

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45201
Docket No. MW-44013
24-3-NRAB-00003-230237**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employes 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 (Ferrosafe, LLC) to perform Maintenance of Way and Structures Department work (vegetation control and tree removal under and around bridges) on the Allouez, Casco, Hinckley, Lakes and Brainerd Subdivisions beginning on May 11, 2015 and continuing (System File T-D-4720-M/11-15-0458 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. Warner, D. MacDonald, C. Bucheger, D. Bender, R. Whitworth, L. Bondley, B. Flickinger, J. Bartczak, K. Dotzler, B. Fegraeus, J. Vandenberghe, J. Paulson, T. Swanberg, N. Berchild, C. Stotesbery, J. Fuller, K. Kirberger, A. Gregory, K. Paulson, T. Kalsbeck, T. Haltom, R. Randall, J. Berns, D. Young, T. Bedore, D. Buchholz, M. Johnson, M. Senger, J. Litwin, J. Paquette, N. Simmons, C. Green, M. Olson, J. Sauvageau, J. Barthel, M. Morrisette, J. Lindenberg, Z. Schendel, N. Stattelmann, J. Crowley Jr., D. Ascheman, M. Oswald, J. Seguin, M. Harmon, J. Pierce, T. Tobin, J. Barr, R.**

Harris, C. McCluskey, T. Williams, T. Koch, C. Flatten, L. Enze, K. Borg, J. Lockwood, M. Wilson, G. Franka, J. Parker and B. Johnson 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 August 30, 2013, the Carrier notified the Organization of its intention to assign outside contractors to “necessary bridge vegetation removal and herbicide application programs at various locations on the BNSF System.” The Carrier notified the Organization that it did not possess the necessary specialized equipment and its forces did not possess the necessary skills for the project, writing, “Herbicide application will include the use of a State and Federally regulated herbicides, or combinations thereof. These herbicides must be applied by commercially licensed applicators in compliance with applicable State or Federal regulations.”

Beginning on May 11, 2015 and continuing, the Carrier assigned outside forces (FerroSAFE, LLC) to perform vegetation control and tree removal under and around bridges on the Allouez, Casco, Hinckley, Lakes and Brainerd Subdivisions.

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 2, 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 vegetation control and tree removal 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 letters dated December 19, 2014 and August 30, 2013, did not meet the Agreement requirements and entitles the Organization to a fully sustained Award. The Organization contends that the Notice states that the Carrier was in need of heavy equipment and commercially licensed chemical applicators, but the contractors utilized hand tools, chain saws, and an application of ordinary chemicals.

The Carrier contends that the parties’ Agreement contains a general Scope Rule and that the disputed work in this case is vegetation control and tree removal, which MOW forces are not trained or equipped to do. The Carrier contends that in Third Division Award 44258, it has already been determined that herbicide application is not MOW work when commercial licenses are required.

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. The Organization contends that the work at issue here – vegetation control and tree removal – is customarily and historically performed by its members. The Carrier’s unrefuted statement was that it did not have the required licenses needed to obtain the regulated herbicides. Although the Organization asserted that ordinary pesticides could be applied, it failed to show that the Carrier’s forces would be able to apply them.

The Organization has failed to meet its burden of proving that the claimed work was customarily performed by the MOW forces. Additionally, the Carrier has proven that this work fell under the exceptions to the Note to Rule 55 that permitted contracting because it had neither the specialized equipment nor forces with special skills necessary for this work.

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.