

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44273
Docket No. MW-43518
20-3-NRAB-00003-200423**

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 (Hamilton Construction) to perform Maintenance of Way and Structures Department work (bridge stiffening) on the Columbia River Draw on the Fallbridge Subdivision beginning on September 8, 2014 and continuing (System File S-P-1945-G/11-15-0144 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notification 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 A. Wells, S. Keller, D. Dewey and G. Sutter shall now each ‘...be allowed 40 hours of straight time and 10 hours of overtime per week and all benefits that the Claimant did not receive because of these violations 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.

This is a case where no notice of intent to contract was issued and where the performance of the disputed work is a matter of record. The Organization filed a timely claim that was progressed on the property without resolution and advanced to the National Railroad Adjustment Board for final adjudication.¹

The Organization insists that the Note to Rule 55 and Appendix Y were violated by the Carrier's failure to inform the General Chairman of the impending contract, thus showing a lack of good faith. The work of bridge stiffening is part of steel bridge maintenance, historically and customarily performed by Carrier Bridge and Building (B&B) Sub-Department forces. Rule 55 Classification of Work, includes classifications and descriptions for a First Class Carpenter, Steel Bridge and Building Mechanic, Welder and Grinder. A document titled Typical Bridge Construction Gang states that such gangs performed programmed work, with one example being "bridge strengthening projects." Job responsibilities are described for B&B Construction Foreman, B&B Truck Driver, B&B Carpenters/Laborers/Helpers and Equipment Operators.

The Organization further contends that the bridge involved in the instant dispute was located on SP&S Railroad trackage before that railroad merged with the now BNSF. Rule 40 of the Agreement with SP&S Railroad posits in relevant part that:

¹ The Board has considered the parties' dispute over the timeliness of the claim and finds no violation of Rule 42.

“All work on Operating property as classified in this Agreement shall be performed by employees covered by this Agreement, unless by mutual agreement between the General Chairman and designated Representative of Management, it is agreed that certain jobs may be contracted to outside parties account inability (sic) of the railroad due to lack of equipment, qualified forces of (sic) other reasons to perform such work with its own forces.”

The disputed work involved neither special skills nor special equipment in the Organization’s view.

The Carrier asserts that the claim should be denied. It has the right to determine the equipment to be used as well as the right to contract work. In particular, the Carrier relies on an e-mail response from Structures Supervisor J. C. Gilmore to questions posed by Supervisor Engineering Support D. Harness. Two questions of particular relevance are: “What equipment was specialized that BNSF forces could not operate? Special skills involved?” Supervisor Gilmore responded: “This repair had never been completed on a bnsf bridge.” Due to this, the project required the material to be manufactured and installed by the fabricator. The material had to be field modified by the fabricator for proper installation.” Therefore, the Carrier contends that no notice is required because the specific type of work performed on the Columbia River Drawbridge is work that has never before been performed on a BNSF Bridge.”

The Board’s decision in on-property PLB 4768, Award No. 10 involved a dispute over a contract with outside forces to perform masonry work on various bridges. The Award includes the following verbiage:

“In this instance, it is the Carrier’s position that the particular bridge work herein required epoxy structural repair, a technique which has not been employed by Carrier employees as part of their customary duty and which, more significantly, has been performed by the Osmose Company on the Carrier’s property since 1976. While the Organization offered evidence that Carrier employees have performed similar work and/or that the work is not as complex as the Carrier would describe it, the fact remains that the Organization has not demonstrated that the type of work involved here has been “customarily performed” by Carrier employees.

The Board need not review other subsidiary aspects of this dispute where the underlying test of customary performance is not met. This conclusion does not, of course, diminish the Organization's right, as referenced by the cited Rules, to bridge repair work in general. Indeed, some aspects of the work here under review may well have come within the parameters of such work. There is, however, insufficient support, in this instance, for a finding that epoxy repair work could have been assigned efficiently on a piecemeal basis between Carrier forces and those of the outside concern. The strictures of Appendix "Y" are not applicable where a showing of customary performance of the work is not clearly demonstrated."

While acknowledging that the work performed by Hamilton Construction on the Columbia River Drawbridge was first-time work of this sort on any BNSF bridge, this Board finds that the prior on-property Award is the appropriate response to the instant dispute; thus, we adopt the reasoning as our own.

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.