

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43646  
Docket No. MW-42829  
19-3-NRAB-00003-150021**

**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 (R. J. Corman) to perform Maintenance of Way and Structures Department work (clean and winterize switches and remove excess ballast from newly placed switches) at various locations on the Canyon, Casper and Orin Subdivisions on July 18, 19, 22, 23, 24, 25, 26, 29, 30, 31 and August 1, 2, 5, 6 and 22, 2013 (System File C-13-C100-354/10-13-0620 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a 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 B. Shannon and S. Wright shall now each be compensated for one hundred twenty (120) hours at their respective 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 Claimant Wright has established and holds seniority as a sectionman in the Carrier's Maintenance of Way Track Sub-department. Claimant Shannon has established and holds seniority as a truck driver within the Carrier's Track Sub-department. On July 18, 19, 22, 23, 24, 25, 26, 29, 30 and 31, 2013 and August 1, 2, 5, 6 and 22, 2013, the Carrier assigned an outside contractor, R. J. Corman, to use a vacuum truck to clean and winterize switches and remove excess ballast from newly placed switches. Two contractor employees, using ordinary equipment and a vacuum truck, removed accumulated debris from switch components and worked a total of 15 days completing 240 straight time hours.

The Organization filed a claim on August 20, 2013, objecting to the Carrier having contracted with outside forces to clean and winterize switches. The Carrier denied the claim on October 21, 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, cleaning and winterizing switches, 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 Carrier must demonstrate that contracting out is justified by one of the exceptions listed under the Note to Rule 55. The Organization contends that the notice provided by the Carrier was too vague to allow the parties to

engage in meaningful discussion to reduce the incidences of contracting out. The Organization contends that the notice provided was tantamount to no notice.

The Organization further contends that the Carrier has failed to demonstrate that it falls under one of the exceptions to the Note to Rule 55. The Organization contends that the equipment used (vacuum truck) was not special or unusual to railroad work. Furthermore, the Organization contends, the Carrier possessed vacuum trucks or it could have leased them for operation by MOW forces. The Organization contends that 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 BMW-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 concedes that it has leased this equipment in the past, but contends that at this time, there was no such equipment available for lease without operators. The Carrier contends that it provided notice in accord with the Note to Rule 55 which covered the claimed work.

The Carrier contends that the material to be removed was “hazardous” coal dust that required specialized handling, per OSHA regulations. The Carrier contends that its forces did not have the specialty training necessary to clean up this type of contamination. The Carrier contends that none of the Claimants is entitled to a monetary remedy.

On March 25, 2013, the Carrier provided notice to the Organization:

“As information, BNSF plans to contract for a vacuum truck, as it has done in the past, to perform the necessary cleaning and maintenance on switches, switch heaters, and other track equipment. BNSF does not possess the specialized vacuum trucks necessary to perform this work

including removal/ proper disposal of coal dust and coal-fouled ballast at the following locations on the Powder River Division:

**Powder River West**

**Orin Sub-Division: MP 0 to MP 127.3**

**Valley Sub-Division: MP 0 to MP 90.4**

**Canyon Sub-Division: MP 90.4 to MP 133.2**

**Black Hills Sub-Division: MP 476 to MP 599.9**

**Casper Sub-Division: MP 133.2 to MP 204.5**

**Campbell Sub-Division: MP 0.0 to MP 9.8**

**Big Horn Sub-Division: MP 599.9 to 829.3**

**Powder River North**

**Sand Hills Sub-Division: MP 128 to MP 364.1**

**Butte Sub-Division: MP 366 to MP 475.2**

**Angora Sub-Division: MP 0 to MP 115.1**

**Alliance Yards**

**It is anticipated this work will begin on approximately April 10, 2013.”**

**The Organization requested a contracting conference which was held on April 18, 2013. The parties were unable to reach agreement regarding the contracting out.**

**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 must show that it meets one of a few specified exceptions listed in the Note.**

**The use of vacuum trucks to clean tracks has been found to be routine track maintenance work, customarily and historically performed by BMWWE-represented employes. Third Division Award 41166. In Third Division Award 40551, this Board wrote,**

**“The disputed work consists of cleaning switches, a routine component of maintaining track that falls within the scope of the Maintenance of Way and Structures Department. The Organization persuasively contends that**

this work falls so squarely within the ambit of the classifications represented by BMW that the Carrier was obligated to demonstrate compliance with the standards articulated in the Note to Rule 55 and the Berge/Hopkins letter of December 11, 1981, which established applicable prerequisites for assigning such work to outside forces.”

In its submission, the Carrier asserted that the material to be removed was contaminated coal dust which requires special equipment and special training to remove. As such, the Carrier contends that the Organization cannot establish that it has exclusively performed this work. Firstly, the Carrier’s initial notice did not reference contaminated materials as the reason for the contracting out. Secondly, because this contention was raised for the first time in its submission, there is no evidence in the record to support the assertion that the material to be removed was contaminated so as to require special handling.

In addition, despite a similar assertion in Third Division Award 40765, this Board found that the work was work customarily performed by the Carrier’s forces:

“Having considered the record, the Board finds that the contractor removed coal dust from switches as well as other environmentally sensitive material or spillage on the claim dates. Cleaning or removing coal dust from switches is a routine maintenance activity on the Orin Subdivision of the Power (*sic*) River North Division where the mines are located and where the transport of coal occurs, almost exclusively, all day. This is dense, concentrated use of a dedicated line for coal transport. Carrier forces deal with coal dust and related spillage when maintaining tracks and switches because the coal dust that blows from passing coal trains settles into the track switches and must be cleaned out. Carrier forces customarily perform coal dust removal using the Carrier’s equipment.”

Because the disputed work is work that is customarily performed by the Carrier’s forces, the Carrier may only contract out the work under certain exceptional 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 ...” Even so, the Carrier must 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 Organization argues that the Carrier's notice in this case was too vague to permit a meaningful contracting conference to take place. The notice provided the where, the what, and the why of the contracting. The Organization contends that because the notice identifies 11 subdivisions covering 1100 miles of track, it fails to list with specificity where the work was expected to occur, precluding effective conferencing. See, Third Division Award 40546. However, this Board finds that while the notice could have been narrower, it specifically identified the work and where and when it was to occur. The notice was sufficient to engage in a meaningful conference.

The reason given in the Carrier's notice for the contracting out of the Maintenance of Way work was "BNSF does not possess the specialized vacuum trucks necessary to perform this work including removal/ proper disposal of coal dust and coal-fouled ballast." The Organization contends that it was incumbent on the Carrier to show that it did not have the vacuum trucks and that such trucks were not available for lease or rent. In Third Division Award 40765, this Board recognized that when vacuum trucks were available, the Carrier's forces are able to operate them:

"The record evidences that in September 2001 the Carrier's forces used a vacuum truck to handle this situation. Specifically the parties engaged in good faith discussions involving use of a vacuum truck and reached an understanding that it would be leased for operation by Carrier forces. The truck was driven to the work site by the contractor's employee and the Carrier's forces used the equipment with assistance, as needed, from the contractor's employee. This is evidence that Carrier forces can operate this equipment when it is made available to them."

The Organization cites the Berge-Hopkins letter as evidence that the Carrier must lease or rent equipment when available to avoid contracting out:

"The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

The Organization presented numerous examples of companies that would lease vacuum trucks to the Carrier and indicated that it had previously presented this information to the Carrier. The Carrier responded that at the time of the contracting out, there was no equipment available for lease without operators. The Organization offered no evidence to refute the assertion. The Organization's proofs fall short of demonstrating the actual availability of vacuum trucks near the site of the work being done or the feasibility of leasing them without operators at the time this work occurred. Accordingly, the claim must be 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.