

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 45537
Docket No. MW-47389
26-3-NRAB-00003-220417

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

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Alton & Southern Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Union Pacific Railroad) to perform Maintenance of Way and Structures Department work (installing new rail) at various locations on the Carrier’s property on October 24, 25 and 26, 2020 (Carrier’s File 1754951 ALS).
- (2) The Agreement was further violated when the Carrier failed to provide proper advance notice of its intent to contract this work or make a good-faith effort to reach an understanding concerning the aforesaid contracting as required by Rule 44.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. White, K. Elliott, J. Sims, S. Williams, K. Hulsey, S. Maloata, D. Hulsey, C. Severs, P. Boien and D. Patterson shall now each “*** receive fifty (50) hours of pay at their applicable rates.””

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 Board's review begins with procedural deficiencies alleged by each party. The Organization maintains it did not receive "proper" notice of the intent to contract because the Carrier issued it to General Chairman Jack David whereas Jason Graham is the General Chairman and Jack David is Senior General Chairman. This violates Rule 44(b). The Carrier responds that it issued the notice, dated May 15, 2020, in the same manner as it mailed prior notices. That is, since 2003 letters and notices have been issued to General Chairman Jack David and he responds and conferences with the Carrier's representative.

The Board finds the Carrier's issuance of the notice addressed to General Chairman Jack David and his conferencing with the Carrier's representative has been the local practice for an extended period of time and shows material and substantial compliance with Rule 44(b): "If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier will promptly meet with him for that purpose." There is no violation of Rule 44(b). Effective with this claim, however, acceptance of the local practice by BMW is no longer in effect and, henceforth, strict compliance with Rule 44(b) is required.

As for the Carrier's asserted procedural deficiency, it maintains that BMW filed an untimely appeal to the Carrier's claim denial, dated February 2, 2021. Pursuant to Rule 21(b)(1), an untimely appeal is foreclosed from the Board's consideration. BMW states its letter of appeal, dated March 15, 2021, was timely filed with the Carrier's Highest Designated Officer ("HDO") when mailed to East St. Louis where the Carrier's employee\agent signed for receipt on March 19, 2021. The Board finds that the Carrier informed BMW in February 2021 that the HDO was assigned to Omaha; however, the Carrier's agent signing for receipt preserved a timely filed appeal in the circumstances of this claim. Moving forward, strict compliance with Rule 21 is in effect.

Pivoting to the claim, in summary manner, the BMW's arguments are: (1) the character of the contested work - - "outside forces (Union Pacific Railroad)" installing new rail on Carrier property - - is customarily performed by the Carrier's workforce and reserved to them under the Agreement and (2) the Carrier's defenses are without

merit. That is, no available manpower is meritless as numerous awards establish the Carrier cannot rely on its own failure to adequately staff and/or assign its work force as a basis for contracting track maintenance work. There was no good faith by the Carrier during conference since it would not discuss the work, equipment and scheduling forces. Multiple awards establish that forces performing other work are not precluded from receiving a compensatory remedy (straight time and overtime) for loss of work opportunities.

As for the Carrier's position, Rule 44 establishes a right to subcontract the work of installing new rail and related work. The same kind of work (relay work in the bowl yard at East St. Louis) was performed with outside forces and sanctioned in Third Division Award 40090, e.g., recognized the on-property practice using contractors for installing rail on Alton & Southern Railroad property. All arguments proffered by the BMWWE fail due to a lack of evidence such as no proof that installing rail is work exclusively reserved to the force. Also without support is the excessive remedy requested. For example, nineteen (19) contractors performed the work and the BMWWE seeks compensation for those 19 contractors split among ten (10) Claimants.

Upon review of the parties' competing positions, the Board finds insufficient evidence to sustain the claim. Persuasive for this Board is on-property Third Division Award 40090 finding a practice, since 1960, to contract this work. Thus, the work is not exclusively reserved for forces. Conference in this claim mirrors the conference in that claim where disagreements persisted as to bad faith - good faith assertions. In this claim the Board will follow and apply the on-property award dated 2009. Accordingly, the claim is denied.

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 27th day of January 2026.

LABOR MEMBER'S DISSENT
TO
AWARD 45537 DOCKET MW-47389
AWARD 45538 DOCKET MW-47548
(Referee Patrick Halter)

The majority held that because on-property Third Division Award 40090 found a practice since 1960 to contract this work, the work was not exclusively reserved for forces. However, whether or not the disputed work was exclusively performed by Carrier's Maintenance of Way forces is immaterial, as the record reflected and there was no dispute that the claimed work was customarily and traditionally performed by Maintenance of Way forces. It is exceptionally well established that the Organization need not demonstrate exclusive performance of work as against contractors to establish scope coverage and trigger the subcontracting provisions of the Agreement. Specifically, Third Division Awards 13236, 32160 and 32861 found:

AWARD 13236:

“Carrier's premise is that we are here confronted with a Scope Rule which does not specifically vest Signalmen with the right to the work here involved. From this it argues that to prevail Signalmen must prove that the employees covered by the Agreement have in the past 'exclusively' performed such work throughout the property; and, not only to the extent it is an incident to the skilled work of Signalmen. We believe this to be a misapplication of the exclusivity doctrine.

The exclusivity doctrine applies when the issue is whether Carrier has the right to assign certain work to different crafts and classes of its employees--not to outsiders.”

AWARD 32160:

“2. The Carrier raises the argument of 'exclusivity'; that is, the Organization did not show that employees it represents have performed the work to the exclusion of all others. This argument has been shown repeatedly and convincingly to be non-determinative in contracting matters (appropriate as it may be in disputes between various crafts and classifications).”

AWARD 32861:

“Contrary to the Carrier's argument, in order to be entitled to notice as required by the Rule the Organization does not have to demonstrate that the covered employees performed the work on an exclusive basis. See Award 31388 ('... [T]he Board has repeatedly held that demonstration of "exclusivity" is not required by the Organization in its claim for specific work.') See also, Award 31386 ('A myriad of Awards have concluded that, while exclusivity may be an appropriate test as to division of work among various crafts and classes of the Carrier's employees, it is not an appropriate requirement under the Agreement provision concerning contracting of work').
***” (Emphasis in original)

Exclusivity as a defense against contracting has been rejected by this Board from minimally 1957, see Third Division Award 7836 to as recently as 2025, see Third Division Award 45491. The NRAB, has consistently held that exclusivity is not the determining factor in contracting out of work cases, customary and historical performance of work is. The record reflects that the Carrier's Maintenance of Way employes have customarily and historically performed the claimed work. As such, the majority's application of exclusivity in these cases conflicts with long standing industry precedent; is erroneous; and elicits my respectful dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John Schlismann', with a long horizontal flourish extending to the right.

John Schlismann
Labor Member