

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44423
Docket No. MW-43422
21-3-NRAB-00003-200403**

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 (Garney Construction) to perform Maintenance of Way and Structures Department work (building repair and concrete work) at the Roundhouse building in Glendive, Montana beginning on August 11, 2014 through September 27, 2014 (System File B-M-2780-E/11-15-0078 BNR).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto 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 the Note to Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Sutton, G. Schuman, R. Utgaard, L. Strohm, T. Keller and O. Gaub shall now ‘ ... each receive a proportionate (sic) share of hours worked, two hundred and six (206) hours of straight time and seventy-one and a half (71.5)**

hours of time and a half overtime rat (sic) at the respective rate 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.

This Claim arose when the Carrier used an outside contractor, Garney Construction, to perform work at the Roundhouse building in Glendive, Montana, repairing and siding the walls and pouring concrete, beginning August 11, 2014, and continuing through mid-September 2014. According to the Organization, the work performed by the contractor is work typically done by MoW B&B forces, which makes it subject to the strictures of Rule 55 of the parties' Agreement regarding subcontracting. The Organization contends that the Carrier failed to provide notice or a reason acceptable under Rule 55 for contracting out work that should have been assigned instead to B&B forces. The Carrier objects, on the ground that it provided not just one, but several notices relating to contracting out renovation and improvements to the Glendive Roundhouse, and that contracting the work was justified under Rule 55 on the basis that the Carrier did not possess the specialized equipment necessary nor do Carrier forces possess the specialized skills required to perform the work.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of bargaining unit work. If the disputed work is work "customarily performed" by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

“[S]uch 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.” In addition, if the Carrier plans to contract out work on one of these bases, the Note requires the Carrier to notify the Organization “as far in advance of the date on the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in ‘emergency time requirements’ cases.”

Here, the Carrier contends that it provided adequate notice per Rule 55 of its intention to contract out the concrete work in dispute. The record includes several notices to the Organization relating to the fueling facilities at Glendive, dated June 15, 2012, September 12, 2013, and January 16, 2015. A review of the 2012 and 2013 notices establishes that neither mentions concrete work of the type that is at issue. The June 15, 2012, notice references “perform camera inspection of existing pipe system and components; perform pneumatic and hydrostatic tests on IWW system; demo/remove/abandon-in-place various gravity and force-main segments; repair approx. 702 l.f. pipes by in-situ method...” The September 12, 2013, notice similarly fails to mention concrete work:

This work will require demolishing existing platform edge and curbing with associated piping and installation of platform/track pans. BNSF does not possess the necessary specialized welding x-ray equipment or pipe fusion machine. Moreover, BNSF forces do not possess all of the necessary skills required for the operation of the weld x-ray equipment, pipe fusion machine, installation of logic systems, or for the dirt work. Also, there is a possibility of fuel-impacted soil and any work performed in this area has to be done in accordance with OSHA 29 CFR 1910.120. BNSF forces do not possess the skills for removal of contaminated debris as outlined by OSHA regulations. The work to be performed by the contractor includes but is not limited to necessary excavate existing material for IW piping; demo/remove approx. 1,400 c.y. existing pipe, track pans, track panels and bollards; . . . [The notice continues with a listing of pipe-related work, hot asphalt work, and disposal of construction debris.]

Concrete work per se is not referenced until the January 6, 2015, notice:

As information, BNSF plans to contract for all work associated with the facility improvements located at various facilities located in Glendive, MT... BNSF forces do not possess the necessary specialized skills required for all aspects of these projects, including the projects that will carry a warrant. The work to be performed by the contractor includes but it not limited to the following locations:

Roundhouse — reinforcing existing brick pour, pour necessary new concrete retaining walls; ...

The problem, of course, is that the January 16, 2015, notice was issued after this Claim was filed.

Moreover, the Carrier's declination, dated December 3, 2014, emphasizes the work previously notice in 2012 and 2013, but mentions concrete work only tangentially: "The repairing and siding the walls and poured concrete support would be a part of this improvement work...."

Upon consideration of the record in its entirety, the Board concludes that the Carrier failed to provide adequate notice of its intention to contract out the concrete work at issue, or to offer a valid reason under Rule 55 for contracting it out. This holding is limited to the facts of this case as evidenced in the record before the Board.

The Statement of Claim seeks for the six Claimants to be paid proportionate shares of the hours worked by the contractor, at both straight time and overtime rates. The issue of exact remedy is remanded to the parties so that they may determine how many hours the contractor's employees worked, and if any of the Claimants would have been assigned the work on overtime.

AWARD

Claim sustained.

**Form 1
Page 5**

**Award No. 44423
Docket No. MW-43422
21-3-NRAB-00003-200403**

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.