

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44457
Docket No. MW-42949
21-3-NRAB-00003-190365**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (R. J. Corman) to perform Maintenance of Way and Structures Department track work (pushing off the shoulder and place rip rap and ballast) along the track at Mile Post 23.5 on the Hannibal Subdivision on the Springfield Division on October 9, 10, 11, 14 and 15, 2013 (System File C-14-C100-27/10-14-0046 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 M. Western, L. Sutton, G. Nichols, J. Whitehead, J. Outlaw, G. Henderson, J. Whitaker, P. Harmon, B. Graham, M. Harn and H. Lawrence shall now each ‘... be paid a total of 40 hours straight time and 12.5 hours over time each at their 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.

The Organization alleges that the Carrier improperly contracted out routine track maintenance work, to wit, pushing dirt off shoulders and replacing with ballast and riprap, and that it failed to provide the notice required by Rule 55. According to the Carrier, the dirt work involved in this case was specialized dirt work; the Board has previously held that such dirt work has not customarily been performed by Maintenance of Way forces; and there is no requirement to piecemeal portions of a larger project. Accordingly, the Claim should be denied.

The Note to Rule 55 establishes parameters for contracting out work:

By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employee[s] 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 employee, 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....

The Note to Rule 55 applies only to scope-covered work. Prior rulings from this Board have established that where work has been performed by both Maintenance of Way employees and outside contractors, there is a "mixed practice." In cases of a mixed

practice, the work is not reserved to BMW-represented employees, and the Carrier may continue to contract it out.

In addition, the Board has consistently ruled previously that bank stabilization and dirt work are not reserved to the Carrier's Maintenance of Way forces. The on-property record of this case includes the following explanation from the Carrier regarding dirt work:

Bank stabilization projects require skills and expertise not possessed by BNSF forces. This process involves knowing what types of soil are involved, knowing whether or not the soil will compact properly or if it is even stable enough to support the grade in high-fill situations. The grading as well is integral because if the grade is not keyed in correctly then all efforts are for naught, as the scour, or erosion. [Sic]

In its initial response to the Organization's claim, the Carrier stated:

This location had a 10 mph and multiple service interruptions on it. This location has had to be surfaced daily to keep it at a 10mph or it would have been taken out of service. *Contractors were utilized to stabilize the bank in order for the surface to stay...* (Emphasis added.)

The record is sufficient for the Board to conclude that the work in dispute was dirt work of the type that has been recognized as non-exclusive to BMW-represented employees.

The Organization contends that the Carrier violated the Agreement when it failed to provide notice of its intent to contract out the work at issue. But the Note to Rule 55 only requires notice of proposed contracting of scope-covered work, which is reserved exclusively to BMW-represented employees. Mixed practice work is not exclusive to the Carrier's Maintenance of Way employees; therefore the Note to Rule 55 does not apply to it, and the Carrier is not required to provide Notice before contracting it out.¹

The record supports the Board's conclusion that the work performed by RJ Corman was dirt work, which is not reserved to Carrier forces, but which has been

¹ The Organization argues that notice is required in cases of mixed practice, which is a defense available to the Carrier. But the Note to Rule 55 specifies the exceptions to the rule against contracting out, and mixed practice is not one of them.

routinely contracted out in the past. Because the work is not exclusively reserved to BMW-represented forces, it is not subject to the Note to Rule 55. The Carrier may contract the work and it is not required to provide notice.

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 10th day of June 2021.