

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45186
Docket No. MW-43951
24-3-NRAB-00003-230222**

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 panels) between Mile Posts 7 and 12 on the Rolla Subdivision on May 21, 2015 and continuing through May 25, 2015 (System File T-D-4725-M/11-15-0462 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 J. Moreland and R. Axtman must each receive forty (40) hours 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 as a machine operator and as a laborer.

On May 13, 2015, the Carrier provided notice to the Organization of its intention to use outside contractors on the Bridge Renewals at various locations on the Twin Cities Division.

The claim alleges that on May 21 through May 25, 2015, the Carrier assigned outside forces to use a crane to unload panels between Mile Posts 7 and 12 on the Rolla Subdivision.

In a letter dated July 16, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated September 10, 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 demonstrated that the work occurred as claimed and that it has satisfied its obligation to present a *prima facie* case of the Carrier's violations. As a result, the Organization claims, the burden shifts to the Carrier to show that the claim is not valid.

The Organization contends that the unloading of panels 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 under Rules 1, 2, 5, 6, 55 and the Note to Rule 55. The Organization contends that the unloading of panels was in connection with the construction, maintenance, or dismantling of tracks, so it is clearly work that is customarily performed by and reserved to MOW forces.

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, contrary to the Carrier's assertion, the notices provided on January 27, 2014 and May 13, 2015, did not serve as advance notice of the Carrier's intention to assign the claimed work to outside forces.

The Carrier contends that the Organization has failed to show that the work took place as claimed and its claim must fail. The Carrier contends that the only proof provided of the work occurring as claimed were two unsupported statements, which are insufficient evidence to meet the Organization's burden of proof.

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 the claimed work was properly contracted out. Even if the work was within the scope of the Agreement, the Carrier contends that it provided proper notice of its intention to contract this work due to being inadequately equipped and its forces not possessing the specialized skills required to handle all aspects of the project. The Carrier contends that the Organization has failed to prove any violation of Appendix Y. Finally, the Carrier contends that the Organization has failed to demonstrate that the Claimants are entitled to a monetary remedy.

The initial burden of proving the claim rests with the Organization. In a matter such as this, it must prove first that the work occurred as claimed, and that the disputed work belongs to the employees and is encompassed by the Scope Rule of the Agreement. The Organization contends that the work at issue here – the unloading of track panels – is customarily and historically performed by its members.

However, the Board finds that the record falls short of demonstrating that the work was performed as claimed. Although the Organization submitted a statement that the panels were unloaded, there is no evidence of who unloaded the panels or when. The Organization carries the burden of demonstrating a violation of the Agreement, and this single statement is insufficient to carry that burden.

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.