

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45199
Docket No. MW-43999
24-3-NRAB-00003-230235**

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 replace switch and track panels) on the KO Subdivision on May 4, 2015 (System File T-D-4706-E/11-15-0444 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 B. Miller, D. Wivholm, E. Zimmerman, K. Brandt, D. Mantz, T. Hanson and D. Wald must “*** each receive seven (7) hours of straight time and six (6) hours 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.

On March 5, 2013, the Carrier and the Organization entered into a Settlement Agreement ("the Summit Agreement") one provision of which reads:

E. Mobile Track Construction Gangs that perform the work of track construction, track and switch panel installation and grade crossing installation covered under this Agreement are added to coverage of Section 12 (RSG's) of the BNSF Addendum to the 2012 National Agreement, and the parties further agree:

- i. The Organization agrees to withdraw all existing track and switch panel installation claims appealed on or before August 31, 2012. The Organization also agrees that during 2013 it will not file new claims if a contractor performs the type of work performed by a Section 12 Track Construction Gang on a seniority district where a Section 12 Track Construction Gang is simultaneously working. In return, BNSF agrees that it will not perform track construction or track, switch and crossing installation "blitzes" with contractors on seniority districts where Section 12 Track Construction Gangs are working. If BNSF acts in good faith relative to this provision in 2013, the Organization will agree to extend the claims prohibition of this provision through 2014. If BNSF similarly acts in good faith during 2014, the Organization will agree to extend the claims prohibition of this provision through 2015.**

Thereafter, the parties agreed to extend the claims prohibition into 2015.

On June 5, 2013, the Carrier notified the Organization of its intention to utilize outside contractors on a large-scale capacity expansion project on the Montana and Twin Cities Divisions, including the Glasgow Sub-Division and in Gavin Yard located in Minot, North Dakota. The Carrier notified the Organization that it did not have adequate equipment or forces to undertake a project of this size. The Carrier also indicated that the project required both specialized skills and specialized equipment not possessed by the Carrier or its forces.

On May 4, 2015, the Carrier assigned outside forces (R. J. Corman) to remove and replace the Broadway switch and track panels, at Mile Post 203.056 and Mile Post 202.9 on the KO Subdivision.

In a letter dated June 26, 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 removing and replacing switches and track panels 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 further contends that the Carrier failed to comply with the Note to Rule 55 and Appendix Y by failing to provide proper advance notification of its plan to use outside forces and failing to make good faith efforts to reduce the incidence of subcontracting. The Organization contends that the Carrier's letter dated June 5, 2013, did not meet the Agreement requirements and entitles the Organization to a fully sustained Award.

The Organization contends that the Summit Agreement is inapplicable to this work and did not bar the Organization from filing this claim. The Organization concedes that a Carrier track construction gang was also working on the seniority district but contends that the contracting notices sent by the Carrier show that the Carrier was engaged in a blitz with contractors. Under the circumstances, the claim is not precluded by the Summit Agreement.

The Carrier does not deny that the work took place as alleged but contends that it was performed as a portion of the capacity expansion projects that have been

ongoing for many years. The Carrier contends that on-property precedent has established that its forces do not perform new construction projects of this magnitude and type. Further, numerous, past on-property awards have recognized that the Carrier is not obligated to piecemeal out small portions of more complex projects simply because its own employees might occasionally perform some of the work.

The Carrier further contends that the Organization has failed to prove that the work was Scope-covered, in that it has failed to show that the work in question has been exclusively or customarily performed by MOW employees.

The Carrier contends that it does not have adequate equipment or forces to undertake such a massive project and it is simply not sensible to expect the railroad industry to maintain a huge workforce to handle these periodic large-magnitude projects, only to lay off employees until the next project comes along. So in advance of this multi-faceted project, the Organization was sent a contracting notice in accordance with the Note to Rule 55 of the Labor Agreement.

The Carrier contends that the Organization agreed in the March 5, 2013, Summit Agreement, that it would not file claims for contractors performing track construction work if a Track Construction Gang was working on that Seniority District. There is no dispute that during the claimed time, Track Construction Gang (CG-03) was working on the Minot, North Dakota District 300 on May 4, 2015. The Organization's claim should be dismissed.

The first issue that must be addressed is the Carrier's argument that this claim should be denied due to the parties' March 5, 2013, Summit Agreement. The Organization argues that the Agreement does not bar this claim, because the Carrier was performing a "blitz."

The Carrier asserts that the best evidence of what the parties intended when they agreed to exempt "blitzes" from the Summit Agreement is the parties' past understanding and usage of the term "blitz." In their on-property correspondence, the Carrier defined a blitz as "a major maintenance effort by...BNSF on one of its main lines." It gave an example of a mutually recognized blitz, The "Thayer" Blitz, where the Carrier took 12 days to work on 250 miles of track and spent \$16 million. The Carrier explained that during the Thayer Blitz, the Carrier renewed 8 bridges, installed 41,000 concrete ties, installed 46,000 wood ties, undercut 32 miles of track, performed 1,300 thermite welds, surfaced 115 track miles, relayed 115,000 lineal feet of rail, performed 282 pass miles of rail grinding, and rebuilt 177 grade crossings.

The Organization felt the term should be defined as in the dictionary, as “a fast and powerful effort,” but offered no evidence to support its assertion that this was the parties’ mutual understanding of the term, “blitz.”

A “blitz” has previously been recognized as a major project involving multiple crews from different crafts during the same track windows in an effort to minimize the adverse impact on customers and communities. The record here does not support a finding that the Carrier was conducting a blitz during the claimed work. In accordance with the Summit Agreement, this claim should not have been filed and will be dismissed.

AWARD

Claim dismissed.

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.