

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43225
Docket No. MW-43299
18-3-NRAB-00003-150497**

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 (Former 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 (hauling and spreading asphalt) in the Lindenwood Yard in St. Louis, Missouri on the Springfield Division on June 13, 2014 (System File 2600-FR99-1473/12-14-0159 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.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants C. Aaron, L. Hall, J. Whitman, B. Bishop and C. Avis shall now each ‘... be paid for any and all hours worked by the contractors 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 asphalt contractor RJ Corman. 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 argues the Carrier's December 17, 2013 letter does not qualify as proper notification to the General Chairman and therefore has violated Rule 99. The letter did not mention the specific work to be contracted.

The Carrier responds that it properly supplemented the work of resurfacing roadway approaches to crossings using hot mix asphalt. Carrier denies that this work has historically been performed by the Organization and therefore the Carrier has not violated Article IV of the 1968 National Agreement. Carrier continues that the Organization has offered no evidence to support that the application of hot mix asphalt is reserved to MOW forces. According to the Carrier, the Organization admits that it must at least show customary, traditional, and historical performance, yet has failed to show that the MOW forces have ever performed the disputed work. The Carrier states this work has historically been performed by outside forces, not BMWED-represented employees. The Carrier continues by stating that it complied with every aspect of Rule 99. It notified the Organization of its intent to contract the work in a letter dated December 17, 2013. The Carrier stated that the work was to be completed by outside forces that were properly equipped to handle the placement

and the rolling of the asphalt. According to the Carrier, the Organization has failed to provide evidence, beyond a mere assertion, to support its claims, resulting in the failure of its claim.

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 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 Carrier defends by arguing that hot asphalt application is not scope covered and has never been historically and customarily performed by Organization-represented employees. The Carrier continues that, even if it has been MOW work, that there was sufficient notice to perform the work.

The record contains correspondence from the Carrier dated December 17, 2013, informing the Organization that the Carrier would “continue the ongoing program of placing asphalt at grade crossings to restore the running surface the roadway approaching the track.” The notice mentions a tentative schedule and invites discussion.

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The record establishes that the Organization was given proper notice in accordance with Rule 99.

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 26th day of June 2018.