

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44298
Docket No. MW- 43639
20-3-NRAB-00003-200442

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 Agreement was violated when the Carrier assigned outside forces (Hulcher Professional Services) to perform Maintenance of Way and Structures Department work (undercutting fouled ballast) at various locations on the Ravenna Subdivision on February 17, 18, 19, 20, 23, 24, 25, 26, 27, 2015 and continuing (System File C-15-C100-65/10-15-0150 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, ‘... Claimants Ryan, Nerverve, Zlomke, and Hetherington be paid seventy-two (72) straight time hours and two (2) overtime hours each, and Claimant Foster be paid eight (8) straight time hours and one (1) overtime hour, at their respective rates of pay, for the work performed by the outside contractors as of the writing of this claim. The Claimants are also entitled to be**

paid for any additional straight time and overtime hours worked by the outside contractors during the above-cited claim period, and continuing until the violation ceases, as settlement of this claim. As this is a continuing claim, additional hours will be forthcoming.”

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 the Carrier's Maintenance of Way Department. On February 17, 18, 19, 20, 23, 24, 25, 26 and 27, 2015, the Carrier assigned outside forces (Hulcher Professional Services) to perform undercutting fouled ballast 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 undercutting fouled ballast is typical Maintenance of Way work, which has customarily and historically been assigned to and performed by the Carrier's Maintenance of Way forces and is contractually reserved to them.

As such, the Organization contends that the Carrier was required to notify the General Chairman of its decision to assign outside forces to perform this work. 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.

The Organization further contends that the alleged notification provided by the Carrier makes no mention of the claimed work. The Organization contends that although the Carrier asserted that the work required specialized equipment, in fact, the work was performed using ordinary excavators and loaders. Therefore, the Organization contends that the Carrier has failed to show that one of the Note to Rule 55 exceptions applied to the claimed work.

The Carrier contends that the Organization has failed to show that the work at issue was scope-covered. The Carrier contends that it gave proper notice to the Organization that it was not adequately equipped to perform the work because it did not possess the necessary specialized equipment.

Furthermore, the Carrier contends that it has the managerial right to lease equipment rather than purchase it. The Carrier contends that the Organization has failed to show that the necessary equipment was available for lease without operators. The Carrier contends that if equipment cannot be leased without the lessor's operators, then the Note to Rule 55 permits BNSF to contract the work out, instead of having to purchase the equipment.

The Organization has demonstrated that the work of undercutting fouled ballast is work that is customarily and historically performed by its members. In awards too numerous to cite, this Board has concluded that the Organization need not prove that it exclusively performed this work, system-wide, when the work is claimed against outside contractors.

The Carrier provided a contracting notice that addressed the claimed work, which asserted that the Carrier would "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." The Carrier went on to inform that it did not "possess the specialized equipment necessary for all aspects of this project."

In the on-property exchange, the Organization challenged the Carrier's assertion that specialized equipment was used, stating that the equipment used in the claimed work was "clearly not specialized equipment and is equipment owned by the

Carrier and operated by Maintenance of Way forces on a daily basis.” While the Carrier responded that it did not possess all of the necessary specialized equipment to complete the work identified in the contracting notice, it did not refute the Organization’s assertion that this claimed work was done by ordinary excavating equipment, owned by the Carrier and operated by its forces. In addition, the Carrier has made no attempt to show that this equipment was not available for lease and operation by carrier employees. *See*, Public Law Board 4402, Award 20.

As the Carrier has failed to show that it met one of the exceptions in the Note to Rule 55, 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.