

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45167
Docket No. MW-43809
24-3-NRAB-00003-230203**

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

**(Brotherhood of Maintenance of Way Employees 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 (reshingle the roof on the B2 West Modular Building) in the Hobson Yard in Lincoln, Nebraska on June 29 and 30, 2015 (System File C-15-C100-121/10-15-0305 BNR).**
- (2) As a consequence of the violations referred to in Part (1) above, Claimants R. Bordeaux, J. Urman and A. Costello must each be paid for twenty (20) hours at their respective straight time 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.

The Claimants in this matter have established and hold seniority within various classifications of the Carrier's Bridge and Building (B&B) Sub-department, including foreman, first-class carpenter, and B&B carpenter. On the dates involved herein, they were regularly assigned to their respective positions on B&B Gang BBCX0 192 and retained the requisite seniority within the Carrier's Maintenance of Way and Structures Department.

On January 27, 2015, the Carrier presented the Organization with a letter stating that it intended to contract out the work of re-shingling the roof on the B2 West Modular Building. The notice reads, in part:

BNSF forces do not possess the necessary specialized skills required for all aspects of these projects, including the projects that will carry a warranty or projects that need to comply with city and municipal codes/licenses.

On June 29 and 30, 2015, the Carrier assigned outside forces (Centi Mark Construction) to re-shingle a roof on the B2 West Modular Building in the Hobson Yard in Lincoln, Nebraska.

In a letter dated July 10, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated August 31, 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 building construction, maintenance, repair and related work is typical Maintenance of Way ("MOW") work and that such work has customarily and historically been assigned to and performed by the Carrier's MOW forces and is contractually reserved to them.

The Organization further contends that the Carrier failed to comply with the Note to Rule 55 and Appendix Y by failing to provide proper advance notice of its plan to use outside forces and failing to make good faith efforts to reduce the incidence of subcontracting. The Organization contends that the criteria listed in the Note to Rule 55 are the only criteria under which the Carrier may assert justification for its desire to contract out work. The Organization contends that this Board has consistently held that the Carrier has the burden of proof when asserting an exception to the Note to Rule 55 applied allowing it to contract out scope- covered work.

The Organization contends that the Carrier has failed to present a valid defense to the claim. The Organization contends that while the Carrier asserted that MOW forces do not have the necessary specialized training certification required by the manufacturer to qualify for the warranty, the record is barren of any evidence to support the Carrier's position. In addition, the Organization contends that MOW forces have customarily and historically performed identical work and were fully qualified and capable of performing all roof repair of the type involved.

The Organization further contends that the Carrier's assertion that special equipment was necessary was completely unproven. The Organization contends that the Carrier presented no evidence of its need for special equipment.

The Carrier contends that the Agreement's general Scope Rule does not reserve the work to the BMWED, so the Organization must show that its members exclusively performed this work on a system-wide basis, which it failed to do. The Carrier contends that if the MOW forces have performed similar work in the past, this would suggest no more than a "mixed practice" on the property, which defeats the Organization's claim to exclusive rights to perform the work.

The Carrier contends that its forces do not have the necessary specialized-training certification that is required by the manufacturer to qualify for the warranty on the installation of the roof, a material benefit. The Carrier contends that recent precedent makes clear that the Carrier is to be afforded reasonable discretion when making business decisions such as whether the warranty was needed.

The installation and repair of roofs has been found to fall within the scope of work customarily performed by the Carrier's MOW forces. The Carrier sent a notice of its intent to contract out the re-shingling of the roof on the B2 West Modular Building. The parties conferenced but were unable to reach agreement.

The Carrier asserted that in order to qualify for the manufacturer's warranty on the roof, the work had to be performed by contractors with specialized training. Using its own forces would have meant the warranty could not be obtained. The Carrier reasonably decided that it desired the warranty benefit. Thus, it argues that its forces lacked the specialized skills necessary to complete this work.

However, the record before the Board contains no evidence that the manufacturer's warranty would only be satisfied if qualified installers installed the roofing. In a previous on-property Award where this Carrier asserted that it was

prevented from using its own forces by the terms of a warranty but failed to include the warranty in the on-property record, this Board wrote,

If such proof had existed, then the Carrier could have relied on the specialized expertise and specialized materials exception, as well as the advantages of obtaining a warranty from the roofing manufacturer, to support its decision to contract out the disputed work. Without such evidence in the record, however, the Carrier has not met its burden of persuasion to demonstrate persuasively that it satisfied the applicable criteria governing contracting out of work customarily performed by the bargaining unit. Therefore, the instant claim must be sustained.

On this record, the Carrier has failed to demonstrate that it met the “specialized training” exception to justify contracting the work at issue. The claim is sustained.

AWARD

Claim sustained.

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 22nd day of February 2024.