

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44594
Docket No. MW-45090
22-3-NRAB-00003-180155

The Third Division consisted of the regular members and in addition Referee James M. Darby when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way work (dirt work, concrete work, tying rebar, building of steel pony bents and other work related to a bridge renewal project) at Mile Post 40.2 on the River Subdivision beginning on July 18, 2016 and continuing through August 26, 2016 and continuing (System File 745-SLA8-16130/14-16-0491 BNS).
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing in advance of its intent to contract out said work or make a good-faith effort to reduce the of subcontracting and increase the use of its Maintenance of Way forces as required by Appendix 8 and the December 11, 1981 National Letter of Agreement.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. Tucker, J. Thomason, B. Curry, N. Jones, D. Henderson, K. Hardin, C. Clements, M. Bennet, T. Hulsey, J. Harbaugh and J. Chambers shall now each be compensated for two hundred forty (240) hours for July 18, 2016 through August 26, 2016 at their appropriate rates of pay and shall be compensated an equal share of all hours worked by the outside forces beginning August 27, 2016 and continuing at their appropriate 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.

On June 16, 2016, BNSF informed General Chairman Marquart of its intent to contract bridge and drainage improvements (bridge renewal) at several locations on the Heartland Division. This letter of intent (“LOI”) was issued via email to General Chairman Marquart identifying six different locations on four subdivisions where this work would occur. Included in this LOI was mile post 40.2 on the River Subdivision. Specifically, the LOI stated, in pertinent part:

As information, BNSF plans to contract for additional heavy equipment, such as, off-track cranes, off-track-hoes (excavators), front-end loaders, pumps, boring equipment, and dump trucks with operators to assist BNSF forces with the bridge and drainage improvements at various locations on the Heartland Division. BNSF is not adequately equipped to handle all aspects of this project. The work to be performed includes but is not limited to site clearing, excavation, grading, and necessary dirt work for access roads and pads; horizontal bore new culverts; core-drill sockets; set h-piles (including backfill of flowable fill or concrete); demolition and disposal of existing bridge deck and components; excavate abutment area, bridge piles and approaches; load/haul/ set bridge deck and various bridge components; and debris removal at the following locations: ...

The LOI also noted specific work for each location in addition to the above overall work being contracted at each of the six projects. For the bridge at mile post 40.2, the LOI informed the General Chairman that the contractor would also drill shafts:

...River Sub: Br 3 8 .4 - drill socket the piling; Br 5 7. 1 - Six (6) 3 0" diameter drilled shafts; Br 58.5 twelve (12) 30" diameter drilled shafts; Br 40.2 – drilled shafts; ...

The Organization grieved BNSF's decision to contract this major bridge renewal project arguing that BNSF failed to provide the requisite 15-day advance notice of its intent to contract and that the Agreement prohibits BNSF from contracting the disputed work. BNSF responded that none of the cited rules had been violated. The Organization then asserted that the LOI had been modified during conference and was limited to only "drilling of shafts, the placement of the piling and the pouring of the flowable fill (concrete) into the shafts." It also again argued that BNSF is prohibited from contracting bridge renewal work because its forces have historically performed this work, that the LOI was invalid because it did not cover all work performed by the contractor, and BNSF should have assigned this project to qualified furloughed employees instead.

BNSF responded that the LOI did address all of the work performed by the contractor and bridge renewal work is not exclusively reserved to MOW forces nor were any of the Claimants furloughed. Simply because the Organization's Representative at the conference to discuss this LOI focused on only one task BNSF intended to contract at mile post 40.2 does not mean that the other work identified in that notice would no longer be performed by a contractor. If any changes to the tasks identified in the LOI for this location had been agreed to during the conference, those changes would have been communicated to the field officers overseeing the project. The fact that this did not prove that no such agreement was made.

With respect to the Organization's contention that the scope of the LOI was altered during the parties' June 24, 2016, conference discussions, the Organization informed the Carrier by letter dated March 18, 2017, that

[t]he work at each of the locations on the notice was discussed, Labor Relations office Farrar specifically stated the work at MP 40.2 would be limited to only the drilling, removing of trash and debris from the drilled shafts, the placement of the H-Piling and the dumping of a flowable fill (concrete) in each casing and around each of the drilled shafts with no exact number provided. The Organization was specifically told

the bridge work would remain the work of the existing forces in the B&B/Structures subdepartment;

Thereafter, by letter dated June 23, 2017, the Carrier responded to this assertion:

And the Organization's assertions regarding what was allegedly discussed during that conference remain unsubstantiated. It is extremely unlikely that Mr. Farrar would have changed the scope of a notice for this type of a large bridge renewal project as the Organization contends. If such had actually occurred, then Mr. Farrar would have immediately notified the field Officers responsible for the project. However, no communications or modifications to the scope of the bridge renewal at mile post 40.2 exist. What is more likely to have occurred, supported by the form of this particular notice, is that Mr. Farrar simply tried to explain that this specific bridge included drilled shafts as well as everything else identified in the notice. Nonetheless, the notice issued to the Organization clearly informed the General Chairman of all of the work performed by contractors and was not vague, open-ended, misleading, or invalid.

After a thorough review of the record, the Board concludes that the Organization has failed to establish that the Carrier's subcontracting of work contained in the LOI violated the parties' Agreement. The LOI specified in detail the work to be contracted and the reasons therefor. The Carrier met with the Organization to discuss the LOI and made good faith efforts to limit the subcontracting involved. Moreover, the record does not substantiate that any agreements were reached between the parties during conferencing as alleged by the Organization. Such contentions were rebutted by the Carrier and thus this Board has no evidentiary basis to accept the Organization's contentions in this regard. Finally, the Organization failed to rebut the Carrier's evidence showing that it has historically contracted out similar work in the past.

The Organization's reliance on *Third Division Award* No. 43344 cannot change the outcome here. In that case, the record clearly showed that the work involved (cut up and removal of mainline track) was work historically performed by BMW forces. Additionally, the Board determined in Award No. 43344 that the Carrier failed to rebut the Organization's assertion that during the parties'

conference the Carrier agreed to a reservation of track work for Carrier BMW employees.

Accordingly, for all these reasons the claim is denied.

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 29th day of October 2021.