

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45187
Docket No. MW-43952
24-3-NRAB-00003-230223**

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 (haul and place ballast) on the Mitchell Subdivision on May 11 and 12, 2015 (System File T-D-4718-M/11-15-0455 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 T. Plummer, M. Meehan and K. Nugteren shall each receive twenty-four (24) 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. On May 11 and 12, 2015, the Carrier assigned outside contractors to haul and place ballast on the Mitchell Subdivision.

In a letter dated July 9, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated September 1, 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 hauling and placing ballast is typical Maintenance of Way ("MOW") work, which 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 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 the Carrier's assertion that it did not own the ballast must fail because the Carrier provided no evidence, such as a bill of sale or invoice, to show that it did not own the ballast that was hauled by the outside contractor on the claimed dates. The Organization contends that in light of the Carrier's failure to prove any of its affirmative defenses, the Claimants are entitled to the claimed remedy.

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 ballast was purchased from a supplier and transported from the supplier's quarry by the supplier's agent to the area near MP 351 on the Mitchell Subdivision. The Carrier contends that it did not take ownership of the ballast until after it was delivered and unloaded. Therefore, the Agreement was not violated.

The precedent on this property as to whether hauling ballast is customarily and historically performed by the MOW, is mixed. Numerous awards of this Board have concluded that hauling ballast is customarily and historically done by the Organization's members. *See*, Third Division Awards 40461, 44297, and 43282. The awards that found otherwise can be distinguished on the facts, as we find insufficient evidence of a mixed practice on this record.

The Carrier initially asserted that the work was not scope-covered because this ballast was not owned by the Carrier until after it was delivered. However, it failed to provide any evidence of an FOB arrangement. The precedent on this issue is consistent. Where an affirmative defense is not supported with proof of the contract claimed or any other evidence, the defense must fail for lack of proof.

However, the Board finds that the record does not contain sufficient information from which a proper remedy can be determined. Accordingly, the Board finds that the parties should make a joint review of the available employee records and calculate the Claimants' proper compensation in compliance with the holdings of the Board.

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.