

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44384  
Docket No. MW-42948  
21-3-NRAB-00003-190364**

**The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Casper Industrial Lubricants) to perform Maintenance of Way and Structures work (install, maintain and re-install wayside greasers and related work) at various locations on the Orin Subdivision of the Powder River Division on September 17 and 24, 2013 (System File C-14-C100-20/10-14-0036 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notice 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 E. Elston and M. McDonald shall each be paid sixteen (16) hours at their respective straight time rates.”**

**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 claim arose when the Carrier contracted with Casper Industrial Lubricants to install a curve greaser servicing Main Tracks 1, 2 and 3 at Milepost 77.90 on the Orin Subdivision in the Powder River Division in Wyoming. Casper also reinstalled curve greasers on Main Track 1 and Main Track 2 at Milepost 72.60. According to the Organization, the work was performed on September 17 and 24, 2013, with one foreman and one laborer, who each worked eight hours a day. BNSF did not send the Organization any notice of its intention to contract the work.

In its Carrier's initial response to the claim, dated December 23, 2013, the Carrier stated:

The curve oiler position went multiple bid cycles without bidders and the field was unable to fill that position. There are numerous greasers to remove and install for the production gangs and there were not qualified employees or employees who wanted the work. The greasers are a vital part of the track structure and had to be removed and installed properly, which BNSF employees are not trained for. Further, BNSF finds that the curve greaser machines were newly purchased from a supplier, delivered and filled "FOB" (Free On Board) Destination Freight collect. BNSF did not take ownership or pay for the curve greasers until after they were delivered, filled and installed.

The Organization requested documentation of the Carrier's claim that the curve greasers had been purchased FOB, but the record does not include such documentation.

The Organization contends that the Carrier violated the parties' Agreement when it failed to send a contracting notice as required by the Note to Rule 55 and that there was no reason for contracting the work when MoW forces were capable of performing the work themselves. Track lubrication and installing and maintaining track greasers is work historically and traditionally performed by BMW-represented employees—the Carrier has Rail Lubricator Gangs who are capable of and do perform this same work. The Carrier raised a “mixed practice” argument, but there is insufficient evidence in the record to substantiate that position. The Carrier also stated that it had purchased the equipment that was being installed FOB, meaning that ownership of the equipment did not pass to the Carrier until after it had been installed by the contractor's forces. During the proceedings below, the Union asked the Carrier for proof of that assertion, but nothing was ever produced. The claim should be allowed and the Claimants compensated for the work opportunity that was denied to them.

According to the Carrier, the Organization has failed to meet its burden of proof. The employee “statements” in the record are nothing more than unsubstantiated repetition of the Organization's claim, and there is no proof that the work was performed by a contractor as alleged. In addition, the Organization has failed to prove that the work in dispute was reserved to its members. At most, there is a mixed practice on the property, and that defeats the claim: numerous Board awards have already determined that if there is a mixed practice of performance of certain work, the Carrier does not violate the Agreement when it assigns outside forces to perform that work.

The Organization bears the burden of proof in cases of contract interpretation. The threshold issue is whether the work in dispute is of the sort customarily, historically and traditionally done by the Carrier's Maintenance of Way forces. This Board has previously recognized that lubricating tracks is scope covered. The record includes a statement signed by five employees, to the effect that they had witnessed Casper Industrial Lubricants perform the work in dispute. The Carrier has not refuted that evidence, so it appears that the work occurred as alleged.

The real issue in this case is the Carrier's contention that there is a long-standing mixed practice of having both its own forces and outside contractors work on the greasers. The record also includes a November 12, 2012, e-mail from Inspector Scott Smith to a Vice General Chairman at BMW of North America about using a contractor to work on curve greasers:

In response to you [sic] question about the Industrial Lubricant technician working on the Hilina Sub:

I have taken Tom Miller, the technician for Industrial Lubricant, out several times to work on both gage face greasers and top of rail greasers. I have worked with him on installing carpet on several gage face greasers.

I have also signed his work orders each time. He has been to Essex and has worked extensively on our tanks that fill the wayside greasers.

Industrial Lube has worked on the Hilina for quite some time, and Tom Miller is now the "local" representative that works on all of the lubricators on both the Hilina and the Kootenai.

He recently went to Texas to pick up a hylar truck that will be used for filling wayside greasers.

The Board is constrained to make its decisions based on the evidence in the record before it. The Carrier contends that it has extensive evidence of a mixed practice regarding lubrication work, with the majority of it being performed by contractors. Unfortunately, that evidence is not in the record here. Without more, a single contractor working on greasers with a Carrier supervisor is not sufficient to constitute a mixed practice, at least on the basis of the record under consideration here. The Organization has established a prima facie case, which the Carrier's evidence is not sufficient to rebut.<sup>1</sup> The Claim is sustained.

### AWARD

Claim sustained.

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<sup>1</sup> The Board wants to make it clear that a record with more evidence of the mixed practice would have warranted a different outcome.

**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 13th day of April 2021.**