

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45203
Docket No. MW-44015
24-3-NRAB-00003-230239**

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 a road crossing track panel) within the Gavin Yard at the Mill crossing on June 16, 2015 (System File T-D-4735-E/11-15-0484 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 B. Miller, K. Brandt, T. Hanson, D. Wald, R. Rostad and B. Schmidt shall each receive ‘*** eight (8) straight time hours and three (3) 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 5, 2013, the Carrier notified the Organization of its intention to contract out certain work:

Capacity Expansion - Various Locations - Montana and Twin Cities Divisions

As you are aware, BNSF has experienced tremendous growth in freight volume due to the recently discovered oil and gas reserves, known as the Bakken Shale, located between BNSF's Montana and Twin Cities Divisions...In order for BNSF to continue to meet its customer needs, as well as provide for the global demand of this vital energy product, it is continuing to expand existing capacity with additional mainlines, yard tracks, and sidings through multi-year, multi-phase projects. Therefore, these projects must be completed as rapidly as possible in order to remain competitive in the transportation industry and still meet BNSF customers' needs in a timely manner. BNSF, with multiple letters on various dates, notified your office of the Company's need to increase capacity on various sub-divisions to accommodate the sudden increase in freight traffic over these locations. In addition to those letters, be advised that BNSF plans to contract for additional dirt and track work on both the Glasgow Sub-Division and in Gavin Yard located in Minot, N.D.

BNSF is not adequately equipped for projects of this magnitude which require both specialized equipment not possessed by BNSF forces and specialized skills not possessed by BNSF employees....

The work to be contracted includes, but is not limited to the following locations:

Minot, N.D. - Gavin Yard Phases 1-6...

On June 16, 2015, the Carrier assigned outside forces to remove and replace a road crossing track panel within the Gavin Yard at the Mill Crossing in Minot, North Dakota.

In a letter dated August 10, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated October 12, 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 a road crossing track panel 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 because the Carrier has failed to maintain an adequate work force. The Organization contends that a lack of proper planning with respect to manpower is

not a valid reason for contracting out work. The Organization contends that the Carrier's assertion that the Bakken Shale oil boom created exigent circumstances requiring immediate action by the Carrier is belied by the Carrier's slow response, as the work has continued for more than two years.

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 it timely notified the Organization that it was contracting a capacity expansion project involving the installation of new track, relocating buildings, dirt work and drainage installation at the Gavin Yard.

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, many on-property awards have held 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 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 has established that this work is customarily and historically performed by its members. In the on-property correspondence, the Carrier acknowledged that removing and replacing a road crossing track panel has been performed by the MOW employees.

Nonetheless, the Carrier asserts that it has met two of the exceptions under the Note to Rule 55, as it was not adequately equipped and its forces did not possess special skills necessary to complete this large, complex project.

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.”

The improvements necessary to the Carrier’s system to meet increased demand due to the Bakken Shale oil boom have been recognized by numerous Boards to be a large-capacity project for which the Carrier is generally not adequately equipped to address without the assistance of outside forces. Third Division Awards 43710, 44255, 44422. The time taken by the Carrier to complete this massive undertaking does not change the result.

Here, we find that the Carrier’s conclusion that it is “not adequately equipped” to complete this large-scale project without assistance from outside forces was not unreasonable. Like many other large scale projects undertaken by this Carrier, the claimed work here is but one small part of a larger construction project. The Board concludes that the Carrier was not adequately equipped to handle the work, and it did not violate the Agreement when it contracted out the work claimed here.

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.