

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44262
Docket No. MW-43485
20-3-NRAB-00003-200412**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Hurk Underground Technologies) to perform Maintenance of Way and Structures Department work (culvert replacement and related work) at Mile Post 258.16 on the Chicago Division beginning on October 7, 2014 through October 17, 2014 (System File C-15-C100-16/10-15-0052 BNR).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing as far in advance as possible and in any event not less than fifteen (15) days prior thereto regarding the aforesaid work or to make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by the Note to Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. White, K. Kenning, S. McMillen, K. Enzeroth and K. Griffel shall now be compensated ‘... 70 hours straight time and 51 hours overtime each. ***’”**

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.

In its submission, the Carrier explains that "On October 3, 2014, the culvert at Mile Post 258.10 was found to be leaking so much that it was not safe for trains to pass over that location. So, BNSF swiftly responded in order to correct this issue as quickly as possible." The culvert work, witnessed each day by Assistant Foreman Keith Kenning, was contracted out as noted above, resulting in a timely filed claim by the Organization. The claim was progressed on the property without resolution and referred to the National Railroad Adjustment Board for final adjudication.

The Organization asserts that the claim should be sustained as it has shown that culvert replacement and related work is reserved to Maintenance of Way forces and has customarily and historically been performed by these forces, as tacitly admitted by the Carrier during the on-property processing of the claim. The existence of one of the exceptions listed in the Note to Rule 55 and Appendix Y does not remove the requirement to give notice of intent to contract work and to honor the Organization's request to meet and discuss in good faith the possible contract. The Carrier has not made the required good-faith effort to reduce subcontracting and increase the use of Maintenance of Way forces. The Carrier has not provided affirmative defenses to the contracted work. The Organization's evidence that the work was done has not been denied. The Carrier has not provided proof of the assertion that an emergency existed, nor has the Carrier shown that its forces were unavailable and incapable of doing the work. Appendix Y is part of the Agreement and thus applicable on the property. The reliance on an exclusivity test is misplaced as shown by the plethora of on- and off-property Awards that identify the appropriate test as a showing that the disputed work was customarily and historically performed. This is not a factual dispute warranting dismissal of the

claim. The requested remedy would make the Claimants whole for lost work opportunities and would protect the integrity of the Agreement. Numerous Awards provide for such a remedy in the face of full employment and approved absences.

The Carrier insists that the claim be denied as the contracting out without prior notice was proper because an emergency existed. The Carrier “has substantial latitude in dealing with emergencies.” The emergency time condition set forth in the Note to Rule 55 applied. The Organization, with the burden of proof as the moving party, has not carried the burden “due to the lack of any evidence to substantiate that the actual work claimed by the contractor even occurred as claimed.” Nor has the Organization shown that the disputed work, not reserved by virtue of the Scope Rule, was reserved to its members by a past practice of exclusive, system-wide performance of the disputed work. If a mixed practice is assumed, the Carrier has the right to contract out. Appendix Y, which does not restrict the right to contract out, is not applicable on BNSF property. Because the Claimants were fully employed during times relevant and provided no proof of out-of-pocket expenses, an award of damages would be punitive, which Boards cannot provide. Also, damages at overtime rates are not to be paid for work not performed.

This case departs from the usual contracting out analysis for reasons noted below. Assuming, *arguendo*, that culvert replacement and related work has customarily and historically been performed by Maintenance of Way forces and, as is the case herein, outside forces performed the disputed work, normally the *prima facie* case would require that the Carrier substantiate the issuance of a proper notice of intent to contract out. The Note to Rule 55 lists several exceptions that, when proven, allow what might normally be Maintenance of Way work to be contracted out. The exception relevant to the instant claim is “when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the company’s forces.” The Note to Rule 55 further states that that notice must be issued at least fifteen (15) days prior to the use of outside forces “except in emergency time requirements cases.” The exception pertaining to emergency situations is repeated verbatim in Appendix Y.

On-property Third Division Award 40517 posits that “The Carrier must be afforded reasonable latitude to determine the equipment and personnel to be used to perform a particular job in the most effective manner.” In on-property Third Division Award 43966 the Board observed that the “Carrier is not prohibited from using contract forces to deal with an imminent danger to property or personnel, even if that danger is not newly discovered.”

The photographs that are included in the record in this case convince this Board that an emergency existed. The emergency allowed the Carrier to contract the work without notice to eliminate the possible danger to property and personnel.

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 23rd day of October 2020.