

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 45538
Docket No. MW-47548
26-3-NRAB-00003-220826

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 and other contractors) to perform Maintenance of Way and Structures Department work (installing new rail) at various locations on the Carrier’s property starting on March 9, 2021 and continuing (Carrier’s File 1763305 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, J. Sims, S. Williams, K. Hulse, S. Maloata, D. Hulse, C. Severs, P. Boien, D. Patterson, B. Stephens, Jr., D. Tyrey, J. Stewart, T. Ivory, L. Stewart, Jr., J. Lurkins, N. Clark, B. Gardner, A. Huggins, T. Branson, B. Hensley, and B. Chinn shall now receive “***. Pay shall be at their applicable rates. Remember, this is a continuing 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 Board's review begins with a procedural deficiency alleged by BMW where it asserts not receiving the notice of intent to contract dated December 10, 2020. Since it was not received, contracting proceeded without conference. The Carrier states it issued the notice to the General Chairman and Senior General Chairman in the same manner as other notices for the past fifteen (15) years. In addition to mailing the notice to the General Chairman and Senior Vice Chairman, the Carrier states it issued the notice to these officials by way of e-mail correspondence inviting them to discuss the contracting notice should they desire.

Rule 44(a) states that "the Carrier will 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 15 days prior thereto." The Board finds the Carrier issued the notice dated December 10, 2020, to the General Chairman and Senior General Chairman. The notice was properly addressed for postal mail transmittal. In addition to postal mail, the notice was issued on December 10, 2020, to the General Chairman and Senior General Chairman by way of e-mail and properly addressed for transmittal as documented by attachment to the Carrier's claim denial.

The documented e-mail is sufficient to establish the Carrier complied with Rule 44 and issued timely notice to contract. Applying the traditional mailbox rule to the e-mail letter of notice creates a rebuttal presumption of receipt. That is a properly addressed and issued notice is presumed to have been received at the time it would be normally delivered through due course of transmission. This presumption is not absolute and can be overcome with evidence of non-receipt. In the circumstances of this claim the presumption prevails. The Board denies and dismisses the alleged procedural deficiency.

Pivoting to the claim, in summary manner, the BMW's arguments are: (1) the character of the contested work - - "outside forces (Union Pacific Railroad and other contractors)" installing new ties 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 failure to adequately staff and assign its work force as a basis for contracting track maintenance work. Time constraints and size of the project are entirely within the Carrier's control and no basis for contracting out and there is no practice to contract work reserved to the force. 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 BMW 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, sixty-nine (69) contractors performed the work and the BMW seeks the total compensation for those 69 contractors shared among twenty-one (21) Claimants.

With this claim, the burden of proof resides with the Organization to establish its alleged rules violations. Notwithstanding numerous arguments advanced by the Organization the Board finds insufficient evidence to sustain the alleged rules violations. Persuasive for this Board is on-property Third Division Award 40090 finding a practice, since 1960, to contract this work, that is, installing ties on Carrier property. Thus, the work is not exclusively reserved for the force. In this claim the Board will follow and apply on-property Award 40090. 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