

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45197
Docket No. MW-43997
24-3-NRAB-00003-230233**

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 (R. J. Corman) to perform Maintenance of Way and Structures Department work (remove and install switches) between CP 1247 and CP 1243 on the Dickinson Subdivision on May 5, 6, 7, 8, 11 and 12, 2015 (System File B-M-2870-EN/11-15-0441 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 J. Roller, M. Lamprecht, B. Jahner, S. Wisniewski, N. Singer and M. Renner must each receive forty-five (45) hours of straight time and twelve (12) hours of overtime as worked by the contract employees, with pay to be at their respective 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.

The Organization asserted that on May 5, 6, 7, 8, 11 and 12, 2015, the Carrier assigned outside contractors (R. J. Corman) to perform the removal and installation of switches between CP 1247 and CP 1243 on the Dickinson Subdivision.

In a letter dated June 23, 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 it has offered sufficient evidence that the work took place as alleged. The Organization contends that it has presented its *prima facie* case by submitting a statement that described the nature and location of work performed on the claim dates. The Organization contends that that Carrier has offered no evidence to refute this statement.

The Organization contends that removing and installing switches is customarily and historically performed by Maintenance of Way ("MOW") forces and is reserved to them under Rules 1, 2, 5, 29, 55 and the Note to Rule 55 of the parties' Agreement. The Organization contends that there can be no question that the claimed work is customarily performed by MOW forces and is reserved to them.

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 there is no question that the Carrier failed to comply with the advance notification and conference provisions of the Agreement. Therefore, the Organization contends that the Claimants are entitled to the remedy sought.

The Carrier contends that the Organization has failed to present its *prima facie* case. The Carrier contends that the single statement that the Organization offered to show that the work took place as alleged does not satisfy the Organization's burden. The Carrier contends that even if the Organization's self-serving statement is accepted, it does no more than create a dispute in fact.

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.

As the moving party, the Organization bears the burden of proving all elements of its claim. First, the Organization must prove that the work occurred as alleged. In this regard, the Organization has offered an un rebutted statement that the work occurred as alleged. The Carrier offered no evidence to the contrary, but simply dismissed the statement as noncredible because it is "self-serving." But, as the Third Division wrote in Award 20773, "Many documents which are exchanged by the parties during the handling of these types of disputes are, to a great extent, self-serving. But, that factor does not, in and of itself, necessarily disqualify the document from all consideration." The Claimant's statement was written contemporaneously with the work being performed by an eyewitness who offered great detail regarding what he observed. The Carrier offered no evidence to refute the statement.

Thus, we have found that the Organization has carried its burden of proving that the work occurred as alleged. Since the on-property correspondence contains no evidence of the Carrier having provided a Notice to the Organization that it intended to contract out the claimed work, we find that the Agreement was violated. The Board remands the matter for a joint check of the Carrier's records to determine the number of hours worked by the contractors so that the Claimants may receive a proportional share.

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.