

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45200
Docket No. MW-44001
24-3-NRAB-00003-230236**

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 (Fenton Construction) to perform Maintenance of Way and Structures Department work of hauling ballast to Mile Post 704.6 near Wolsey, South Dakota on the Aberdeen Subdivision on July 27, 28, 30 and 31, 2015 (System File T-D-4770-M/11-16-0023 BNR).**
- (2) The Agreement was violated when the Carrier assigned outside forces (Fenton Construction) to perform Maintenance of Way and Structures Department work of hauling ballast to Mile Post 704.6 near Wolsey, South Dakota on the Aberdeen Subdivision on August 5, 6 and 7, 2015 (System File T-D-4777-M/11-16-0033).**
- (3) The Agreement was further violated when the Carrier failed to notify the General Chairman, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by the Note to Rule 55 and Appendix Y.**
- (4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants T. Plummer, M. Meehan, K. Nugteren and A.**

Larned shall now each be compensated forty-eight (48) hours overtime at their respective rates of pay.

- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants T. Plummer, M. Meehan, K. Nugteren and A. Larned shall now each be compensated forty-two (42) hours overtime 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 Department, including truck driver.

On various days between July 27, 2015 and August 7, 2015, the Carrier assigned outside forces (Fenton Construction) to haul ballast to Mile Post 704.06 near Wolsey, South Dakota on the Aberdeen Subdivision. On the claim dates, the outside forces utilized four ordinary trucks with drivers.

In letters dated September 25, 2015 and October 1, 2015, the Organization filed claims on behalf of the Claimants. The Carrier denied the claims in letters dated November 23, 2015 and November 30, 2015. Following discussion of these disputes in conference, the parties agreed to combine the two claims into one for presentation to the Board. Thereafter, 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 ballast 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.

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 January 26, 2015 Notice properly notified the Organization of the Carrier’s intention to subcontract this work:

Bridge, Track, Crossing, and Switch Renewals -Various Locations Twin

Cities Division
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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 bridge, track, 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; pour/pave necessary bridge abutments, caps, piers; drive necessary h-pile and sheet piles; furnish/haul/unload necessary rip-rap protection; necessary setting of bridge components; and debris removal at the following locations:

Aberdeen Subdivision

Crossings: MP 513.1, 513.2, 517-533.9, 521.2, 533.1, 616-650, 687-728, 701.7

Switches: MP 512.9

Aberdeen Yard

Crossings: MP 2210-2211

Appleton Subdivision

Crossings: MP 609.2, 611.4

Switches: LS 200 MP 0, LS 2004 MP 599.7

Canton Subdivision:

Crossings: MP 50.5, 56.4

Marshall Subdivision

Crossings: MP 2-50, 186.2

Track Panels: MP 2-50

Switches MP 104.4

Mitchell Subdivision

Crossings: MP 322.1, 360.8

Mobridge Subdivision

Crossings: MP 749.6, 799.4, 803.9

Bridge Panels: MP 805.7

Switches: MP 719.7, 728.5, 783, 784.5

Morris Subdivision

Switches: MP 100.9, 101.2, 101.8

Sioux City Subdivision

Crossings: MP 105

Sioux City Yard

Crossings: MP 105

Switches: LS 555 MP 0

Wayzata Subdivision

Switches: MP 76.1

Willmar Yard

Switches: LS 552 MP 0

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). This work was being contracted out 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. The Carrier asserted two exceptions applied: 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. 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. The Carrier reminds that it is not obligated to piecemeal out smaller portions of large projects.

This Board has previously defined large construction projects as those that "occur on such a scale that it is not realistic to think that they could be accomplished by Carrier forces working on overtime and weekends." Third Division Award 41223. In that on-property Award, this Board denied a claim after recognizing that the Carrier was involved in "a huge undertaking that could easily require the assistance of outside forces to complete in a timely manner – and completing such a large project quickly, with a minimum disruption to the existing service, is an important and legitimate goal for the Carrier."

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 single "huge undertaking," 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.