

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43634
Docket No. MW-42753
19-3-NRAB-00003-140443**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (Ram Trucking) to perform Maintenance of Way and Structures Department work (right of way cleanup loading and hauling away of dirt) at the North Yard in Fort Collins, Colorado on the Front Range Subdivision, Powder River Division beginning on April 23, 2013 through May 24, 2013 (System File C-13-C100-299/10-13-0459 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with 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, Claimants D. Ficke, S. Conradt, B. Ruzicka, J. Willey, C. Wischhusen, M. Portenier, V. Havorka, D. Fierstein and T. Tracy shall now each be compensated for one hundred ninety-two (192) hours at their respective straight time rates of pay and ninety-six (96) hours at their respective overtime 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.

The Claimants have established and hold seniority in various classifications in the Carrier's Maintenance of Way Department. This claim concerns the use of outside forces to haul away a dirt mound at the North Yard in Fort Collins, Colorado. From April 23 to May 24, 2013, the Carrier used outside forces, Ram Trucking, to perform this work.

The Organization contends that the disputed work is reserved to the Carrier's Maintenance of Way forces under Rules 1, 2, 5, 55 and the Note to Rule 55 and should have been assigned to them, rather than to outside contractors. The Organization contends that there should be no dispute that the work has been customarily performed by BMW-represented employees for decades. The Organization contends that the work performed required neither special skills nor special equipment. The Organization further contends that the Carrier failed to notify the General Chairman in advance of its plans to assign outside forces to perform this work. The Organization contends that the Claimants are entitled to the claimed remedy.

The Carrier contends that the disputed work of hauling of contaminated dirt from the Carrier's property was properly done by an outside contractor, because the Carrier's forces do not possess the specialized skills to perform the work. The Carrier contends that it provided notice in accord with the Note to Rule 55.

On June 5, 2012, the Carrier provided notice to the Organization:

As information, BNSF plans to contract all work and heavy equipment with operators necessary for the pavement and drainage improvements located at Fort Collins between MP 73.00 and MP 75.00 on the Front Range Sub-Division. BNSF is not adequately equipped to perform all aspects of this project. Moreover, BNSF forces do not possess the necessary specialized dirt work, hotmix asphalt or reinforced concrete paving skills for all aspects of this project. The work to be performed by the contractor includes but is not limited to the following, site survey/design/erosion control measures; excavate/remove approx. 11,833 s.y. existing pavement and inserted track; furnish/grade/compact approx. 9,530 c.y. sub-ballast material to proper runoff; install necessary geo-grid material; install approx. 3,759 l.f perforated drain pipe (including tie-ins to city SWS); install approx. 12 l.f—15” RCP; furnish/haul/unload approx. 448 c.y. drainage aggregate; install approx. 3,342 s.y. geotextile filter fabric; install/pave approx. 3,889 l.f curb with gutters; hot-mix asphalt pave approx. 1,872 s.y. new pavement; remove/repave existing hot-mix asphalt approaches; and debris removal.

Afterward, the parties participated in a contracting conference, but were unable to reach agreement.

The Organization filed this claim on June 6, 2013, claiming a lost work opportunity due to a violation of the Agreement. The claim described the complained of work:

The facts surrounding this case are that the Carrier contracted with Ram Trucking to haul away contaminated dirt from Mason Street project (that took place in July of 2012) that was piled up in our own North Yard in Ft. Collins CO. on the Front Range Sub-division, Powder River Division. This violation took place from April 23, 2013 thru May 24, 2013 on week days only.

In support of its assertion that the work was performed as described, the Organization wrote,

“This was just old dirt taken from our own work project that sat for almost a year, and could have been done by our own forces, but the

Carrier had the contractor do it. There was no time restraint or special equipment required, and could have easily been done by our own forces cheaper and faster. I also have statements and pictures.”

The Carrier declined the claim in a letter dated July 29, 2013. The Organization appealed on September 6, 2013, and the Carrier denied the appeal stating, among other defenses, that the Organization had failed to demonstrate that the contractor had not used specialized equipment or that the Carrier’s forces possessed the necessary skills to utilize the specialized tools.

At a claims conference held on March 6, 2014, the Organization clarified that when it referred to the soil as “contaminated,” it meant, “the dirt had creosote, road salts, mud, along with pieces of wood ties and anything else that was in the road bed for the last 30 plus years” and “did not mean that the soil was hazardous.”

As the moving party, the Organization bears the burden of proving all elements of its claim. The record clearly demonstrates that the work claimed (haul away contaminated dirt) was performed by Ram Trucking in the North Yard in Fort Collins, Colorado. Although the Carrier initially challenged the sufficiency of the Organization’s proofs on this point, it does not deny the work was done as charged.

The next question is whether the work is “customarily performed” by the Organization’s members. The Note to Rule 55 provides that if the work is customarily performed by bargaining unit members, the Carrier may only contract out the work under certain specified circumstances: (1) the work requires “special skills, equipment, or material” (2) the work is such that the Carrier is “not adequately equipped to handle (it)” or (3) in cases of emergencies that “present undertakings not contemplated by the Agreement and beyond the capacity of the Company’s forces.”

The Organization need not show that the work of hauling dirt was done exclusively by its members, but that it has historically and traditionally performed this work. This record leaves no doubt that hauling of dirt is routinely done by the Carrier’s BMW-represented forces. As such, the Carrier must show that it met one of the exceptions in the Note to Rule 55 that permitted it to contract out this work customarily performed by the Organization’s members.

The Carrier contends and stated in its notice that it was not adequately equipped to perform all aspects of the project and that BNSF forces do not possess the necessary

specialized dirt work skills for the project. The Carrier contended in its submission that the Carrier's forces were not trained or experienced in the removal of environmental contaminants, such as that here, but did not specifically refer to environmentally-contaminated soil in its contracting notice. The Organization contends that it may not now claim, without proof, that the soil was environmentally hazardous. *See*, Third Division Award 41166.

However, unlike in the cited award, this record contains sufficient evidence that the Carrier's position was that its forces were not adequately equipped, trained, or experienced to do this particular removal of dirt because of the condition of the soil. In its initial claim, the Organization referred to this soil as "contaminated." It was a point in contention on-property, because the Local Chairman later clarified that by "contaminated dirt," he meant the "dirt had creosote, road salts, mud, along with pieces of wood ties and anything else that was in the road bed for the last 30 plus years" and that he "did not mean that the soil was hazardous." Given the plethora of decisions that have found that the Carrier may contract out removal of environmentally hazardous materials, the Carrier has demonstrated that it fell into one of the narrow exceptions to Rule 55.

Therefore, the Carrier was required to provide advance notice to the Organization of its intent to have this work performed by outside forces and which permitted a meaningful conference regarding the work. A proper notice contains enough specificity to allow the parties to have a meaningful dialogue regarding the intent to contract out. Third Division Award 42542. This Board finds that the Carrier's notice was sufficient to put the Organization on notice that it was contracting out this work because its forces were not equipped to remove it due to its environmental nature. Therefore, the claim is denied.

AWARD

Claim denied.

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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 17th day of May 2019.