Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 45165
Docket No. MW-43806
24-3-NRAB-00003-230201

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Corporation

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 and Structures Department work (haul dirty coal, rock and dirt from a derailment site) from Louisville, Nebraska to Milford, Nebraska on February 26, 27, March 2, 3, 4, 9, 10 and 11, 2015 (System File C-15-C100-102/10-15-0240 BNR).

(2) The Agreement was further violated when the Carrier failed to notify the General Chairperson in advance of its plans to contract out the aforesaid work and failed to make a good-faith attempt to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces or reach an understanding concerning such contracting as required by the Note to Rule 55 and Appendix Y.

(3) As a consequence fo the referred to in Parts (1) and/or (2) above, Claimants G. Fabian, B. Gerken, C. Hilbers, D. Mitchell, S. Partusch, B. Wheeler, K. Johnson, R. Gaudreau, J. Epp, D. Murphy, B. Snyder, D. Rockenbach, S. McCoid, M. Sailors, M. Roloff, J. Covarrubias, S. Schrage, D. Potter, M. Reynolds, R. Hetherington and G. Stall must each be paid eight (8) straight time hours and four (4) overtime hours each day that the contractors worked."

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 Claimants have established and hold seniority within various classifications of the Carrier's Maintenance of Way Department.

After a derailment on the Creston Subdivision near Louisville, Nebraska, the Carrier assigned outside contractors (Hulcher and Gana Trucking) to haul coal, rock, and dirt from the derailment site at LS 2, MP 24.5 to Milford, Nebraska on February 26, 27, March 2, 3, 4, 9, 10 and 11, 2015. The contractor employes used semi-trucks, a front-end loader, an excavator, and a track dozer.

In a letter received on April 27, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated June 22, 2015. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Organization contends that the hauling of coal, rock, and dirt work involved has customarily and historically been performed by the Carrier's Maintenance of Way ("MOW") forces and it is contractually reserved to them under Rules 1, 2, 5, 6, 55 and the Note to Rule 55.

The Organization contends that the Carrier failed to comply with the provisions of the Note to Rule 55 and Appendix Y. The Organization contends that the work performed by the contractor forces neither required special equipment nor any special skills that were not already possessed by the experienced and fully qualified Claimants or any other MOW forces.

The Organization contends that the subject work is Scope-covered and may only be contracted out under certain unique, express conditions and after the Carrier has asserted good-faith efforts to use its own forces, notified the General Chairman in writing of its intent to contract out, and provided the General Chairman the opportunity to discuss the matters surrounding the contracting out transaction in a good-faith attempt to reach an understanding.

The Organization contends that since the Carrier does not dispute that the claimed work occurred and is basic Maintenance of Way work, these assertions must be accepted as fact. Under such circumstances, the criteria listed in the Note to Rule 55 are the only ones under which the Carrier may assert justification for its desire to contract out work customarily performed by MOW employes.

The Organization contends that the Carrier has admitted that it failed to notify the General Chairman of its intent to contract out the claimed work and failed to engage in a good faith attempt to reduce the incidence of subcontracting. The Organization contends that the Carrier's failure to comply with the advance notification and meeting provision precludes it from raising a defense now.

The Organization contends that it has refuted the Carrier's assertion that the work was performed in connection with an alleged emergency. The Organization contends that at the location where the derailment occurred, the main line was open and the Carrier was running traffic, belying its emergency defense. In addition, the Organization contends that the work occurred over eight days.

Finally, the Organization contends that the Claimants were available and capable of performing all the MOW work involved on the dates claimed, even had the work needed to be performed urgently. Thus, the Claimants should be fully compensated in accordance with the precedent on this property.

The Carrier contends that the parties' Agreement contains a general Scope Rule and that the disputed work in this case is the removal of spilled coal, which MOW forces are not trained or equipped to do. The Carrier contends that in an emergency, it is permitted to use any resource available to it. The Carrier contends that in Award 58 of Public Law Board 2206, it has already been determined that coal removal is not MOW work.

The Carrier contends that the claimed work performed in this matter was necessitated by a derailment which created an emergency. The Carrier contends that

the derailment caused vehicle traffic to be adversely impacted. In addition, the spilled coal needed to be removed. The Carrier contends that it is a well-established principle that it has wide latitude in dealing with emergencies.

Finally, the Carrier contends that even if the Organization's claim had any merit, the Claimants would not be entitled to any damages, as they were fully employed on the claimed dates. They suffered no monetary loss.

In a claims matter, the Organization bears the burden of proving its *prima facie* case. It must prove that the work occurred as claimed, that the disputed work belongs to the employes, and is encompassed by the Scope Rule of the Agreement. The Organization contends that the work at issue here – the hauling away of coal spilled by the derailment – is customarily and historically performed by its members.

However, the Organization has failed to prove that the claimed work is within the Scope of the Agreement, or that it was customarily performed by MOW forces. The Board finds no express provision reserving the removal of coal to the BMWED. Additionally, the Carrier asserted without contradiction, that its forces are not trained to do this type of work.

The Organization has failed to meet its burden of proving that the claimed work was customarily performed by the MOW forces. Therefore, it has not developed its *prima facie* case and the Board finds it unnecessary to address the Carrier's defense that an emergency prompted the use of outside contractors. The claim must be 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 22nd day of February 2024.