

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45202
Docket No. MW-44014
24-3-NRAB-00003-230238**

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 (Lakeside Construction and R. J. Corman) to perform Maintenance of Way and Structures Department work (digging out bridge ends, back filling, placing rip rap, removing cups and pile and related work) at Mile Post 11.4 on the Rolla Subdivision, Twin Cities Division beginning on June 22, 2015 through June 25, 2015 (System File B-M-2880-EN/11-15-0488 BNR).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman, 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 K. Brandt, E. Zimmerman, T. Hanson and T. Smith shall each receive “*** an equal portion of one hundred forty (140) hours of straight time and sixty six (66) 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 the Carrier's Maintenance of Way Department.

On June 22, 23, 24 and 25, 2015, the Carrier assigned outside forces to perform bridge change-out including digging out bridge ends, back filling, placing rip-rap, removing cups and piles at Mile Post 11.4 on the Rolla Subdivision.

In a letter dated August 14, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated October 13, 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 digging out bridge ends, back filling, placing rip rap, removing cups and pile and related 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.

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 May 13, 2015 Notice properly notified the Organization of the Carrier's intention to subcontract certain work:

Bridge Renewals – Various Locations – Twin Cities Division

As information, BNSF plans to contract work associated with the bridge renewals at various locations on the Twin Cities Division. BNSF will contract for all associated heavy equipment with operators such as, snooper truck (bridge inspection vehicles) excavators (track-hoes), F/E loaders, graders, earthmovers, compactors, dump trucks, with operators. In addition, BNSF will contract for specialized equipment such as, offtrack cranes, with drilling attachments, and concrete pumpers, all with operators. BNSF does not possess all the necessary equipment for this project nor do BNSF forces possess the specialized skills necessary to perform the dirt work and off-track crane operations.

Jamestown Sub – LS 26, MP 64.40; Glasgow Sub – MP 116.80 and MP 72.80; Niobe Sub – MP 32.70; Devils Lake Sub – MP 11.40; Glasston Sub – MP 36.20 and MP 37.40; Rolla Sub – MP 11.40.

The Carrier contends that it notified the Organization that it planned to contract out bridge renewals in various locations on the Twin Cities Division (including the Rolla Subdivision). It asserted that 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 Organization points out that the parties' Agreement provides that the classes of employees within the Bridge and Building and Roadway Equipment sub-departments are required to perform the "work in connection with the construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service...." We find that the claimed work is reserved to the BMWED by the parties' Agreement and the record shows that the work is customarily and historically performed by the MOW forces.

The May 13, 2015 contracting notice sent to the Organization identified the work claimed here. The Carrier asserted that its Notice satisfied its obligation under the Note to Rule 55 to give a reason for the contracting out. Here, the Carrier asserted 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, two of the exceptions listed under the Note. 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 bridge 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.