

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45207
Docket No. MW-44021
24-3-NRAB-00003-230243**

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 (Hulcher) to perform Maintenance of Way and Structures Department work (unloading panels and concrete ties) at Becker, Minnesota on the Staples Subdivision on July 12 and 13, 2015 (System File T-D-4757-M/11-16-0003 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 R. Pawlu, Jr., M. May and B. Hoemberg shall each ‘... receive thirty two (32) hours and with the pay to be at the Claimant’s respective overtime 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.

On March 5, 2015, the Carrier notified the Organization of its intention to contract out certain work:

Additional Heavy Equipment - Various Locations - Twin Cities Division

As information, BNSF plans to contract for additional heavy equipment, such as excavators and front-end loaders with operators to assist BNSF forces with the installation of various temporary turnouts to support the associated regional and system gang projects located on the Twin Cities Division. These temporary turnouts will be installed to allow for the machines and equipment on these production gangs to tie up at more efficient locations and prevent lost production time when traveling longer distances to tie up equipment. BNSF is not adequately equipped with the sufficient equipment to perform all aspects of this project.

The work to be performed by the contractor includes but is not limited to, load/haul/set/remove turnouts (including necessary leading/trailing track panels); necessary excavate/grade/compact materials for set-out track; load/haul/unload necessary sub-ballast and ballast; and debris removal on the following sub-divisions, involved with any regional and system gang projects:

Aberdeen, Allouez, Appleton, Brainerd, Browns Valley, Casco, Devils Lake, Grand Forks, Hib Tac, Hillsboro, Hinckley, Jamestown, K O, Lakes, Marshall, Midway, Monticello, Morris, Noyes, P Line, Prosper, St. Paul, Staples, Watertown....

On July 12 and 13, 2015, the Carrier assigned outside forces (Hulcher) to perform the work of unloading panels and concrete ties at Becker, Minnesota on the Staples Subdivision. On the claim dates, the outside contractor utilized two excavators with operators and one groundsman.

In a letter dated September 9, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated November 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 unloading panels and concrete ties 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 to address this large capacity project should be rejected because the contractors used ordinary equipment used by MOW forces in the past and 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 of work.

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 the claimed work was part of the ongoing capacity expansion project on the Montana and Twin Cities Divisions. The Carrier contends that it timely notified the Organization that it was not adequately equipped with sufficient equipment to perform all aspects of the project. 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 unloading panels and concrete ties has been performed by the MOW employees.

Nonetheless, the Carrier asserts that it has met one of the exceptions under the Note to Rule 55, as it was not adequately equipped to complete this large, complex project without the use of outside forces.

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”

to complete this large-scale project without assistance from outside forces is supported by the record. 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.