

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45188  
Docket No. MW-43953  
24-3-NRAB-00003-230224**

**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) between Mile Posts 211.2 and 211.4 on the Marshall Subdivision on April 29 and 30, 2015 (System File T-D-4712-M/11-15-0450 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 and K. Wacker 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 April 29 and 30, 2015, the Carrier assigned outside forces (Fenton Construction) to haul and place ballast between Mile Posts 211.2 and 211.4 on the Marshall Subdivision, using a front end loader and a dump truck.

In a letter dated June 27, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated August 25, 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 Carrier here asserted that the work was performed in connection with an emergency. The Organization contends that the Carrier failed to show that a *bona fide* emergency existed. The Organization contends that even if the Carrier faced an

urgent situation, the Carrier's forces were able and available to respond.

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 in an emergency, it is permitted to use any resource available to it. The Carrier contends that the Note to Rule 55 recognizes that notice to the Organization of contracting out is not necessary in an emergency situation:

In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization not less than fifteen (15) days prior thereto, except in emergency time requirements" cases.

The Carrier contends that at the time it hired outside forces, the track's speed limit was reduced to ten mph due to rough track. In order to maintain track stability and prevent a major north/south corridor from being taken out of service, the contractor delivered ballast to the Carrier's surfacing gangs who were performing this work.

Numerous awards of this Board have concluded that hauling ballast is customarily and historically done by the Organization's members. However, where an emergency exists, this Board has held that the Carrier is afforded wide latitude in its actions and decisions. Third Division Award 40767.

This Board has defined an emergency as "an unforeseen combination of circumstances that calls for immediate action." Third Division Award 20527; Third Division Award 10965. This Board has also suggested that an event which is neither sudden nor unforeseeable, such as a heavy snowstorm, is not an emergency.

The destabilization of the track was affecting train traffic and constituted an emergency. The Carrier presented sufficient evidence that the hauling and placing of ballast was necessary due to an emergency situation that was sudden and unforeseeable. Therefore, the Carrier had wide latitude to address the problem.

**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 22<sup>nd</sup> day of February 2024.