

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45177  
Docket No. MW-43868  
24-3-NRAB-00003-230213**

**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 (build right of way road) between Mile Posts 142.6 and 142.9 on the Beardstown Subdivision on April 1, 3, 4 and 6, 2015 (System File C-15-C100-114/10-15-0281 BNR).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairperson in writing in advance of its plans to contract out this 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 of the violations referred to in Parts (1) and/or (2) above, Claimants M. Harn, M. Ward, J. Pearce, M. Hartman, M. Yates, G. Kuberski, R. Jarvis, J. Mudd, J. Dildine, J. Czarnecki, D. Crim, J. Tinker, T. Snelling, C. Redington and M. Luther shall each be paid a total of twenty-seven (27) hours straight time and three (3) hours overtime at their applicable rate 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 various classifications of the Carrier's Maintenance of Way and Structures Department. On April 1, 3, 4, and 6, 2015, the Carrier assigned outside contractors Palivka Construction, Midwest Construction, and Luprey Construction to build a right of way road between Mile Posts 142.6 and 142.9 on the Beardstown Subdivision.**

**In a letter dated May 25, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated July 27, 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 work of building a right of way road 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 notification 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 Carrier's letter dated October 28, 2014 did not meet the Agreement requirements and entitles the Organization to a fully sustained Award.**

**The Carrier contends that the Organization has failed to meet its burden of proof and has failed to show that its members have performed this work to the**

exclusion of others on a system-wide basis. Therefore, the Carrier contends that the Organization has failed to show that the work was reserved to its members.

The Carrier does not deny that the work took place as alleged but contends that it was performed as a portion of the capacity expansion projects that have been an ongoing practice for many years.

The Carrier contends that it does not have adequate equipment or forces to undertake such a massive project and it is simply not sensible to expect the railroad industry to maintain a huge workforce to handle these periodic large-magnitude projects, only to lay off employees until the next project comes along. So in advance of this multi-faceted project, on October 28, 2014, the Carrier sent the Organization a contracting notice in accordance with the Note to Rule 55 of the Labor Agreement. The Notice states, in part:

**Capacity Expansion – Various Locations – Beardstown Sub-Division**

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As information, BNSF plans to construct new sidings to improve capacity and velocity on the Beardstown Sub-Division. Therefore, BNSF plans to build two new sidings at MP 142x-143x (Vermont Siding) and MP 1.2-2.3 (Concord Siding). BNSF is not adequately equipped with the necessary specialized equipment, such as scrapers, graders, rollers, compactors, dozers, loaders, blades, off-track cranes, as well as front-end loaders, dump trucks, water trucks, and track-hoes (excavators) necessary to perform this volume of dirt work. Moreover, BNSF forces do not possess the necessary specialized dirt work skills or licenses for projects of this type.

**Vermont Siding - MP 142x to MP 143x...**

This Board has previously defined large construction projects as those that “occur on such a scale that it is not realistic to think that they could be accomplished by Carrier forces working on overtime and weekends.” Third Division Award 41223. In that on-property Award, this Board denied a claim after recognizing that the Carrier was involved in “a huge undertaking that could easily require the assistance of outside forces to complete in a timely manner – and completing such a large project quickly, with a minimum disruption to the existing service, is an important and legitimate goal for the Carrier.”

Here, we find that the Carrier's conclusion that it is "not adequately equipped" to complete this large-scale project without assistance from outside forces was not unreasonable. Like many other large scale projects undertaken by this Carrier, the claimed work here is but one small part of a larger construction project. The Board concludes that the Carrier was not adequately equipped to handle the work, and it did not violate the Agreement when it contracted out the work in this claim.

In Third Division Award 43662, the Board found that the "rationale behind these awards is that large-scale construction or capacity expansion projects that ordinarily involve unit work cannot realistically be performed by Carrier forces." Applying that rationale to the expansion project at Gavin Yard, that Board wrote,

The Carrier determined that it would need additional forces to complete multi-phase project in the Gavin Yard because it was not adequately quipped to handle all aspects of a project of this magnitude and that its forces did not have the necessary skills to perform specialized dirt work.

Although the claimed work was customarily performed by the MOW forces, the Carrier provided sufficient notice of its intention to use outside forces in the capacity expansion project to build two new sidings at the Beardstown Sub-Division. As a result, the Organization has not shown a violation of the parties' Agreement by use of outside contractors in a project of this magnitude.

**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 22<sup>nd</sup> day of February 2024.