

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45185
Docket No. MW-43950
24-3-NRAB-00003-230221**

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 (distress rail, install crossings, clean up scrap and leveling of the ground) at the Old Minot Yard in Minot, North Dakota on the KO Subdivision beginning on May 27, 2015 and continuing through June 9, 2015 (System File T-D-4715-E/11-15-0465 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, D. Wald, R. Rostad, J. Nelson, L. Marcy, B. Schmidt, D. Morris, C. Opp and J. Dosch must “*** each receive an equal portion of the eight hundred thirteen (813) straight time hours and four hundred eighty eight (488) hours overtime as worked by the contract employees, with pay to be at their respective 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 foreman, laborer, machine operator, truck driver, welder and grinder.

The Carrier asserted that it provided Notice to the Organization on March 26, 2013, April 26, 2013, September 30, 2014, and October 16, 2014, of its intention to use outside contractors on a Capacity Expansion Project at Old Yard, Minot, North Dakota. The September 30, 2014, Notice reads, in part:

As information, BNSF advised by letters dated March 26, 2013 and April 26, 2013 of its plans to contract all work associated with the capacity expansion project located in the Old Yard in Minot, N.D. This letter regarding this multi-phase project included extensive track, utility, and dirt work. That earlier letter is hereby amended to the extent necessary to include additional construction of tracks on west end of lead track into Minot's (Old) Yard, for the reasons stated in those earlier letters. The work to be contracted includes, but is not limited to load/haul/unload approx. 4,000 l.f. track panels; demo existing track and components; necessary sub-grade prep; excavate/compact turnout pads; load/haul/set approx. 5 new turnouts (including leading and trailing panels); and debris removal...

The Organization requested a contracting conference and the parties met to discuss the Capacity Expansion Project on April 9, 2014. Afterward, the Organization summarized the agreement reached during the conference:

"I asked why you list load/haul ballast, unloading, and setting in switches. You said the intent is for us to do all track work and haul ballast, with the contractors only performing the dirt work."

Beginning on May 27, 2015, and continuing through June 9, 2015, the Carrier assigned outside forces (North Shore Track, J.B. Railroad and Park Construction) to

distress rail, install crossings, clean up scrap, and level the ground at the Old Minot Yard located in Minot, North Dakota on the KO Subdivision. On the claim dates, the contractor employees, utilized ordinary equipment to accomplish the work.

In a letter dated July 23, 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 distressing rail, installing crossings, cleaning up scrap and leveling the ground is typical Maintenance of Way work. Such work has customarily and historically been assigned to and performed by the Carrier's Maintenance of Way forces and is contractually reserved to them under Rules 1, 2, 5, 6, 55 and the Note to Rule 55.

The Note to Rule 55 states, in part:

“By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event that the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith....

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

The Organization contends that based on the Carrier's representations during the contracting conference that it only intended to contract out the dirt work and that the MOW would perform all the track work associated with the Minot Yard project, the Organization refrained from disputing performance of the dirt work by outside forces. However, the Organization contends that this claim is not for dirt work and thus, the Notices are not applicable to this claim.

The Organization contends that the Carrier's failure to timely discuss its intention to use outside forces to perform other than "dirt work" is a failure to comply with the good faith discussion referenced in the Note to Rule 55. The Organization contends that the failure to comply with the notification and conference provisions of the parties' Agreement requires a sustaining 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 contends that numerous on-property Awards have already confirmed that the Carrier's forces do not perform new construction projects of the magnitude and type as that considered in the instant capacity expansion project. *See*, Third Division Awards 37433, 41222, 41223, and 44388, and Award 22 of Public Law Board No. 4768. The Carrier contends that it notified the Organization that the Carrier was not adequately equipped and its forces did not possess the specialized skills necessary to perform a project of this magnitude and type, thus meeting the exceptions in the Note to Rule 55.

Even if some part of the claimed work has customarily been performed by the Organization's members, numerous Awards have found that a project of this magnitude and type cannot be accomplished except through the hire of outside forces. The record amply demonstrates that the Carrier provided a Notice of its intent to contract out work at Minot Yard and the parties met to discuss the proposed

contracting.

The unrefuted evidence shows that the parties reached agreement as to what work would be performed by outside forces and what would be performed by the Carrier's forces. The parties engaged in a good faith attempt to reach an understanding concerning the contracting and they were successful. However, the Carrier then assigned all the track and dirt work to the outside forces, in contravention of the good faith agreement reached. This hardly complies with the letter or the spirit of a contracting conference as described in the Note to Rule 55.

Had no agreement been reached, the Carrier would have been permitted to proceed with its intention to contract out the work, but having reached agreement, it was no longer free to deprive the Claimants of the claimed work. The Claimants were entitled to the track work, as agreed to by the Carrier. Accordingly, the Board finds that the parties should make a joint review of the Carrier's records to determine the number of hours worked by the contractors and compensate the Claimants correspondingly.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of February 2024.