

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45196  
Docket No. MW-43996  
24-3-NRAB-00003-230232**

**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 (lifting the track out of mud for surfacing) between Mile Posts 18 and 24 on the Browns Valley Subdivision beginning on May 11, 2015 and continuing through May 28, 2015 (System File T-D-4719-M/11-15-0456 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. Iverson, B. Moses, J. Anderson, B. Latham, A. Zinken, B. Iverson, C. Moses, B. Jarveis and R. Benson must ‘... each receive an equal and proportional amount of the hours worked by the contractor, with pay to be at their respective 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 and Structures Department.

On May 11, 2015 and continuing through May 28, 2015, the Carrier assigned outside forces (R J Corman/Lakeside) to lift the track out of mud for surfacing between Mile Posts 18 and 24 on the Browns Valley Subdivision of the Twin Cities Division.

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 track maintenance and repair work 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, there was a significant amount of rainfall on the Subdivision. This rainfall caused soft subgrade, causing the tracks between Mile Posts 18 and 24 to sink into the mud. These tracks were rendered out of service, constituting an emergency situation. The Carrier contends that it utilized its own forces to address the emergency and supplemented with outside forces.

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.

Here, the Organization pointed out in its on-property correspondence that the claimed work in response to a heavy rainfall was not performed around-the-clock, nor even seven days a week, belying the Carrier's assertion that an emergency existed. The Organization asserted, without rebuttal, that the track was taken out of service well before the contractors were brought onto the site. It was ordinary track work.

The Carrier has not shown that the necessary repairs were made with urgency, let alone on an emergency basis, as this Board has defined the term. The Carrier has failed to support its affirmative defense that the sinking of the tracks due to a heavy rainfall constituted an emergency. Notice pursuant to Rule 55 was required, but not provided. 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 22<sup>nd</sup> day of February 2024.