

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 43639  
Docket No. MW-42771  
19-3-NRAB-00003-140476

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 Agreement was violated when the Carrier assigned outside forces (Herzog Services) to perform Maintenance of Way and Structures work (haul, unload and spread main line ballast and construct a walkway) at various locations on the Canyon, Orin and Casper Subdivisions on May 7, 8, 10, 11 and 14, 2013 (System File C-13-C100-298/10-13-0497 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, Claimant R. Leeling shall now ‘... be paid 32 straight time hours and 16 overtime hours at his 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.

The Claimant has established and holds seniority in the Carrier's Maintenance of Way and Structures Department. This claim concerns the use of outside forces (Herzog Services) to haul, unload, and spread mainline ballast, as well as construction of a walkway at various location on the Canyon, Orin, and Casper Subdivisions on May 7, 8, 10, 11, and 14, 2013. This work was accomplished by one employee using a Multipurpose Machine ("MPM") along with hand tools.

The Organization filed a claim on June 17, 2013, objecting to the use of outside forces to perform this work. The Carrier denied the claim on August 19, 2013. The parties were unable to resolve the dispute on-property and it is now properly before this Board for final adjudication.

The Organization contends that the disputed work, hauling and unloading materials in connection with rail maintenance and repair and the installation of a walkway, 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 BMWE-represented employees for decades. The Organization contends that the work performed required neither special skills nor special equipment. The Organization contends that the Carrier failed to show that it attempted to negotiate with Herzog to have its own forces operate the 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 Organization has failed to show that the disputed work occurred as claimed, or that the disputed work was customarily performed by the BMWE-represented employees. The Carrier contends that the Organization must show

that its members have done this work, system-wide, to the exclusion of others. The Carrier asserts that, at best, the Organization has shown a mixed practice of assigning the work in question.

The Carrier contends that it gave proper advance notice of its intent to contract out the disputed work. The Carrier contends that the work was done by outside contractors, because it does not possess the equipment necessary or its forces do not possess the requisite skills to perform the work. The Carrier contends that it provided notice in accord with the Note to Rule 55 which covered the claimed work. Afterward, the parties participated in a contracting conference, but were unable to reach agreement. The Carrier contends that none of the Claimants is entitled to a monetary remedy.

**On December 17, 2012, the Carrier provided notice to the Organization:**

**“As information, the Carrier plans to continue its ongoing program using an outside contractor’s specially equipped cars and machines that pick up scrap steel, perform ditching or clearing work, place rip-rap, pick up ties and potentially transport short strings of rail at various locations across the system in 2013.**

**The equipment used to perform this work is not owned by the Carrier, nor is it available to the Carrier for operation by Carrier forces. It consists of several rail cars that are permanently attached with articulated couplers along with a machine equipped with interchangeable grapple and bucket attachments that operates over the length of the cars while picking up or removing material from inside the cars. BNSF employees will perform incidental work, such as flagging, consistent with the type of work being done with the contract operations.**

**Attached is a tentative list of divisions where this equipment is expected to work during 2013. Obviously, this list is subject to change as the work season progresses.”**

As the moving party, the Organization bears the burden of proving all elements of its claim. First, the Organization must prove that the work occurred as alleged, which is no longer contested. 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 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. The Carrier asserted in its contracting notice that the equipment to be used (the MPM) was not owned by the Carrier, nor was it available for operation by the Carrier’s forces. The Organization provided no proof to refute the Carrier’s assertion that specialized equipment was used in performing the disputed work.

Therefore, the claim is denied.

**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 17th day of May 2019.