

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45223
Docket No. MW-45890
24-3-NRAB-00003-200380**

The Third Division consisted of the regular members and in addition Referee Melinda Gordon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned or otherwise allowed outside forces (Vector Construction) to perform Maintenance of Way Department work (bridge concrete prep, repair and debris removal) at or near Mile Posts 237.4 to 237.9 on the Cuba Subdivision beginning October 10, 2018 to November 16, 2018 and continuing (System File 0493-SLA8- 8100/14-I9-0095 BNS).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding the work referred to in Part (1) above and when it failed to assert good-faith efforts to reach an understanding and reduce the amount of contracting as required by Appendix No. 8 and the December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants Z. Bray, R. Groetke, R. Harris, E. Williams, G. Bryan, J. Brown and J. Owens ‘... should be allowed compensation of two-hundred (sic) (250) hours and continuing, for work being wrongfully performed by the contractors, at the claimants’ respective 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 Organization filed the instant claim on behalf of Claimants alleging that the Carrier violated the parties' Agreement by using a contractor to perform Maintenance of Way ("MOW") Department work. On August 31, 2018, the Carrier served a contracting notice on the Organization notifying the Organization of a bridge repair project between Mile Post ("MP") 237.0 to MP 237.9 on the Cuba Subdivision and Heartland Division. The notice stated that the Carrier would contract for epoxy/polymer repairs on two bridges, and other ancillary work. The Carrier's notice stated the work would commence on approximately September 24, 2018.

When the Carrier plans to contract out work typically performed by its MOW employees that the parties agree falls under the Scope of the Agreement, it is required to notify the General Chairman in writing of such plans in accordance with Appendix No. 8, Article IV of the May 17, 1968, National Agreement and the amendment and interpretation thereof embodied in the December 11, 1981, National Letter of Agreement, which reads:

APPENDIX NO. 8

**ARTICLE IV - CONTRACTING OUT- NATIONAL AGREEMENT
5/17/68**

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss the matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

Existing rules with respect to contracting out on individual properties may be retained in their entirety in lieu of this rule by an organization giving written notice to the carrier involved at any time within 90 days after the date of this agreement.

LETTER OF UNDERSTANDING DATED SEPTEMBER 28, 1956

In connection with the application of the above, the Carrier may, without conference with the General Chairman, arrange for the use of equipment of contractors or others and use other than Maintenance of Way employees of the Carrier in the performance of work in emergencies, such as wrecks, washouts, fires, earthquakes, landslides and, similar disasters.”

“December 11, 1981

Dear Mr. Berge:

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

Notwithstanding any other provision of the December 11, 1981 National Agreement, the parties shall be free to serve notices concerning the matters herein at any time after January 1, 1984. However, such notices shall not become effective before July 1, 1984.

“Please indicate your concurrence by affixing your signature in the space provided below.

Very truly yours,

/s/ Charles I. Hopkins, Jr. Charles I. Hopkins, Jr.

I concur:

/s/ O. M. Berge”

Irrespective of the adequacy of the notice issued to the Organization by the Carrier, the Organization raises an initial procedural argument that must be addressed prior to addressing the merits of this case. The evidence demonstrates that the Carrier failed to comply with the time limits mandated by Rule 14 of the Agreement. The Carrier violated Rule 14 of the Agreement by failing to timely respond to the Organization’s Claim. Rule 14 of the Agreement mandates, in pertinent part:

RULE 14 - TIME LIMIT ON CLAIMS AND GRIEVANCES 14(a) - Handling Claims and Grievances. All claims or grievances shall be handled as follows:

- (1) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. *Should any such claim or grievance be disallowed, the Carrier shall, within sixty (60) days from the date same is filed notify whoever filed the claim or grievance (the employee*

or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.” (Emphasis added).

The Organization timely and properly filed the claim. However, the Carrier responded sixty-one (61) days after the Organization’s filing. The Carrier’s failure to comply with the mandates of Rule 14 requires that the claim be sustained. This Board sees no reason to deviate from the strict adherence to time limits in these proceedings. The Board may have reached a different conclusion if the merits of the claim had been examined. Lastly, we remand the issue to the parties for a joint check of the Carrier’s records to determine the number of hours worked by the contractors over the claimed dates. The Claimants shall be compensated at their respective straight time rate of pay for their respective straight time rate of pay for their portion of the total hours actually worked by the contractors.

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 28th day of March 2024.