

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45182
Docket No. MW-43918
24-3-NRAB-00003-230218**

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 (unload, haul and remove ties) between Mile Posts 210 and 255 on the Ottumwa Subdivision beginning on May 11, 2015 and continuing through June 18, 2015 (System File C 15-C100-136/10-15-0340 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 subcon-tracting 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, Claimant J. Sutcliffe shall be paid two hundred twenty-four (224) hours at his regular rate of pay and Claimants R. Anderson, Jr. and J. Six shall each be paid seventy-two (72) hours at their regular rate of pay and fifty-eight (58) hours at their time and one-half 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.

The Organization alleged that beginning on May 11, 2015, and continuing through June 18, 2015, the Carrier assigned outside forces (Hulcher) to unload, haul, and remove ties between Mile Posts 210 and 255 on the Ottumwa Subdivision.

In a letter dated July 5, 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 it has offered sufficient evidence that the work took place as alleged. The Organization contends that it has presented its *prima facie* case by submitting statements that described the nature and location of work performed on the claim dates. The Organization contends that the witness statement from Hulcher did not disprove its proffered evidence.

The Organization contends that unloading, hauling, and removing ties is customarily and historically performed by Maintenance of Way ("MOW") forces and is reserved to them under Rules 1, 2, 5, 29, 55 and the Note to Rule 55 of the parties' Agreement. The Organization contends that there can be no question that the claimed work is customarily performed by MOW forces and is reserved to them.

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. Therefore, the Organization contends that the Claimants are entitled to the remedy sought.

The Carrier contends that the Organization has failed to present its *prima facie* case. The Carrier contends that the evidence that the Organization offered to show that the work took place as alleged does not satisfy the Organization's burden. The Carrier contends that even if the Organization's statements are accepted, they do no more than create a dispute in fact when considered against the Carrier's evidence that no work by Hulcher took place on the claimed dates.

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.

As the moving party, the Organization bears the burden of proving all elements of its claim. First, the Organization must prove that the work occurred as alleged. In this regard, the parties have offered competing statements. The Organization's evidence states that the work occurred as claimed and the Carrier's says that neither it nor the contractor has any record of it performing work as alleged.

As a result, the Board is confronted with a conflict in the facts regarding whether the work occurred as claimed. The Board is an appellate body and, as such, has no mechanism for measuring the validity of one statement versus another. It is the well-settled principle of numerous Awards that when there is a conflict in material fact, the Board must deny the claim because the dispute in fact prevents the Organization from sustaining its burden of proof. Accordingly, the claim is denied.

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.