

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 45204  
Docket No. MW-44018  
24-3-NRAB-00003-230240

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 (R. J. Corman) to perform Maintenance of Way and Structures Department work (installing, welding, tying in track panels and related work) for the new set out tracks on both sides of the main track from Mile Posts 50.5 to 51.0 on the Glasgow Subdivision, Montana Division beginning on June 11, 2015 through June 26, 2015 (System File T-D-4733-E/11-15-0478 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 J. Quinn, J. Peterson, B. Williams, D. Knutson, R. Hayes, L. Cruitt, G. Bentz, J. St. Pierre, M. Sackman, R. Mace, E. Janey, J. Elker and T. Crow shall each receive ‘... their respective rates of pay for the hours listed on Attachment B, as worked by the contract employees.’”

**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, including foreman, truck driver, machine operator, laborer, welder, and grinder.

Beginning on June 11, 2015 through June 26, 2015, the Carrier assigned outside forces (R. J. Corman) the work of installing, welding, tying in track panels, and related work for the new set out tracks on both sides of the main track from Mile Posts 50.5 to 51.0 on the Glasgow Subdivision of the Montana Division.

In a letter dated August 7, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated October 6, 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 installing, welding, tying in track panels, and related work for the new set out tracks is customarily and historically performed by Maintenance of Way ("MOW") forces and is reserved to them under Rules 1, 2, 5, 29, 55 and the Note to Rule 55 of the parties' Agreement. The Organization contends that there can be no question that the claimed work is customarily performed by MOW forces and is reserved to them.

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.

The Organization contends that a review of the record demonstrates that the Carrier failed to comply with the advance notification and conference provisions of the Agreement. Therefore, the Organization contends that the Claimants are entitled to the remedy sought.

The Carrier contends that the Organization failed to present its *prima facie* case that the work took place. 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 provided multiple notices to the Organization of its intention to subcontract certain work in connection with capacity expansion projects that have been ongoing for many years. The Carrier contends that it timely notified the Organization that it was contracting out a capacity expansion project at the Gavin Yard due to the Bakken Shale oil boom. The Carrier contends that on-property precedent has established that its forces do not perform new construction projects of this magnitude and type. 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 Organization denies that it received any such notice and pointed out at multiple points in the on-property correspondence that the Carrier had failed to include the purported notices in the record. A review of the record confirms that the first time any contracting Notices were included in the on-property exchanges was with the Carrier's submission to this Board.

As an appellate Board, we are constrained to consider the record that was developed on the property and are not at liberty to consider evidence included for the

first time in a party's submission to this Board. Third Division Award 19928; Second Division Award 8944.

Since the Carrier was unable to show that it properly notified the Organization of its intention to contract out this work, it cannot rely on any exceptions to the Note to Rule 55 to justify contracting out this MOW work. The Board remands the matter for a joint check of the Carrier's records to determine the number of hours worked by the contractors so that the Claimants may receive a proportional share.

**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 22<sup>nd</sup> day of February 2024.