

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43635
Docket No. MW-42755
19-3-NRAB-00003-140460**

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

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

PARTIES TO DISPUTE: (
(BNSF 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 (Buel/Pavers) to perform Maintenance of Way and Structures work (deliver rock) at Mile Post 16.9 at Milford, Nebraska on the Ravenna Subdivision on May 17 and 20, 2013 (System File C-13-C100-285/10-13-0469 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with 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 M. Muirhead and T. Meyer shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and eight (8) 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.

This claim concerns the Carrier's assignment of outside contractors (Buel/Pavers) to deliver rock at Milford, Nebraska on the Ravenna Subdivision on May 17 and 20, 2013. The Claimants established and hold seniority in the Carrier's Maintenance of Way Department.

The Organization contends that the work performed is historically and customarily work performed by the Carrier's Maintenance of Way forces and is reserved to them by Rules 1, 2, 5, 55, and the Note to Rule 55. The Organization contends that the Carrier failed to notify the General Chairman of its decision to assign outside forces to perform this work. The Organization contends that the Carrier may only assign its work to outside contractors under certain specified conditions and after notice to and conferencing with the Organization. The Organization contends that no advance notice was provided, and no contracting conference was held.

The Organization contends that the Carrier failed to prove its affirmative defense that advance notice was not required because the rock was purchased from a supplier and delivered FOB (freight on board) Destination, so the Carrier did not take possession until delivery was completed. The Organization contends that the Carrier's other defenses must also be rejected, because the Carrier failed to provide any advance notice that alleged that the Carrier lacked special equipment or that its forces were not qualified to perform the work. The Organization contends that the Carrier's claim of scheduling difficulties is a red herring and of the Claimants' unavailability is wrong. Finally, the Organization contends that the Claimants are entitled to the requested remedy.

The Carrier contends that the Organization has failed to meet its burden of proof. The Carrier further contends that the Organization has failed to prove that the disputed work was reserved to its members, because it has not shown that the work is exclusively performed system-wide by BMW-represented forces. The Carrier contends that none of the Claimants is entitled to any monetary remedy.

The Organization filed this claim on June 8, 2013, asserting that work which was customarily performed by Maintenance of Way employees was done by outside contractors and that no notice was given to the Organization. On August 5, 2013, the Carrier declined the claim, stating, in part,

“BNSF finds that the rock was newly purchased from a supplier and delivered “FOB” (Free On Board) Destination Freight collect. BNSF did not take ownership or pay for the rock until after it was delivered.”

The Organization appealed, pointing out that there was no dispute that the work had occurred, or that no notice was given to the Organization before the work was contracted. With respect to the Carrier’s claim that the rock was delivered FOB, they wrote,

“Ms. Tripp provides absolutely no evidence to support her statement. I am requesting that the Carrier provide me with invoices showing the work performed and hours charged by the contractor for this work, as well as, a copy of the purchase agreement and any documentation between the contractor and BNSF Railway proving that the claimed rock was newly purchased and delivered “FOB” (Free On Board) Destination Freight collect, as Ms. Tripp claims in her declination.”

In the Carrier’s answer, it was asserted that advance notice was provided, but this Board cannot find any contracting notice in the record with respect to this work. Further, at the claims conference, the Organization reiterated its request to see the contractor invoices which had not yet been provided. None appear in the record before this Board. As the parties were unable to resolve this claim on-property, it is now properly before this Board for final adjudication.

First, there appears to be no dispute that the work occurred as the Organization has alleged. Under the Note to Rule 55, the Organization must demonstrate that this work is “customarily performed” by bargaining unit employees. Previous on-property awards have found that hauling and transporting material to job sites is bargaining unit work. Third Division Award 40495. This is the kind of work that Maintenance of Way forces routinely perform on a daily basis, and as such, the work falls within the “customarily performed” coverage of the Note to Rule 55. Third Division Award 40565. In Third Division Award 43261, an on-property award, this Board found that the Carrier was required to provide advance notice when outside contractors Buels/Pavers were assigned “to perform the work of delivering ballast for bridge track panels.”

If the work is “customarily performed” by the Carrier’s forces, the Carrier must give advance notice to the Organization of the intended contracting out and show that it meets one of the exceptions in the Note to Rule 55. Here, the Carrier asserted that such notice was given and alternatively, that no notice was needed because the rock was delivered FOB. However, this record contains neither a contracting notice nor documentation of the FOB contract. Therefore, the Carrier has not met its burden to show that proper notice was given or that one of the exceptions applied.

The Carrier’s violation requires that the Claimants be awarded damages for the time claimed for the lost work opportunities.

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 17th day of May 2019.