

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45214
Docket No. MW-44139
24-3-NRAB-00003-230250**

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 (CentiMark Roofing) to perform Maintenance of Way and Structures Department work (patching and repairing a roof) at the Brainerd Work Equipment Shop in Brainerd, Minnesota on July 20, 21, 22, 23 and 24, 2015 (System File T-D-4766-M/11-16-0019 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 T. Miller, J. Erickson, R. Whitworth, D. MacDonald, J. Bartczak and L. Bondley shall now each be compensated sixty (60) hours 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.

Claimants have established and hold seniority within the Carrier's Maintenance of Way Department.

On July 20, 21, 22, 23 and 24, 2015, the Carrier assigned outside forces (CentiMark Roofing) to patch and repair a roof at the Brainerd Work Equipment Shop in Brainerd, Minnesota.

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 roof repair and patching is typical Maintenance of Way ("MOW") work and that such work has customarily and historically been assigned to and performed by the Carrier's MOW forces and is contractually reserved to them.

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 notice 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 criteria listed in the Note to Rule 55 are the only criteria under which the Carrier may assert justification for its desire to contract out work. The Organization contends that this Board has consistently held that the Carrier has the burden of proof when asserting that an exception to the Note to Rule 55 applied, allowing it to contract out scope-covered 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 record contains sufficient evidence that the work was performed as alleged. The repair of roofs has been found to fall within the scope of work customarily performed by the Carrier’s MOW forces. Third Division Award 40493.

Rule 55 requires that the Carrier provide Notice of its intent to contract out Scope-covered work, for one of the exceptions listed. 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.

Although the on-property correspondence refers to a May 12, 2015, Notice of Intent to contract out this work, no Notice was contained in the record submitted to the Board. The Organization pointed this out during the on-property exchanges, but still no Notice was added to the record. Without the contracting notice, the Board cannot determine whether the Carrier properly relied upon any of the exceptions.

Since the on-property correspondence contains no evidence of the Carrier having provided a Notice to the Organization that it intended to contract out the claimed work, we find that the Agreement was violated. The Board remands the matter for a joint check of the Carrier’s records to determine the number of hours worked by the contractors so that the Claimants may receive a proportional share.

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 22nd day of February 2024.