

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45206  
Docket No. MW-44020  
24-3-NRAB-00003-230242**

**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 (fill ballast on and around new track switches) in Palermo, North Dakota between Mile Posts 46 and 49 and in Berthold, North Dakota at Mile Posts 22.5 to 24.5 on the Glasgow Subdivision on the Montana Division on June 30, 2015 and July 1 and 9, 2015 (System File T-D-4739-E/11-15-0502 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, D. Wald, G. Neset, J. Footh, M. Bloms and R. Mace, Jr. shall each receive ‘... the hours listed on Attachment ‘A’ under claimed hour’s the actual hours worked by the contract employees with pay to be at claimant’s respective 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, including foreman, truck driver, machine operator, and laborer.

On June 30, 2015 and July 1 and 9, 2015, the Carrier assigned outside forces (R. J. Corman) to fill in ballast on and around track switches in Palermo, North Dakota between Mile Posts 46 and 49 and in Berthold, North Dakota at Mile Posts 22.5 to 24.5 on the Glasgow Subdivision of the Montana Division.

In a letter dated August 27, 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 filling in ballast on and around track switches 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 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 it timely notified the Organization that it was contracting a capacity expansion project in Palermo and Berthold, North Dakota on the Glasgow Subdivision on the Montana Division. The on-property correspondence shows that the Carrier provided twelve contracting notices to the Organization regarding the capacity expansion project (May 24, 2011; April 13, 2012; May 18, 2012; August 20, 2012; October 9, 2012; March 26, 2013; April 26, 2013; May 2, 2013; May 15, 2013; May 16, 2013 (2); and June 5, 2013). Each of these notices alleged either that the Carrier was not adequately equipped or that its forces did not possess the necessary specialized skills for projects of this magnitude.

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 precedent on this property as to whether placing ballast is customarily and

historically performed by the MOW, is mixed. Numerous awards of this Board have concluded that hauling ballast is customarily and historically done by the Organization's members. Third Division Awards 40461, 44297, and 43282. The awards that found otherwise can be distinguished on the facts, as we find insufficient evidence of a mixed practice on this record.

Therefore, pursuant to the Note to Rule 55, the Carrier had the burden of showing that one of the listed exceptions applies here. The Note reads,

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 argued that its Notices satisfied its obligation under the Note to Rule 55 to give a reason for contracting out the work. 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.

The Organization argues that the Carrier's twelve Notices failed to provide sufficient notice. In its post-conference letter, the Organization wrote:

In its disallowance of the initial claim, the Carrier initially asserted that a notice, simply dated June 5, of the subcontracted work was provided to the Organization. As noted in its appeal, the Carrier failed to provide a copy of that letter.

Now after receipt of the Carrier's letter dated January 11, 2016, the subcontracted work is asserted to be found someplace within the content of the twelve (12) letters enclosed with the January 11, letter. Other than the initial reference by Ms. Jimenez to the June 5, letter, the Carrier does not lend any guidance as to verbiage or description of the work found in any of the twelve letters. In that the Carrier failed to cite any one specific letter, it is obvious to the Organization, that the Carrier can not find any

letter that actually addresses the claimed work. During conference the Carrier would not clarify its position in regard to which notice is alleged to have actually included the disputed work.

It remains the position of the Organization that no letter mentioned, either specifically or impliedly, by the Carrier actually addresses the disputed work...

Despite the Organization's concern, the Board finds that the claimed work is covered by two of the twelve notices. The May 2, and June 5, 2013, Notices identify the work that is claimed here. While it certainly would have been less confusing had the Carrier specifically identified which Notice applied to which work, it cannot be said that the provision of multiple Notices was fatally defective. This was a large, complex capacity project which spanned several years. The Board finds no evidence that the parties were unable to engage in a meaningful contracting conference. We cannot find that the Carrier failed to engage in good faith discussions by failing to identify the Notices that applied to this claimed work. The Notices were sufficient.

With respect to the reason given for contracting out this Scope-covered work, 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 this work, two of the exceptions listed under the Note.

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."

Here, we find that the Carrier's conclusion that it is "not adequately equipped" or that its forces did not possess "specialized skills" 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 in this claim.

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