

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43223
Docket No. MW-43252
18-3-NRAB-00003-150412**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Formerly St. Louis - San
(Francisco Railway 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 (unload, layout and install multiple track switches) in the Lindenwood Yard in St. Louis, Missouri on the Springfield Division on February 23, 24 and 25, 2014 (System File 2600-FR99-1422/12-14-0097 SLF).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto 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 99 and the December 11, 1981 National Letter of Agreement.**

As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants C. Aaron, J. Henson, D. Ash, R. Brooks, B. Hoke, M. Beirman, L. Castens, T. Smith, J. Maggard, J. Williamson, B. Welton, W. Johnson, C. Brooks, J. Scott and J. Grayson shall now each ‘... be paid for all hours worked by the Contractors, 12 hours each day totaling 24 Straight hours and

12 hours Overtime hours, each at their respective rates of pay as settlement of this Claim.’”

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 filed a claim alleging the Carrier violated the terms of the Agreement when it assigned work to outside contractors. In support, the Organization states the work is contractually reserved, and has customarily, historically, and traditionally been performed by MOW employees. The Organization need not show exclusive reservation of scope covered work when the dispute involves assignment of work to outside contractors. Further, the Agreement requires that work reserved to employees may only be contracted out under specific conditions. Rule 99 requires the Carrier provide proper notice of its intent along with a good faith attempt to reach an understanding. The Carrier’s failure to do so created a violation of Rule 99.

The Organization denies that any past practice exists allowing the Carrier to contract out the work at issue and has failed to provide evidence of such practice. It is the Organization’s position that this qualifies as non-emergency, routine work. Further, the Carrier has failed to provide any evidence to support the assertion that an emergency existed. Operations did not appear to come to an immediate halt, nor was there any evidence of train traffic delays. The Organization claims that the Claimants were available to perform the work at issue and the Carrier had a duty to hire sufficient employees to perform the work.

The Carrier argues that it properly responded to emergency repairs after numerous switches and several tracks had been damaged in the Lindenwood Yard in St. Louis, Missouri. Based on the magnitude of damage, Carrier supplemented its forces with additional heavy equipment from R.J. Corman on February 23, 24, and 25, 2014 to restore Lindenwood Yard. Carrier states that when an emergency situation exists it is neither required to submit a notice to the Organization nor required to reduce the incidence of subcontracting or increase the use of MOW forces.

The Carrier continues by providing multiple statements corroborating that BNSF complies with the on-going practice of contracting additional heavy equipment when necessary in order to quickly maintain full operation in these circumstances. Carrier points to the evidence in support of the conclusion that BNSF has historically used contractors to assist available MOW forces with emergency repairs, such as the type involved in the instant case. The Carrier correctly determined outside forces were required to supplement its own employees. It was an emergency situation therefore notice to the Organization was not required.

This Division has reviewed the record. The Organization alleges a violation of the December 11, 1981 National Letter of Agreement, which provides:

“Rule 99. Contracting Out

- (a) In the event the Carrier plans to contract out work within the scope of the applicable schedule agreement, the Carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.**
- (b) If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and the Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Carrier may nevertheless proceed with said**

contracting, and the Organization may file and progress claims in connection therewith.”

The critical issue in the instant matter is the notice to the Organization. The Organization claims a violation of Rule 99 and the Carrier responds with an exception to the rule due to emergency. During the handling of the claim, the Carrier stated that it was an emergency situation and notice was not required. However, the explanation for the emergency was contained in the Carrier’s September 15, 2014, letter which stated, in pertinent part:

“as Ms. Tripp explained in her response the disputed work was related to repairs made necessary by derailments and, as such, was an emergency situation requiring immediate resolution. In emergencies such as this, arbitral precedent has granted BNSF greater latitude in the assignment of forces, including contractors. Moreover, arbitration has also ruled that it is not required that train movement be stopped, only that it is adversely affected in order to support the existence of an emergency. And as this was an emergency situation requiring immediate action to avoid further delay to train traffic, no notice is required.”

The Organization questioned the Carrier’s rationale in correspondence. Specifically, the Organization referenced a safety meeting discussion about outside forces as well as the common occurrence of derailments in the yard.

The Carrier cites an emergency exception to the Rule 99 requirement due to a derailment. A review of the record shows that there was no specificity to the Carrier-cited reference to an emergency save for “related to repairs made necessary by derailments.” The Carrier cites an emergency, yet there is nothing in the record to support when the derailments occurred, where they occurred, what equipment was implicated, or any other details. There is no explanation why an outside contractor would be needed to unload, lay out, and install fifteen yard switches. This is work normally and customarily performed by the Organization-represented forces. Absent the details about the emergency situation requiring replacement of numerous yard switches, neither the Organization, nor this Division, can assess whether the defense of emergency applies.

AWARD

Claim sustained.

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 26th day of June 2018.