

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45184
Docket No. MW-43949
24-3-NRAB-00003-230220**

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 (remodeling the hump tower) in Northtown on the Twin Cities Division beginning on May 27, 2015 and continuing (System File T-D-4726-E/11-15-0468 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. Olson, P. Garth and J. Sauvageau must each receive an equal and proportionate share of all hours worked by the contractor forces at their respective overtime 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 various classifications of the Carrier's Maintenance of Way and Structures Department, including Bridge and Building (B&B) foreman, B&B 1st class carpenter and B&B truck driver.

The Carrier contends that by letter dated May 12, 2015, it provided proper advance notice of its intention to use outside contractors for certain facility improvements at the Northtown Offices on the Twin Cities Division. It reads, in part:

“As information, BNSF plans to contract all work associated with facility improvements to the offices located at the Northtown Terminal Hump Tower and GOB on the Twin Cities Division. The existing buildings are in need of upgrades, modification and interior improvements to be suitable for use by BNSF forces. Therefore, the buildings will be demo/retro-fitted with remodeled offices, locker rooms, and other various interior modifications. BNSF is not adequately equipped to handle all aspects of this project nor do BNSF forces possess all the specialized skills for all aspects of the project....”

Beginning on May 27, 2015, and continuing, the Carrier assigned outside forces (A&A) to remodel the hump tower in Northtown on the Twin Cities Division.

In a letter dated July 24, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated September 22, 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, construction, maintenance and repair 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.

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.

The Organization contends that the Carrier has failed to prove its assertion that it was not adequately equipped to perform this work on the basis that the MOW forces did not possess the necessary skills to perform the work claimed. The Carrier asserted that the state of Minnesota required licensing for this work, which the MOW forces do not possess. The Organization contends that it established that no special licensing was required.

The Carrier contends that the Organization has failed to show that the work by the contractor even occurred as alleged. 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 contracted the remodeling work at the hump tower, as it has done for many years. The Carrier contends that previous Awards of this Board have held that building construction, remodeling, and demolition work is not customarily performed by the Carrier's employees and can be contracted out with impunity. The Carrier contends that the claimed work was part of a larger project to upgrade and remodel various buildings at Northtown Yard, including the Northtown Terminal Hump Tower. The Carrier further contends that Minnesota State Law requires all employees who do remodeling work to have specialized licenses, not possessed by the Carrier's forces.

The first question to be resolved is whether the Organization has shown that the work of building, construction, maintenance and repair is reserved to the MOW forces by the parties' Agreement or because it is work customarily and historically reserved to them. If the work is not customarily performed by the MOW forces, the ban on contracting out of this work found in the Note to Rule 55 does not apply. As this Board wrote in Third Division Award 40794, "While the parties may disagree about the exact

meaning of ‘customarily performed,’ numerous prior Awards have established that the Note to Rule 55 does not apply where there is a ‘mixed practice’ of work being done by both Carrier forces and outside contractors.”

While the Carrier concedes that this work has been done by its own forces, it argues that a “mixed practice” exists, as the work has also frequently been performed by contractors on this property. Each side submitted a plethora of evidence to support their opposing positions. A review of the evidence reveals that contractors have performed a substantial amount of the same type of work in this location. What’s more, while these lists of examples begin in the distant past, they continue to the time the claim was filed. Thus, this Board finds the instances to be both temporally and geographically germane. Just as this Board was in Third Division Awards 40794 and 40795, we are persuaded by the Carrier’s evidence of a mixed practice regarding the building, construction, maintenance and repair work claimed here. The Note to Rule 55 did not apply.

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.