

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44392
Docket No. MW-42993
21-3-NRAB-00003-190373**

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 (Stephens & Smith Construction/Iron Hide Construction) to perform Maintenance of Way and Structures work (dock repair work) on the west end of the Wheel Plant in Havelock Yard in Lincoln, Nebraska beginning on November 1, 2013 and continuing (System File C-14-C100-48/10-14-0068 BNR).**
- (2) The Agreement was further violated when the Carrier failed to properly notify and confer with the General Chairman regarding 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 R. Thoms, R. Malcolm, R. Wall, M. Whitmore and G. Waegli shall each now ‘... be paid for the hours that the contractor charges to do this job at the appropriate rate of pay as settlement of this claim.’”**

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 in November 2013 when the Carrier used a contractor to make dock repairs on the west end of the Wheel Plant in the Havelock Yard, Lincoln, Nebraska. On July 23, 2013, the Carrier sent notice to the Organization of its intention "to contract for all work associated with the facility and dock improvements located at various facilities located on the Nebraska Division.... BNSF does not possess all of the specialized equipment necessary for this project. Moreover, BNSF forces do not possess the necessary specialized skills required for all aspects of these projects." The Havelock Wheel Plant was one of the sites listed.

The Organization alleges that the dock work that was done is scope-covered work that has customarily, historically and traditionally been performed by the Carrier's own Maintenance of Way employees. As such the Note to Rule 55 applies. The July 23, 2013, "notice" was a vague, blanket notice that did not meet the notice requirement prescribed by Rule 55. The Carrier did not identify any valid reason for assigning the work to an outside contractor. There is no material difference between the work that was performed by the contractor in this case and work of this nature that has been performed by MoW forces in the past.

According to the Carrier, it has contracted this type of dock work for years. It gave notice to the Organization, covering the claimed work, particularly the pouring of concrete and hot-mix asphalt on the dock and its approaches. The Board has definitively decided this issue in the past. Third Division Award 7600 upheld the Carrier's right to contract the construction of buildings, including the pouring of concrete foundations and floors. Numerous past on-property awards have also recognized that BNSF does not have an obligation to piecemeal out small portions of a project. The Organization

has not met its burden of proof, but even if Maintenance of Way employees have performed such work in the past, the Carrier has used contractors as well, and there is a mixed practice, which defeats the Organization's claim.

The on-property record in this case includes 18 pages of instances where the Carrier has contracted out concrete pouring and asphalt work of the type that was performed at the Havelock Wheel Yard. This is sufficient to establish the existence of a mixed practice. The Board has previously recognized the Carrier's right to continue to contract out work where a mixed practice has been established.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of April 2021.