

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43638
Docket No. MW-42768
19-3-NRAB-00003-140463**

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 (LG Pike Construction Company) to perform Maintenance of Way and Structures work (install retarder panels and switches) in the Hobson Yard at Lincoln, Nebraska on May 13, 14, 15, 16 and 17, 2013 (System File C-13-C100-286/10-13-0470 BNR).**
- (2) The Agreement was violated when the Carrier assigned outside forces (LG Pike Construction Company) to perform Maintenance of Way and Structures work (install retarder panels and switches) in the Hobson Yard at Lincoln, Nebraska on May 20, 21, 22, 23 and 24, 2013 (System File C-13-C100-287/10-13-0471).**
- (3) The Agreement was violated when the Carrier assigned outside forces (LG Pike Construction Company) to perform Maintenance of Way and Structures work (install retarder panels and switches) in the Hobson Yard at Lincoln, Nebraska on May 28, 29 and 30, 2013 (System File C-13-C100-288/10-13-0472).**
- (4) The Agreement was violated when the Carrier assigned outside forces (LG Pike Construction Company) to perform Maintenance of Way and Structures work (install retarder panels and switches)**

in the Hobson Yard at Lincoln, Nebraska on June 3, 4, 5, 6 and 7, 2013 (System File C-13-C100-293/10-13-0475).

- (5) The Agreement was violated when the Carrier assigned outside forces (Reilly Construction) to perform Maintenance of Way and Structures work (install retarder panels) in the Hobson Yard at Lincoln, Nebraska on May 28, 29 and 30, 2013 (System File C-13-C100-291/10-13-0466).**
- (6) The Agreement was violated when the Carrier assigned outside forces (Reilly Construction) to perform Maintenance of Way and Structures work (install retarder panels) in the Hobson Yard at Lincoln, Nebraska on May 20, 21, 22, 23 and 24, 2013 (System File C-13-C100-290/10-13-0467).**
- (7) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notice of its intent to contract out the work referred to in Parts (1), (2), (3), (4), (5) and/or (6) above 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.**
- (8) As a consequence of the violations referred to in Parts (1) and/or (7) above, Claimants R. Brennan, R. Hetherington, S. Hrenchir, L. Miller, D. Francke, B. Longsine, D. Biggs, K. Kildow, M. Lane, M. Sailors, J. Gotchall, R. Bruha and J. Butcher shall each now ‘... be paid forty (40) straight time hours and thirty (30) hours overtime at the appropriate rate of pay as settlement of this claim.’**
- (9) As a consequence of the violations referred to in Parts (2) and/or (7) above, Claimants R. Brennan, R. Hetherington, R. Musil, J. Francke, S. Hrenchir, L. Miller, D. Francke, B. Longsine, D. Biggs, K. Kildow, M. Lane, M. Sailors, J. Gotchall, R. Bruha and J. Butcher shall each now be allowed ‘... forty (40) straight time hours and thirty (30) hours overtime at the appropriate rate of pay as settlement of this claim.’**

- (10) As a consequence of the violations referred to in Parts (3) and/or (7) above, Claimants D. Boyle, R. Hetherington, R. Musil, J. Francke, S. Hrenchir, L. Miller, D. Francke, B. Longsine, D. Biggs, K. Kildow, M. Lane, M. Sailors, J. Gotchall, R. Bruha and J. Butcher shall each now be allowed ‘... twenty four (24) straight time hours and twenty four (24) hours overtime at the appropriate rate of pay as settlement of this claim.’
- (11) As a consequence of the violations referred to in Parts (4) and/or (7) above, Claimants R. Brennan, R. Hetherington, R. Musil, J. Francke, L. Miller, D. Biggs, W. Schenk, M. Lane, M. Sailors, B. Wheeler, J. Covarrubias and J. Butcher shall each now be ‘... paid forty (40) straight time hours and twenty four (24) hours overtime at the appropriate rate of pay as settlement of this claim.’
- (12) As a consequence of the violations referred to in Parts (5) and/or (7) above, Claimants J. Covarrubias, F. Aldana, H. Pelayo, L. Brugman, T. Daniel, E. Delano, F. Fankhauser and G. Colombe shall each now be allowed ‘... twenty four (24) straight time hours and twenty four (24) hours overtime at the appropriate rate of pay as settlement of this claim.’
- (13) As a consequence of the violations referred to in Parts (6) and/or (7) above, Claimants J. Covarrubias, F. Aldana, H. Pelayo, L. Brugman, T. Daniel, E. Delano, F. Fankhauser and G. Colombe shall each now be allowed ‘... forty (40) straight time hours and thirty (30) hours overtime at the appropriate rate 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.

This claim concerns the Carrier's assignment of LG Pike Construction Company and Reilly construction to install retarder panels and switches at the Hobson Yards in Lincoln, Nebraska in May and June 2013. All of the Claimants held seniority in various classifications within the Maintenance of Way Departments. The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Organization contends that the track maintenance and repair work here (installation of retarder panels and switches) is fundamental Maintenance of Way work that has customarily been performed by Maintenance of Way forces. It further contends that this work has been reserved to the Carrier's forces and should have been assigned to the Claimants, rather than outside forces, pursuant to Rules 1, 2, 5 and the Note to Rule 55. It contends that the work has been unambiguously reserved to and performed by Maintenance of Way forces.

The Organization further contends that the Note to Rule 55 and Appendix Y demand that the Carrier give notice of anticipated contracting out so that the parties may make a good-faith attempt to reach an understanding regarding the contracting. The Organization contends that the Carrier failed to provide proper advance notice of its intent to contract out the work. The Organization contends that the notice fails to mention the specific dates and locations of the work to be performed; fails to even mention retarder panels; and fails to provide a detailed description of the work to be performed. The Organization objects to the Carrier's "amendment" of its prior notices, contending that the Carrier must issue a separate notice for each contracting transaction. It contends that the Carrier's notice is tantamount to "no notice."

The Organization contends that the Carrier has failed to point to any specialized equipment or special skills that were utilized by the outside forces. The Organization contends that the Carrier's forces are well-skilled in the operation of the machines used to accomplish track work exactly like that objected to here. The Organization contends that this led to the Carrier's failure to conference in good faith regarding the use of outside forces. Finally, it argues that none of the defenses raised by the Carrier has merit, and therefore, should not be considered.

The Carrier contends that this matter has already been resolved by the Board, when it was determined that Carrier forces do not perform new construction projects of the magnitude and type as that found in the Hobson Yard capacity expansion project. The Carrier contends that this Board previously found that the Lincoln Yard Improvement Project, scheduled to proceed in six phases over several years is a large-scale project that could not be completed using its existing workforce. The Carrier contends that it has used outside forces to supplement, not supplant, its own forces. The Carrier contends that it has no obligation to piecemeal out small portions of more complex projects.

The Carrier contends that the Organization has failed to demonstrate that the work at issue is work that was reserved to its members. The Carrier contends that the Organization must show that it has performed the disputed work "system wide, to the exclusion of others." The Carrier further contends that the Organization cannot show that the disputed work is customarily performed by Maintenance of Way forces. Further, the Carrier contends that even if this type of work is customarily performed by the Carrier's forces, in this case, it was not adequately equipped to handle all aspects of the project and that its forces do not possess the required special skills. The Carrier contends that its advance notice of its intent to contract the work was sufficient under the Agreement and past Awards. Further, the Carrier contends that the Organization has failed to present sufficient proof that the work occurred and asks that the evidence presented here be disregarded. Finally, the Carrier contends that the Claimants are not entitled to any monetary remedy.

On October 20, 2011 and October 23, 2012, the Carrier provided notice to the Organization of its intent to subcontract certain work in conjunction with the Hobson Yard project. On January 15, 2013, it amended its notice:

“As information, BNSF advised by letter dated October 20, 2011 and October 23, 2012 of its plans to contract for the necessary heavy equipment, such as excavators (track-hoes), F/E loaders, graders, compactors, dumps, and hot-mix asphalt paving equipment with operators to assist BNSF forces with the yard improvements at Hobson Yard located in Lincoln, NE. This is a multi-year, multi-phase project requiring installation of new track, crossovers, crossings and pavement. BNSF is not adequately equipped with the necessary equipment to perform all aspects of this project. Moreover, BNSF forces do not possess the necessary specialized dirt work or hot-mix paving skills for this project. Those earlier letters are hereby amended to include the following work, with the addition of 150-ton off-track crane, and for the same reasons stated on October 20, 2011 and October 23, 2012: install erosion-control measures; excavate/grade/compact prep for foundations; install new yard storm drain inlets (including drain pipe and protection); grade/build-up/compact new sub-grade material (to existing hump embankment); pave hot-mix asphalt roadway and adjacent sidewalk; load/haul/set pre-cast foundations; load/haul/set new modular buildings; and debris removal.

It is anticipated that this work will begin immediately following and concurrent to existing work to take advantage of the existing yard windows in the multi-phase, multi-year improvements addressed in both the October 20, 2011, and October 23, 2012 letters.”

The Organization bears the burden of establishing a violation of the Agreement. First, the Organization must show that the work in dispute was performed by outside contractors. The record contains sufficient evidence of work performed by outside contractors (LG Pike Construction Company and Reilly Construction) on May 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 28, 29 and 30, 2013. However, there is no evidence in the record of work performed by any outside contractor on June 3, 4, 5, 6 or 7, 2013.

Next, the Organization must show that the work in dispute is customarily performed by BMWF-represented forces. As this Board has found in the past, this holding conforms with the line of precedent that holds that the Organization must show

that the work is customarily, but not exclusively, performed by Carrier forces. Third Division Awards 40563, 43393.

In Third Division Award 43393, this Board found that this work, the installation of retarders, must be considered track work. The Board reviewed the same notices under consideration here, issued October 20, 2011 and amended October 23, 2012, and January 15, 2013, with respect to the installation of retarders at Hobson Yard, and found that the notice “cannot be read to have alerted the Organization to an intent to contract out this work such that retarders needed to be discussed in the conference that was held.” As pointed out, nowhere in the notices does the Carrier identify installation of retarders as work to be done by outside forces. The Board found, “The detail lacking in the notice and the amendments that followed was insufficient, depriving the parties of the opportunity to make a good faith effort to find ways to retain the scope work for the Maintenance of Way forces. The insufficient notice and amendments violated the Note to Rule 55 and Appendix Y and require an Award in the Organization’s favor. See on-property Third Division Awards 41166, 40798, 40677, 40565 and 40495.”

The disputed work there (installation of retarders and switches at Hobson Yard) was the same as the disputed work at issue here. The notices considered there are the same notices as presented here. Therefore, we consider the reasoning of Third Division Award 43393 to be controlling precedent, as the identity of parties, facts and Rules are the same. The holding of that Award must be followed here.

For the same reasons as stated in Third Division Award 43393, the Claimants are entitled to damages for the time claimed that it has demonstrated that work was done by outside contractors (May 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 28, 29 and 30, 2013.)

AWARD

Claim sustained in accordance with the Findings.

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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.