

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44305
Docket No. MW-43740
20-3-NRAB-00003-200449**

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 Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way and Structures Department work (leveling off rock and ditching) between Mile Posts 154 and 157 around the Robinson Spur on the Aurora Subdivision on March 2 through 6, 2015 and on March 23 through 28, 2015 (System File C-15-C100-84/10-15-0208 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 D. Furar, L. Niedziela, J. Pearce, K. Isherwood, R. Arnett, III, R. Younge and L. McKeel shall now each be compensated for eighty (80) hours at their respective straight time rates of pay and for thirty-nine (39) 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 the Carrier's Maintenance of Way Department. On March 2 through 6, 2015, and again from March 23 through 28, 2015, the Carrier assigned outside forces to perform leveling off rock and ditching between Mile Posts 154 and 157 around the Robinson Spur on the Aurora 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 leveling off rock and ditching has customarily and historically been assigned to and performed by the Carrier's Maintenance of Way forces and is contractually reserved to them.

The Organization further contends that the Carrier's January 13, 2015 notice to the Organization failed to serve as advance notice of the Carrier's intent to contract out the claimed work. The Organization asserts that the Carrier never proved its assertion that the Carrier lacked special equipment or was not adequately equipped to perform the claimed work, which was performed by ordinary excavators, dozers and skid steers, which the Carrier has across its system or else could readily lease.

The Carrier contends that it provided sufficient notice under the Note to Rule 55 when it gave notice on January 13, 2015, of its plans to "expand capacity" and that,

“BNSF is not adequately equipped with the necessary specialized equipment, such as scrapers, graders, rollers, compactors, dozers, loaders, blades, off-track cranes, as well as front-end loaders, dump trucks, water trucks, and track-hoes (excavators) necessary to perform this volume of dirt work. Moreover, BNSF forces do not possess the necessary specialized dirt work skills for projects of this size and type.”

The Carrier further contends that it is not required to piecemeal large capacity expansion projects and that the Organization’s claim must fail.

It is well-settled that in a contracting claim, the Organization bears the burden of proving that the claimed work is customarily performed by its members. Then, the burden shifts to the Carrier to show that the reason for contracting out this work is one of the specific exceptions listed in the Note to Rule 55:

“By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees described herein, may be let to contractors and be performed by contractors’ forces. However, such work may only be contracted provided that special skills not possessed by the Company’s employees, 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.”

Then, Appendix Y makes clear that the Carrier must identify the reasons for the contracting in the notice to the General Chairman. Here, there is no question that the Carrier stated in its notice that it was not adequately equipped to perform the work and that its forces did not possess the necessary skills.

In the on-property handling, the Organization asserted that the Carrier had failed to prove that any of the Note to Rule 55 exceptions applied to the claimed work. The Organization wrote, “The work did not require special skills not possessed by the Company’s employees, it did not require any specialized equipment, materials and/or

supplies, and was not emergent in nature, and the Carrier has provided no evidence to the contrary.”

In response, the Carrier wrote, “The Organization also claims that no specialized equipment was utilized by the contractor in performing the disputed work. However, the Organization has provided no proof in support of these statements. Nor has the Organization proven that the Claimants possess the necessary skills to utilize whatever specialized tools were actually required.”

But, as pointed out by the Organization, the Carrier must show that a Note to Rule 55 exception applies to the claimed work; the Organization does not bear the burden of proving that it does not apply. The Board has searched the record and cannot find any evidence offered by the Carrier purporting to establish that one of the exceptions applied to the claimed work. Although the Carrier asserted that this was part of a large-capacity project which did not need to be piecemealed, the record does not support this assertion, either. Thus, 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.