

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44284
Docket No. MW-43526
20-3-NRAB-00003-200199**

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 (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 (R.J. Corman) to perform Maintenance of Way and Structures Department work (remove and replace crossing planks and panels and associated duties) at Mile Posts 6.9 and 7.0 on the Crosby Subdivision of the Montana East Division on October 1 and 2, 2014 (System File T-D-4566-E/11-15-0186 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 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 Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Wivholm, A. Hill, K. Brandt, T. Hanson, B. Miller, D. Wald and W. Wilson shall now each receive an equal and proportionate share of one hundred four (104) hours at their respective straight time rates of pay and twenty-eight (28) hours at their respective overtime 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 Claimants have established and hold seniority within various classifications of the Carrier's Maintenance of Way Department, including foreman, machine operator, and laborer. On October 1 and 2, 2014, the Carrier assigned outside forces to remove and replace a track switch and crossing planks and panels, and perform associated work at Mile Posts 6.9 and 7.0 on the Crosby Subdivision of the Montana East Division. The Organization presented evidence that the outside contractors utilized two foremen and two laborers, two Group 2 excavators with operators, one Group 2 dozer with operator and four trucks driven by four truck drivers.

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 work of removing and installing track switches and installation of new crossing panels is typical Maintenance of Way work, which has customarily and traditionally been assigned to and performed by the Carrier's Maintenance of Way forces and is contractually reserved to them.

The Organization contends that the Carrier failed to notify the General Chairman of its intent to contract out this work and failed to discuss the possible contracting out. Therefore, the Carrier failed to comply with the provisions of the Note to Rule 55 and Appendix Y. The Organization contends that the work performed

by the contractor's forces required neither special equipment nor any special skills that were not already possessed by the Claimants or other Maintenance of Way forces. Further, the Claimants were readily available to perform the subject work and would have performed this work had the Carrier afforded them the opportunity to do so.

The Carrier contends that this claim is moot in light of the March 5, 2013 Summit Agreement reached by the parties, in which the Organization agreed not to file claims for switch panel and grade crossing installation work so long as certain conditions were met. The Carrier contends that those conditions were met here, so the claim should be dismissed.

The Carrier further contends that the Organization has failed to prove that the work was Scope-covered, in that it has failed to show that the work in question has been exclusively or customarily performed by Maintenance of Way employees.

The first issue that must be addressed is the Carrier's argument that this claim is moot due to the parties' March 5, 2013, Summit Agreement. The Board cannot find evidence that this assertion was made during the on-property handling of the claim but was presented for the first time at the Board level. Accordingly, under clearly established authority regarding this Board's scope and jurisdiction, this argument cannot be considered by us.

The Organization has sufficiently demonstrated that the work occurred as claimed; the Carrier does not challenge this part of the *prima facie* case. With respect to the Carrier's assertion that this work was not reserved to the Organization's members because it was not exclusively performed by them, numerous Boards have made clear that the Organization need only establish that the work was customarily and historically performed by its members when the claim is against outside forces. "We do not believe the term 'customary' conveys the concept of exclusivity, but rather refers to what is usual or ordinary." Third Division Award 43962. *See also*, Third Division Award 40563. This work that is ordinary, routine track work, is covered by the Note to Rule 55 and may only be contracted out under the specific exceptions in the Note. *See, e.g.*, Third Division Award 43628.

Once the Organization has demonstrated that the type of work claimed is customarily performed by the unit and the work was performed by outside forces, the burden shifts to the Carrier to show it met one of the enumerated exceptions under

which it may contract out the work. If the Carrier plans to contract out work for one of these reasons, the parties' Agreement requires the Carrier to notify the Organization "as far in advance of the date on the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases." The Organization may then request a conference to discuss possibilities for avoiding the proposed contracting out, pursuant to the Note and Appendix Y.

Here, the Carrier initially asserted that it provided sufficient notice of its intent to contract out this work. However, the Carrier never presented a copy of the notice which allegedly notified the Organization that it intended to contract out this work, at this time, or at this location, or which identified which exceptions were applicable. The Carrier failed in its obligation to provide the Organization with sufficient notification of its intent to contract out this work. As a result, there was no opportunity to engage in a meaningful conference discussing the intention.

The Board, therefore, finds that the Carrier failed to meet its burden of proving that the contracting out identified in this claim fell within the exceptions to Rule 55. The Claimants must be compensated for the hours claimed.

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 23rd day of October 2020.