

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45180  
Docket No. MW-43914  
24-3-NRAB-00003-230216**

**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 (remove and replace switches and track, haul and dump ballast, surface and weld) on the KO Subdivision beginning on April 14, 2015 and continuing through May 22, 2015 (System File T-D-4690-E/11-15-0429 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 B. Miller, D. Rust, R. Selk, G. Mackley, T. Kesler, J. Nelson, D. Riekert, D. Dahm, E. Zimmerman, J. Faul, D. Wivholm, K. Brandt, D. Mantz, T. Hanson, M. Bloms, R. Axtman, D. Wald, R. Rostad, D. Thiebert, J. K. Nelson, L. Marcy, T. Tranby, R. Voller, B. Schmidt, J. Dosch, D. Morris and C. Opp shall receive an equal and proportionate share of all hours worked by the contractors, reportedly four thousand seven hundred forty-four (4,744) hours of straight time and two thousand four hundred eighty-five (2,485) hours of 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 March 26, 2013, the Carrier notified the Organization that it intended to use outside forces in connection with the following:

**Capacity Expansion Project – Old Yard – Minot, ND**

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As information, BNSF plans to contract all work associated with the capacity expansion project located in the Old Yard in Minot, N.D. This multi-phase project will include extensive track, utility, and dirt work. BNSF is not adequately equipped to handle all aspects of a project with this magnitude, nor do BNSF forces possess the specialized dirt work skills necessary for this portion of the project....BNSF forces will be on-hand performing associated track work (rail, ties, surfacing, switch in-service). It is anticipated that this work will begin on approximately May 1, 2013...

Beginning on April 14, 2015 and continuing through May 22, 2015, the Carrier assigned outside forces (North Shore Track, Northland Construction, Abernathy Trucking, Keller Paving, J. B. Railroad, Northern Plains Railroad, R.J.S. Construction, Park Construction and Abramson Trucking) to remove and replace switches and track, haul and dump ballast, and surface and weld at the Old Minot Yard located in Minot, North Dakota on the KO Subdivision.

In a letter dated June 6 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 switches and track, hauling and dumping ballast, surfacing and welding is typical Maintenance of Way (“MOW”) work. This 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 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 March 26, 2013, 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 all work associated with the capacity expansion project located in the Old Yard in Minot, North Dakota (the Gavin Yard improvement project). The Carrier contends that in advance of this complex project, it sent a contracting notice to the Organization on March 26, 2013.

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 Organization has established that this work is customarily and historically performed by its members. In the contracting Notice, the Carrier indicated that the BNSF’s forces would be on-hand performing associated track work with the outside forces. Thus, the work is reserved to the BMWED by the parties’ Agreement.

The March 26, 2013, contracting notice sent to the Organization identified the work claimed here. The work of removing and replacing switches and track, hauling and dumping ballast, surfacing and welding on the west end of the Old Minot Yard in Minot, North Dakota on the KO Sub-division was encompassed by the Notice. It was one of several parts of the capacity expansion project that the Carrier was undertaking at the Old Yard at Minot.

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 nor did the Carrier’s forces 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 22<sup>nd</sup> day of February 2024.