

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44297
Docket No. MW-43636
20-3-NRAB-00003-200441

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 (Former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (HB Trucking) to perform Maintenance of Way and Structures Department work (haul and unload new and fouled ballast in support of off-track undercutting work) at various locations on the Ravenna Subdivision on February 23, March 5, 7 and 9, 2015 and continuing (System File C-15-C100-66/10-15-0156 BNR).
- (2) The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with the Carrier’s intent to contract out this 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, Claimant M. Lane shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay and for ten (10) hours at his respective overtime rate of pay for February 23, March 5, 7 and 9, 2015 and for any additional hours worked by the outside contractor continuing after March 9, 2015.”

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 has established and holds seniority within the Carrier's Maintenance of Way Department. On February 23, March 5, 7, and 9, 2015 and continuing, the Carrier assigned outside forces (HB Trucking) to haul and unload new and fouled ballast in support of off-track undercutting work at various locations on the Ravenna Subdivision.

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 hauling and unloading new and fouled ballast in support of off-track undercutting work is typical Maintenance of Way work, which has customarily and historically been assigned to and performed by the Carrier's Maintenance of Way forces. Therefore, the Organization contends that this work is within the scope of the Agreement and specifically reserved to Maintenance of Way employees by the Agreement.

The Organization contends that the Carrier may only assign its work to outside contractors under certain specified conditions and after notice to and conferencing with the Organization, and that the Carrier failed to notify the General Chairman of its decision to assign outside forces to perform this work. The Organization contends that the Carrier's notice alleged that specialized equipment was necessary to complete the work in question, but the work was performed by ordinary dump trucks and the Carrier did not explain what specialized equipment was required.

The Carrier contends that the Organization failed to show that the work took place as alleged. The Carrier contends that the Organization's proofs fall far short of the proof needed to substantiate its claims.

The Carrier contends that the Organization has failed to show a system-wide practice of assigning the claimed work exclusively to BNSF forces, so its claim must fail. The Carrier contends that at best, the Organization has demonstrated a mixed practice of assigning this work to outside forces and BMWED-represented employees.

The Carrier contends that it provided a notice of contracting dated January 27, 2015, which properly notified the Organization of the Carrier's intention to subcontract this work:

“As information, BNSF advised by letter dated October 20, 2014 of its plans to contract for specialized equipment on the St. Joseph and Ravenna Subdivisions. Due to unforeseen reasons, not all of those locations were completed therefore, that earlier letter is amended to inform you of the continuance of the work and to include the Napier and Omaha Subdivisions and for the reasons stated in the earlier letter. BNSF plans to contract for specialized equipment necessary, such as excavators (with undercutter bars and dual hydraulic tamping heads), track-hoes with multiple attachments), F/E loaders, dozers, graders, dump trucks and end-dumps with operators. BNSF does not possess the specialized equipment necessary for all aspects of this project, nor do BNSF forces possess the skills required for embankment stabilization and dirt work. The work to be performed by the contractor includes but is not limited to, excavation of a 4' trench parallel to the trackage to be undercut, and removal of fouled ballast, placement of shot rock or ballast, undercut of selected fouled switch and track areas, and debris removal at the following various MP locations:

St. Joseph Subdivision: MP 8.0 to MP 206.5
Ravenna Subdivision: MP 0.0 to MP 127.7
Napier Subdivision: MP 97.4 to MP 173.9
Omaha Subdivision: MP 0.0 to MP 47.0”

Although it was near the end of the on-property handling, the Organization provided sufficient proof that the work in question was performed by outside forces. Furthermore, the Carrier's defense is that it provided proper notice of the claimed work, thereby acknowledging that it took place.

Numerous awards of this Board have concluded that hauling ballast is customarily and historically done by the Organization's members. Therefore, pursuant to the Note to Rule 55, the Carrier had the burden of showing that one of the listed exceptions applies here. The Note reads,

“However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces.”

The Carrier asserted that specialized equipment was necessary to handle the claimed work but provided no evidence that anything other than ordinary dump trucks were used to haul and unload new and fouled ballast. As the Carrier has failed to show that it met one of the exceptions in the Note, the claim must be sustained.

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.