

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45170
Docket No. MW-43851
24-3-NRAB-00003-230206**

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 (Railworks) to perform Maintenance of Way and Structures Department work (installing switch heater covers/switch heaters and related duties) in the Northtown Yards and on the Midway, Wayzata, St. Paul, Staples and Monticello Subdivisions beginning on September 17, 2014 and continuing (System File T-D-4560-M/11-15-0172 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notification of its intent to contract out the aforesaid work or to 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. Olson, J. Bartherl, D. Flaig, T. Swanberg, J. Sauvageau, N. Berchild, M. Oswald, P. Cushing, P. Garth, L. Gilliland, M. Morrisette, J. Lindenberg, J. Pierce, D. Ascherman and C. Stotesbery shall now each be compensated for an equal and proportionate share of the hours worked by the contractor forces performing the claimed work at their respective 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 have established and hold seniority within the Carrier's Maintenance of Way Department.

The Organization alleged that beginning on September 17, 2014 and continuing, the Carrier assigned outside forces (Railworks) to perform installation of switch heater covers/switch heaters and related work on the Midway, Wayzata, St. Paul, Staples and Monticello Subdivisions.

In a letter dated November 15, 2014, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated January 13, 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 installing switch heaters and switch covers 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 under Rules 1, 2, 5, 6, 29, 55 and the Note to Rule 55 of the parties' Agreement. The Organization contends that the Carrier did not factually dispute that the claimed work is basic MOW work that has customarily been performed by MOW forces.

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. Furthermore, the parties set forth specific criteria under which

reserved work may be contracted out and that these are the only criteria under which the Carrier may assert justification for its desire to contract out work customarily performed by MOW employees. The Organization contends that there is no question that the Carrier failed to comply with the advance notification and conference provisions of the Agreement. Therefore, the Organization contends that the Claimants are entitled to a sustaining award and the remedy sought.

The Organization contends that once it has presented a *prima facie* case, the burden of proof shifts to the Carrier to prove that the claim was not valid. The Carrier asserted that the work was done for reasons which it claimed qualified as contracting out exceptions under the Agreement. The Organization contends that as it is claiming this work against contractors, it is not required to show that it exclusively performed this work, as it might in a jurisdictional dispute involving other crafts.

The Carrier contends that the Organization has failed to provide any evidence of what work was done, when or where the work was performed, or how many hours per day the contractors worked. The Carrier contends that the Organization provided no evidence that this work belongs to the MOW employees.

The Carrier contends that while the Organization presents this as a contracting dispute, it is really an inter-craft dispute between crafts of the Carrier. Therefore, the Carrier contends, the Organization must show that MOW employees have exclusively performed this claimed work to the exclusion of all others.

The Carrier contends that the BNSF/BRS Agreement specifically refers to switch heaters, whereas the MOW Agreement contains a general scope provision. The Carrier contends that there is clearly a “mixed practice” on the property as to who installs switch heaters.

The Carrier contends that the Organization has failed to provide specific evidence to support its claim that Maintenance of Way employees should have performed the work. In an inter-craft dispute, the Organization must prove that the work has been exclusively performed by the MOW on a system-wide basis.

The Carrier contends that the parties’ Agreement does not reserve this work to the Organization. Rule 1 is a general scope rule and Rule 55 is a classification of work rule – not a reservation of work rule. There is a significant body of on-property awards that hold these rules – either singly or combined – do not reserve any work to the employees.

The Carrier contends that the Organization has failed to prove that this is a continuing claim, or how the Claimants are entitled to any remedy.

The parties' Agreement has been found on numerous occasions to have a general Scope Rule which does not provide an exclusive grant of work to the employees represented by the BMWED. In such a case, the Organization bears the burden of proving that the claimed work has customarily and historically been performed by the Claimants' craft.

After a careful review of the record, the Board finds that the Organization has not met its burden of proving that the installation of switch heater covers/switch heaters and related work belongs to the MOW forces. The claimed work is neither covered by the language of the Scope Rule nor shown to be historically and customarily performed by this craft.

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.