

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45205  
Docket No. MW-44019  
24-3-NRAB-00003-230241**

**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 (Hulcher) to perform Maintenance of Way and Structures Department work (clean and winterize switches) at various locations within the Northtown Yard, Class Yard and Departure Track on the Twin Cities Division on June 29 and 30, 2015 and July 1 and 2, 2015 (System File T-D-4750-M/11-15-0491 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. Gaylor, T. Lom, K. Johnston, K. Melchisedech and R. Bernier shall “\*\*\* each receive forty eight (48) hours as worked by the contract employees with pay to be at their respective overtime 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 and Structures Department.

On June 29 and 30, 2015 and July 1 and 2, 2015, the Carrier assigned outside forces (Hulcher) to clean and winterize switches at various locations within the Northtown Yard, Class Yard, and Departure Track on the Twin Cities Division. On the claim dates, four employees of the outside contractor, utilized a suction vacuum truck along with hand tools - to clean and winterize switches.

In a letter dated August 28, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated October 27, 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 cleaning and winterizing switches has customarily and historically been assigned to the Carrier's Maintenance of Way ("MOW") forces and is contractually reserved to them under the parties' collective bargaining agreement. The Organization contends that the Carrier did not factually dispute this assertion.

Because the work is scope-covered, the Organization contends, it may only be contracted out under certain conditions expressed in the Note to Rule 55 and only after

the Carrier has notified the Organization and provided an opportunity for the parties to discuss the matter.

The Organization further contends that the letter dated December 19, 2014, which the Carrier asserted served as advance notification, does not identify the claimed work and failed to comply with the requirements of the Agreement. The Organization contends that, at best, the Carrier provided a vague, blanket notice of its intention to use outside contractors rather than MOW employees.

The Organization contends that although the Carrier asserted that it was not adequately equipped to perform this work with its own forces, in fact, the Carrier has a plethora of equipment allowing it to clean and winterize switches. The Organization contends that the Carrier's "specialized equipment" defense is not supported by the record.

The Carrier contends that the Organization has failed to carry its burden of showing that the work occurred as claimed. 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 even if the work was scope-covered, it did not have the type of equipment necessary to perform this work and met one of the exceptions under the Note to Rule 55. Further, the Organization did not prove that any company had this equipment available for rent at this particular time and in sufficient quantity to complete this project.

There is no dispute that the work took place as alleged. Furthermore, the Organization has demonstrated that this work, use of a vacuum truck to clean and winterize switches, is work customarily performed by the Organization's members. As has been reiterated by numerous Boards on too many occasions to repeat, the term "customary" does not mean "exclusively," but rather what is usual or ordinary. Third Division Award 43962. As the Organization has satisfactorily shown a *prima facie* violation, the burden of proof shifts to the Carrier. Third Division Award 43970.

On December 19, 2014, the Carrier provided the following notice to the Organization, with a tentative schedule attached:

As information the Carrier plans to continue the ongoing program of contracting the use of yard cleaners and vacuum trucks on the BNSF system in 2015.

Three yard cleaners will be provided in 2015 and each will include a contractor's technician to assist with the operation and maintenance of the machine. Nine vacuum trucks will be used at various locations this year. Each vacuum truck will have one contract technician and one contract operator/driver.

This year we plan to have three yard cleaners working a total of 400 days. We will also have nine vacuum trucks working 410 days. We plan to use these yard cleaners and vacuum trucks over the entire BNSF system.

Attached is a tentative copy of the 2015 Yard Cleaning and Vac Truck work locations. Obviously these locations are subject to change as the work season progresses...

The parties held a contracting conference but were unable to reach agreement regarding this proposed work.

The Carrier demonstrated that it provided specific notice to the Organization of its intention to contract this work to outside forces. The notice contained detailed information regarding the places and times that contractors would be used. However, the Carrier also bears the burden of showing that the work falls into one of the exceptions expressly identified in the Note to Rule 55:

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's Notice fails to identify the reason for the use of outside forces, let alone any one of the specific reasons listed in the Note to Rule 55 that may justify contracting out. Although the Carrier later argued that it did not own this type of specialized equipment, it offered no evidence that the vacuum truck used was any different from those owned by the Carrier. Furthermore, its failure to identify any reason for contracting out in its Notice requires a sustaining Award. In Third Division Award 43572, an on-property award, this Board wrote,

The notice in this case does not identify a reason to justify contracting under the Note to Rule 55, and the Carrier did not submit any evidence that would support any contractual justification. On this record, the claim shall be sustained.

However, the Board finds that the record does not contain sufficient information to determine an appropriate remedy. Accordingly, the issue shall be remanded for a joint check of the Carrier's records to determine the number of hours worked by the contractors in order to calculate the Claimants' proper compensation.

**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.