

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43641
Docket No. MW-42775
19-3-NRAB-00003-140497**

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 (Loram Rail Company) to perform Maintenance of Way and Structures work (install greasers, pouring concrete, smoothing and leveling ground and related work) at various locations between Mile Posts 274.2 and 169.5 on the Ottumwa Subdivision of the Nebraska Division on June 3, 4, 5, 6, 7, 12, 13, 14, 15, 17, 18, 19 and 20, 2013 (System File C-13-C100-337/10-13-0588 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 the aforesaid 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 W. Wilson, P. Mulholland, K. Liles, C. Bohrman, S. Bradley and S. Bushong shall each ‘... be paid ninety six (96) hours at straight time pay and seventy seven (77) hours at time and one half 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 Loram Rail Company to install greasers, pour concrete, smooth and level ground, and related work between Mile Posts 274.2 and 169.5 on the Ottumwa Subdivision of the Nebraska Division in 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 (track lubrication and related work) 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 this type of routine, non-emergency 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 none of the defenses raised by the Carrier has merit, and therefore, should not be considered. The Organization contends that the

Carrier may not now claim that specialized equipment was utilized by the contractor, because no advance notice of this exception was given to the Organization. The Organization contends that the Carrier's "purchased materials" defense must be rejected because the disputed work (installation of greasers and related work) is unrelated to the delivery of lubricators to the Carrier's property. The Organization further contends that the Carrier has failed to provide any proof in support of this affirmative defense. Finally, the Organization contends that the Claimants are entitled to the claimed remedy.

The Carrier contends that the Organization has failed to provide any evidence to support its position that the work occurred as alleged. 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.

In the on-property handling, the Carrier contended that the "greasers were newly purchased from a supplier, delivered and installed 'FOB' (Free On Board) Destination Freight Collect. BNSF did not take ownership or pay for the greasers until after they were delivered and installed." The Carrier provided a statement from a supervisor in support of this assertion, but no contract. Finally, the Carrier contends that the Claimants are not entitled to any monetary remedy.

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 evidence proffered by the Organization that the work occurred and was performed by Loram Rail Company is unrefuted by the Carrier.

Next, the Organization must show that the work in dispute is customarily performed by BMW-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 on-property Third Division Award 41162, the Board found that the track lubrication and installation of wayside curve lubricators “is work ‘customarily performed by employees described herein’ under the Note to Rule 55.” Similarly, in Third Division Award 43346, the Board found that Maintenance of Way forces have “customarily, traditionally and historically, as opposed to exclusively, system-wide, been assigned to work related to the installation and maintenance of greasers/lubricators.”

In cases where the disputed work is covered by the Note to Rule 55, the Carrier may contract out the work only under certain 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 here asserted on-property that it was not required to give notice because the initial declination asserts an “FOB” defense, that is, that it did not take ownership of the materials in question until after they were delivered and installed. The record before the Board contains no documentation to support the Carrier’s assertion that the work was done pursuant to an FOB arrangement.

Further, no notice was given to the Organization before the disputed work occurred. The Carrier has not explained its failure to give notice, other than on-property assertions of an FOB arrangement which was not proven. Accordingly, the Claimants are entitled to a monetary remedy 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.