

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45213
Docket No. MW-44138
24-3-NRAB-00003-230249**

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 to perform Maintenance of Way and Structures Department work (track construction) near Mile Post 248.5 on the Staples Subdivision, Twin Cities Division beginning on July 21, 2015 and continuing (System File T-D-4765-M/11-16-0018 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notification of its intent to contract out the aforesaid work or 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 R. Boll, M. Hoopman, S. Ellis, M. Jorgensen, E. Steil, M. Meisch and J. Jenson shall now each be compensated an equal and proportionate share of all hours worked by the contractor 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 March 5, 2013, the Carrier and the Organization entered into a Settlement Agreement ("the Summit Agreement") one provision of which reads:

E. Mobile Track Construction Gangs that perform the work of track construction, track and switch panel installation and grade crossing installation covered under this Agreement are added to coverage of Section 12 (RSG's) of the BNSF Addendum to the 2012 National Agreement, and the parties further agree:

- i. The Organization agrees to withdraw all existing track and switch panel installation claims appealed on or before August 31, 2012. The Organization also agrees that during 2013 it will not file new claims if a contractor performs the type of work performed by a Section 12 Track Construction Gang on a seniority district where a Section 12 Track Construction Gang is simultaneously working. In return, BNSF agrees that it will not perform track construction or track, switch and crossing installation "blitzes" with contractors on seniority districts where Section 12 Track Construction Gangs are working. If BNSF acts in good faith relative to this provision in 2013, the Organization will agree to extend the claims prohibition of this provision through 2014. If BNSF similarly acts in good faith during 2014, the Organization will agree to extend the claims prohibition of this provision through 2015.**

Thereafter, the parties agreed to extend the claims prohibition into 2015.

On March 5, 2015, the Carrier notified the Organization of its intention to utilize outside contractors 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, including the Staples Sub-Division. The Carrier also notified the Organization that it was not adequately equipped to perform all aspects of the project.

In a letter dated September 18, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated November 19, 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 track construction 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 further contends that the Carrier failed to comply with the Note to Rule 55 and Appendix Y by failing to provide proper advance notification of its plan to use outside forces and failing to make good faith efforts to reduce the incidence of subcontracting. The Organization contends that the Carrier's letter dated March 5, 2015, did not meet the Agreement requirements and entitles the Organization to a fully sustained Award.

The Organization contends that the Summit Agreement is inapplicable to this work and did not bar the Organization from filing this claim. The Organization concedes that a Carrier track construction gang was also working on the seniority district but contends that the contracting notices sent by the Carrier show that the Carrier was engaged in a blitz with contractors. Under the circumstances, the claim is not precluded by the Summit Agreement.

The Carrier contends that the Organization has failed to prove that the work was Scope-covered, in that it has failed to show that the work in question has been exclusively or customarily performed by MOW employees.

The Carrier contends that it does not have adequate equipment or forces to undertake such a massive project and it is simply not sensible to expect the railroad industry to maintain a huge workforce to handle these periodic large-magnitude projects, only to lay off employees until the next project comes along. So in advance

of this multi-faceted project, the Organization was sent a contracting notice in accordance with the Note to Rule 55 of the Labor Agreement.

The Carrier contends that the Organization agreed in the March 5, 2013, Summit Agreement, that it would not file claims for contractors performing track construction work if a Track Construction Gang was working on that Seniority District. There is no dispute that during the claimed time, a Track Construction Gang was working alongside the outside forces. The Organization's claim should be dismissed.

The first issue that must be addressed is the Carrier's argument that this claim should be denied due to the parties' March 5, 2013, Summit Agreement. The Organization argues that the Agreement does not bar this claim, because the Carrier was performing a "blitz."

A blitz has been defined as when the Carrier "schedules major maintenance, repair, and upgrade work involving multiple crews from different crafts during the same track windows in order to minimize an adverse impact on customers and communities." Third Division Award 40316. A mutually recognized blitz is the "Thayer" Blitz, where the Carrier took 12 days to work on 250 miles of track and spent \$16 million. The Carrier explained that during the Thayer Blitz, the Carrier renewed 8 bridges, installed 41,000 concrete ties, installed 46,000 wood ties, undercut 32 miles of track, performed 1,300 thermite welds, surfaced 115 track miles, relayed 115,000 lineal feet of rail, performed 282 pass miles of rail grinding, and rebuilt 177 grade crossings.

The Organization felt the term should be defined as in the dictionary, as "a fast and powerful effort," but offered no evidence to support its assertion that this was the parties' mutual understanding of the term. In the on-property handling, the Organization wrote, "Based upon the sheer number of switch and track panels to be installed by subcontracted forces on District 300, in 2015, constitutes the work being performed under the concept of a blitz, in violation of the March 5, 2013 Agreement."

A "blitz" has previously been recognized as a major project involving multiple crews from different crafts during the same track windows in an effort to minimize the adverse impact on customers and communities. The record here does not support a finding that the Carrier was conducting a blitz during the claimed work. In accordance with the Summit Agreement, this claim should not have been filed and will be dismissed.

AWARD

Claim dismissed.

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.