

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43709
Docket No. MW-42606
19-3-NRAB-00003-140291**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Industrial Lubricant Company) to perform Maintenance of Way and Structures work (repair, maintain and fill track side rail lubricators) at various locations between Summit and Columbia Falls on the Hi Line Subdivision of the Montana Division beginning on June 4, 2012 and continuing (System File B-M-2573-M/11-12-0334 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 B. Petersen, R. Mattheisen, III, S. Byrd, K. Reed and D. DeForge shall ‘... each receive a proportionate share, of the hours worked by, or, money paid to the contractors beginning June 4, 2012, and continuing until the violation stops.’.”**

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.

Train tracks are constantly subject to stresses—trains travel over them, they are exposed to the elements, and so on. Steel to steel contact between rail and wheel creates friction and wear. To combat that friction, lubrication in the form of grease stored in wayside greaser tanks located along the track right of way is applied to the rail at various locations throughout the system. As trains roll over the site, grease is ejected onto the rail and the wheels distribute the material on the rail. Track lubrication and related tasks are work that Maintenance of Way forces have historically performed.

The Organization alleges that the Carrier violated the parties' Agreement when, beginning June 4, 2012 (and continuing), it assigned an outside contractor, Industrial Lubricant Company, to repair, maintain and fill track side rail lubricators at various locations between Summit and Columbia Falls on the Hi Line Subdivision of the Montana Division. The claim was filed August 1, 2012. The Carrier initially declined the claim in part on the basis that there was no evidence to support the Organization's allegations. In its appeal, dated On November 19, 2012, the Organization submitted an e-mail from Track Inspector Scott Smith that stated:

"In response to you [sic] question about the Industrial Lubricant technician working on the Hiline Sub:

I have taken Tom Miller, the technician for Industrial Lubricant, out several times to work on both gage face greasers and top of rail greasers. I have worked with him installing carpet on several gage face greasers.

I have also signed his work orders each time. He has been to Essex and worked extensively on our tanks that fill the wayside greasers. Industrial Lube has worked on the Hiline for quite some time, and Tom Miller is now the “local” representative that works on all of the lubricators on both the Hiline and the Kootenai. He recently went to Texas to pick up a hyrail truck that will be used for filling wayside greasers.”

The Carrier again denied the claim, this time for two reasons: first, the Smith e-mail, dated some six months after the claim was filed, failed to identify any particular dates or locations identified in the claim and second, the e-mail indicated that the contractor had performed the work for “quite some time” and it was not Scope-covered work.

The Organization contends that the work of maintaining rail and trackage throughout the Carrier’s system has always been the responsibility of the Maintenance of Way forces, primarily the Track Sub-department. The work of repairing, maintaining and filling rail lubricators has his historically, customarily and traditionally been assigned to and performed by the Carrier’s MoW forces. As such, it is covered by the Note to Rule 55, which requires the Carrier to provide advance written notice of any intent to contract out unit work and also restricts the Carrier’s ability to do so to limited circumstances. In this case, the Carrier failed to provide the Organization with advance notice of its intent to contract the work at issue, nor did it establish any justification for assigning the work to a contractor that comported with the restrictions in the Note to Rule 55. The Organization has established a *prima facie* case that work reserved to MoW forces has been contracted out without notice. The Carrier’s defense of a mixed practice is without merit and should be rejected.

According to the Carrier, the Organization has failed to meet its burden of proof. Throughout the claims process the Organization was challenged on its failure to provide any probative evidence to substantiate that the actual work claimed to have been done by the contractor occurred as claimed. Moreover, the Organization has failed to prove that the work was reserved to its members or that they customarily, historically and traditionally performed the work to the exclusion of others. The evidence establishes that there is a mixed practice regarding who performs the work, and mixed practices are not subject to the Note to Rule 55.

In a series of recent awards on the subject of subcontracting track lubrication work, the Board has held that installation and maintenance of greasers is work customarily, historically and traditionally performed by MoW forces and that it is therefore subject to the Note to Rule 55. (*See*, Awards 43347, 43392, and 43395.) Once that has been established, the Organization is required to establish a *prima facie* case that the work in dispute occurred as alleged.

There is no evidence in the record here that establishes what dates the alleged work occurred or how many hours were involved. Unlike the facts in Awards 43347, 43392 and 43395, there are no statements from employees who observed the contractor performing any track lubrication work. Award 43347 also references a December 10, 2012, letter from General Chairman Bruce Glover that stated:

“Our initial claim was generated when the Carrier assigned the outside contractor, Industrial Lubricants, to go, independently, instead of assisting the employees, and perform the required service on the track side track lubricators in lieu of, and without, the employees. Prior to the claim period, as plainly stated by Track Inspector Smith’s statement, outside contractor, Industrial Lubricants, serviced as a “technician” and exclusively only rode along with the BNSF employees and assisted us with technical advice and provided assistance as a “local representative” help us trouble shoot and repair the rail lubricators.”

The significance of Chairman Glover’s statement is that it acknowledges that for a period of time, Tom Miller acted solely as a “technician” in support of the Carrier’s employees, but that that role allegedly changed at some point, although the statement does not indicate when that happened. The dates at issue in Award 43347 were December 5 and 6, 2012, six months after the dates of the alleged violations in this case.

The only evidence in the record relating to the performance of this unit work by an outside contractor is the November 5, 2012, e-mail from Track Inspector Scott Smith. The e-mail substantiates that lubrication work had been, and was still, being done by Tom Miller. Smith’s message suggests that at some point Miller was acting as a technician assisting Carrier forces. From Chairman Glover’s statement cited in Award 43347, the Organization started filing claims when Miller stopped accompanying Carrier forces and started doing lubrication work on his own. What is not clear from Smith’s e-mail or Glover’s statement is when that transition occurred, much less that it

had occurred by early June 2012. The evidence in the record may be sufficient, barely, to establish that Miller was working on his own by December 2012 and perhaps by November 2012. But the evidence in the record is insufficient to establish that Miller (or any other employee from Industrial Lubricants) was performing bargaining unit work alone, rather than continuing to act as a technician, as of June 4, 2012, or on any specific dates thereafter. Without adequate proof that any violations occurred as alleged, the Board cannot find that the Organization has met its burden of proof, and 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 18th day of June 2019.