have been unforeseen – at least in an operation the size of the Carrier’s, with its extensive operations history – that the materials needed to install new switches might be delayed. All in all, the situation lacks the elements of suddenness and unforeseeability that are the hallmarks of a true emergency. See Third Division Award 40767.

The Carrier also contends that the temporary repair was encompassed in the original Notice, and it should not have to piecemeal a job. Requiring the Carrier to use its own forces to make the temporary repair is not piecemealing: the temporary repair was a discrete piece of work, separate and distinct from the new switch installation that required outside forces to accomplish.

When the record as a whole is considered, the temporary repair at issue in this case falls under the Note to Rule 55, and the Carrier failed to establish that it needed specialized equipment to accomplish the repair, or that the situation was an emergency. Accordingly, the Organization met its burden of proof and must prevail.

This brings the Board to the issue of a remedy. The Organization seeks compensation for nine Claimants for seven and one-half hours of work at their respective straight time rates. Generally, the Claimants are entitled to the monetary remedy requested to preserve the integrity of the Agreement and to compensate them for the loss of a work opportunity. An exception is when the Claimants in fact did the work in dispute. That is true for the four Claimants in this case who worked with the contractor on the temporary repair (Martens, Bell, Nairn and Miller, according to the Roadmaster's email). Having already been compensated for the work once, they are not entitled to be paid for the same work again. The remaining five Claimants shall be paid seven and one-half hours at their respective straight time rates of pay.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of November 2011.