

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45179
Docket No. MW-43913
24-3-NRAB-00003-230215**

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 (R. J. Corman) to perform Maintenance of Way and Structures Department work (remove and replace the West Siding Switch, Towner, ND) on the Devils Lake Subdivision on April 9, 2015 (System File T-D-4689-E/11-15-0428 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 fo the violations referred to in Parts (1) and/or (2) above, Claimants B. Miller, D. Rust, G. Mackley, E. Zimmerman, J. Faul, K. Brandt, D. Mantz, D. Wivholm, T. Hanson, M. Bloms, R. Axtman, D. Wald, D. Riekert, R. Rostad, D. Thiebert, J. K. Nelson, L. Marcy, T. Kesler and T. Tranby shall each be compensated eight (8) hours’ straight time and three (3) hours= overtime as worked by contractor employees at their respective 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 February 23, 2015, the Carrier provided a Notice to the Organization of its intention to use outside contractors in connection with the following work:

Crossing, and Switch Renewals – Various Locations – Montana Division

As information, BNSF plans to contract for additional heavy equipment, excavators, off-track cranes or side-booms, large haul trucks, graders and F/E loaders with operators, to assist BNSF forces with the associated crossing and switch renewals located at various locations on the Montana Division. BNSF is not adequately equipped to handle all aspects of this project and BNSF forces do not possess the specialized skills for the dirt work or synchronized tandem-excavator movements...

On April 9, 2015, the Carrier assigned outside forces (R. J. Corman) to remove and replace a track switch at the West Siding Switch, Towner, North Dakota on the Devils Lake Subdivision.

In a letter dated June 1, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated August 3, 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 removing and replacing track switches is typical Maintenance of Way (“MOW”) work. This work has customarily and traditionally 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 to 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 contends that the Carrier’s assertion that the work has been subject to a “mixed practice” performed by both MOW forces and contractors is not supported in the record.

The Organization contends that it has presented a *prima facie* case of the Carrier’s violation, so the burden shifts to the company to prove that the claim is not valid. The Organization contends that the Carrier violated the Note to Rule 55 and the National Letter of Agreement when it failed to notify the Organization in writing in advance of its plans to assign outside forces to perform the claimed work. 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. The Organization contends that the Carrier’s alleged February 23, 2015, letter did not apply to the claimed work. Therefore, the Organization contends that the Claimants are entitled to the remedy sought.

The Organization contends that the Carrier’s assertion that it was inadequately equipped or staffed to address this large capacity project should be rejected, because the Carrier has failed to maintain an adequate work force, leading to the claim that it must assign the work to others. The Organization contends that it is not requesting the Carrier to piecemeal this project, which is really several small projects grouped together in one contracting notice. The Organization contends that the work claimed here is not part of a large capacity expansion project.

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 it notified the Organization that it was contracting to complete a large-scale expansion capacity project on the Montana Division. The object of the project was to accommodate the high traffic volume the Carrier was experiencing in the Bakken Shale region, to sustain traffic velocity, and to meet the needs of its customers. The Carrier contends that in advance of this complex project, it sent a contracting notice to the Organization on February 23, 2015.

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 ongoing for many years. The Carrier contends that on-property precedent has established that its forces do not perform new construction projects of this magnitude and type and that the Carrier is not obligated to piecemeal out small portions of more complex projects simply because its own employees might occasionally perform some of the work. The Carrier contends that the claimed work was one small part of a much larger project.

The Carrier contends that even if the Organization’s claim possessed merit, the claim for damages is excessive. The Claimants are not entitled to any damages, as they were fully employed and suffered no monetary loss.

The claimed work, removing and replacing track switches, is work customarily and historically performed by the MOW forces. *See, e.g.,* Third Division Award 40785, “The work in dispute here, track cutting, is routine track work, ordinarily performed by Carrier forces.” Thus, the work is reserved to the BMWED by the parties’ Agreement.

The February 23, 2015, contracting notice sent to the Organization identified the work claimed here. The work to remove and replace the West Siding Switch on the Devils Lake Subdivision was encompassed by the Notice. It was one of several switch renewals and crossing renewals that the Carrier was undertaking at this time on the Montana Division.

The Carrier asserted that its Notice satisfied its obligation under the Note to Rule 55 to give a reason for the contracting out. Here, the Carrier asserted that it was not adequately equipped to handle all aspects of this project and that its forces

did not possess the specialized skills required for all aspects of these installations, two of the exceptions listed under the Note. While the Carrier characterized this work as a smaller part of a large capacity expansion project, the Organization objects that this is really several smaller projects grouped together into one contracting notice.

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 is 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 Note to Rule 55 when it contracted out the work in this claim.

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.