

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45208
Docket No. MW-44022
24-3-NRAB-00003-230244**

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 (B&R Construction and All American Builders LLC) to perform Maintenance of Way and Structures Department work (set the steel and construct a steel section truck building) in the Hobson Yards in Lincoln, Nebraska beginning on August 24, 2015 and continuing through August 30, 2015 (System File C-15-C100-156/10-15-0395 BNR).**
- (2) The Agreement was further violated when the Carrier failed to make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants F. Fankhauser, J. Menousek, D. Johnson, J. Taylor, B. Kreikemeier and W. Brhel shall each ‘... be paid forty (40) straight time hours and thirty (30) overtime hours, at their respective Steel Erection rates of pay, for the work performed by the outside contractors on the above-cited claim dates, as settlement of this claim.’”**

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.

The Carrier contends that by letter dated April 10, 2015, it provided proper advance notice of its intention to use outside contractors for all work associated with the turnkey installation of pre-engineered or metal siding for protection of the new Haz-Mat response equipment. The Carrier notified that this work would take place in several locations, including Lincoln, Nebraska. The Carrier asserted that its forces "do not possess the necessary skills for the turn-key installation of building necessary for this project."

Beginning on August 24, 2015 and continuing through August 30, 2015, the Carrier assigned outside forces (B&R Construction and All American Builders LLC) to set the steel and construct a steel section truck building in the Hobson Yards in Lincoln, Nebraska.

In a letter dated September 17, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated November 16, 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 setting steel and constructing a steel section building is typical Maintenance of Way ("MOW") work. This work has customarily and historically been assigned to and performed by the Carrier's MOW forces and is contractually reserved to them under Rules 1, 2, 5, 6, 29, 55 and the Note

to Rule 55 to the parties' Agreement.

The Organization contends that the Carrier failed to comply with the provisions of the Note to Rule 55 and Appendix Y. The Organization contends that the work performed by the contractor forces required no special skills that were not already possessed by the experienced and fully qualified Claimants or any other MOW forces.

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 numerous Boards have held that constructing and remodeling buildings is not customarily performed by BNSF employees and can be contracted out. The Carrier contends that its forces do not possess construction skills and the Carrier does not keep a workforce ready to complete major construction projects, such as the new buildings at issue here.

The Carrier contends that it timely notified the Organization that it was contracting out this construction work because its forces did not possess the specialized skills necessary to complete this construction project. Further, the Carrier contends that it is not required to piecemeal one part of a large project to the Organization's members.

The first question to be resolved is whether the Organization has shown that the work of setting steel and constructing a steel section building is reserved to the MOW forces by the parties' Agreement or because it is work customarily and historically reserved to them. If the work is not customarily performed by the MOW forces, the ban on contracting out of this work found in the Note to Rule 55 does not apply. As this Board wrote in Third Division Award 40794, "While the parties may disagree about the exact meaning of 'customarily performed,' numerous prior Awards have established that the Note to Rule 55 does not apply where there is a 'mixed practice' of work being done by both Carrier forces and outside contractors."

While the Carrier concedes that this work has been done by its own forces, it argues that a "mixed practice" exists, as the work has also frequently been performed

by contractors on this property. A review of the evidence submitted reveals that contractors have performed a substantial amount of the same type of work in this location. What's more, while these lists of examples begin in the distant past, they continue to the time the claim was filed. Thus, this Board finds the instances to be both temporally and geographically germane. Just as this Board was in Third Division Awards 40794 and 40795, we are persuaded that the Carrier's evidence of a mixed practice regarding the construction work claimed here defeats the Organization's assertion that its members have customarily performed this work. The Note to Rule 55 did not apply.

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.