

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45191
Docket No. MW-43958
24-3-NRAB-00003-230227**

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 (preparation and pouring of a 40 x 50 concrete slab) at Mile Post 185.2 in East Dubuque, Illinois on the Aurora Subdivision on August 3, 7, 10, 11 and 12, 2015 (System File C-15-C100-150/10-15-0373 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, Claimant J. Haas shall be compensated for twenty-nine (29) hours at his straight time rate of pay and for three (3) hours at his overtime rate of pay; Claimant M. Church shall be compensated for eight (8) hours at his straight time rate of pay and for three (3) hours at his overtime rate of pay; Claimant J. Church shall be compensated for sixteen (16) hours at his straight time rate of pay and for three (3) hours at his overtime rate of pay; Claimant R. Heinek shall be compensated for twenty-two (22) hours at his straight time rate of pay and for three (3) hours at his overtime rate of pay; Claimant E.**

Running shall be compensated for sixteen (16) hours at his straight time rate of pay and for three (3) hours at his overtime rate of pay; Claimant C. Stevens shall be compensated for fourteen (14) hours at his straight time rate of pay and for three (3) hours at his overtime rate of pay and; Claimant S. Allen shall be compensated for twenty-one (21) hours at his straight time rate of pay and for three (3) hours at his overtime rate 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 Department, including Bridge and Building (B&B) foreman, B&B assistant foreman, B&B mechanic, and Group 3 Skid Steer Operator.

The Carrier notified the Organization by letter dated April 10, 2015, of its intention to use outside contractors for all work associated with the turnkey installation of pre-engineered or metal siding building for protection of the new Haz-Mat response equipment located in Denver, Colorado, and other locations including East Dubuque, Illinois. The Carrier asserted that its forces “do not possess the necessary skills for the turn-key installation of building necessary for this project.”

On August 3, 7, 10, 11 and 12, 2015, the Carrier assigned outside forces to prepare and pour a 40 x 50 concrete slab at Mile Post 185.2 in East Dubuque, Illinois on the Aurora Subdivision.

In a letter dated August 17, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated October 19, 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 preparing and pouring of a concrete slab is typical Maintenance of Way (“MOW”) work. This work has customarily and traditionally been assigned to and performed by the Carrier’s MOW forces and is contractually reserved to them under Rules 1, 2, 5, 6, 29, 55 and the Note to Rule 55 to the parties’ Agreement.

The Organization contends that the Carrier failed to comply with the provisions of the Note to Rule 55 and Appendix Y. The Organization contends that the work performed by the contractor forces neither required special equipment nor any special skills that were not already possessed by the experienced and fully qualified Claimants or any other MOW forces.

The Organization contends that the Carrier’s assertion that the work has been subject to a “mixed practice” performed by both MOW forces and contractors is not supported in the record. 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 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 April 10, 2015 contracting Notice was sufficient to inform the Organization that it needed to use outside forces to complete the Turnkey Installation of a Haz-Mat Response Equipment building in East Dubuque, Illinois. The Notice advised the Organization that its forces did not possess the necessary skills for the project.

In a claims matter, the Organization bears the burden of proving its *prima facie* case. It must prove that the work occurred as claimed, that the disputed work belongs to the employees, and is encompassed by the Scope Rule of the Agreement. In the

alternative, the Organization can show that the work at issue here – preparing and pouring concrete – is customarily and historically performed by its members.

There is no express provision of the Agreement reserving this work to the Organization. An on-property Award has previously found that Rule 55 F does not reserve the concrete work claimed to the Organization's members. Award 2 of Public Law Board 6538. Additionally, this Board finds no evidence in the record that the BMWED has customarily and historically performed this work.

The Organization has failed to meet its burden of proving that the claimed work was customarily performed by the MOW forces. Therefore, it has not developed its *prima facie* case and the Board finds it unnecessary to address the Carrier's defenses. The claim must be denied.

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.