

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45190
Docket No. MW-43957
24-3-NRAB-00003-230226**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employes 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 703.0 and 703.3 on the Aberdeen Subdivision on May 4, 2015 (System File T-D-4713-M/11-15-0451 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, K. Nugteren and A. Larned shall each receive twelve (12) 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 truck driver.

On May 4, 2015, the Carrier assigned outside forces (Fenton Construction) to perform the work of hauling and placing ballast between Mile Posts 703.0 and 703.3 on the Aberdeen Subdivision. The outside contractor utilized four ordinary trucks with drivers.

In a letter dated July 2, 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 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 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.

Additionally, the Organization contends that the Carrier failed to demonstrate that an exception under the Note to Rule 55 applied, as the work performed by the

outside contractors did not require special equipment or any special skills that were not already possessed by the Carrier's MOW forces.

The Organization contends that the Carrier's assertion that it was inadequately equipped or staffed to address this large capacity project should be rejected. The Organization is not requesting the Carrier to piecemeal this project, which it asserts are several small projects grouped together in one contracting notice. The Organization contends the work claimed here is not part of a single large capacity expansion project.

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 its February 10, 2015 Notice properly notified the Organization of the Carrier's intention to subcontract this work:

RE: Crossing, and Switch Renewals – Various Locations –Twin Cities Division

As information, BNSF plans to contract for additional heavy equipment, excavators, off-track cranes or side-booms, large haul trucks, graders, and F/E loaders with operators, to assist BNSF forces with the associated crossing and switch renewals located at various locations on the Twin Cities Division. BNSF is not adequately equipped to handle all aspects of this project and BNSF forces do not possess the specialized skills for the dirt work or synchronized tandem-excavator movements. The work to be contracted includes, but is not limited to, load/haul/unload panels; necessary sub-grade prep; furnish/haul/place necessary sub-grade materials; necessary turnout pad construction (including grading/compaction); furnish/haul/unload necessary ballast; remove/set necessary panels; remove/replace crossing panels (including planks); pave necessary hot-mix asphalt approaches and turnout foundations; furnish/haul/unload necessary aggregate/rock/rip-rap; and debris removal at the following approximate locations...

The Carrier contends that it notified the Organization that it planned to

contract out crossing and switch renewals in various locations on the Twin Cities Division (including the Aberdeen Subdivision) because the Carrier was not adequately equipped to handle all aspects of this project nor did its forces possess the specialized skills needed. The Carrier contends that once the project was contracted out, it was not required to piecemeal portions of the project to the BMWED's members.

The Carrier contends that even if the Organization's claim possessed merit, the claim for damages is excessive. The Claimants are not entitled to any damages, as they were fully employed and suffered no monetary loss.

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. 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.

Therefore, pursuant to the Note to Rule 55, the Carrier had the burden of showing that one of the listed exceptions applies here. The Note reads,

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.

The Carrier argued that its Notice satisfied its obligation under the Note to Rule 55 to give a reason for the contracting out. Here, the Carrier asserted that it was not adequately equipped to handle all aspects of this project and that its forces did not possess the specialized skills required for all aspects of these installations, two of the exceptions listed under the Note. While the Carrier characterized this work as a smaller part of a large capacity expansion project, the Organization objects that this is really several smaller projects grouped together into one contracting notice.

After a careful review of the record, we find that the Carrier has failed to offer

any evidence purporting to show how it was “not adequately equipped” or that its forces “did not possess the specialized skills” needed to complete this project. In fact, the Carrier does not identify a large-scale project that this work was part of. Its notice says only that it intended to perform crossing and switch renewals at various locations throughout the Twin Cities Division. If these renewals were part of a larger project, the Board does not find it identified in the record. The Organization’s point is well-taken that this record does not demonstrate that the Carrier was undertaking a single large-scale construction project for which it was not adequately equipped.

In accordance with prior precedent on this property, the named Claimants are entitled to be compensated for the number of hours actually worked by the contractors on the dates cited in the original claim. Lastly, we remand the issue to the parties for a joint check of the Carrier’s records to determine the number of hours worked by the contractors over the claimed dates. The eligible Claimants shall be compensated at their respective straight time rate of pay for their portion of the total hours actually worked by the contractors.

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.