

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37280
Docket No. MW-36411
04-3-00-3-645**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Burlington Northern and Santa Fe Railway Company
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Track Sub-department employees (Nickerson Section forces) to perform Bridge and Building Sub-department work (drive piling and related work) on March 9, 1995 on the Hinkley Subdivision of the Lake Superior Division instead of Bridge and Building Sub-department Seniority District 12 B&B Foreman W. W. Schadewald, First Class Carpenters D. A. Bender, R. K. Russom, R. A. Magerl, J. F. Goettl, T. M. Auge and M. J. Peterson (System File T-D-923-B/MWB 95-08-07AC BNR).**
- (2) The Carrier violated the Agreement when it assigned Track Sub-department employees (Nickerson Section forces) to perform Bridge and Building Sub-department work (drive piling and related work) on July 24, 25, 26, 27;, 28, 31, August 1, 2, 3, 4, 7 and 8, 1995 on the Hinkley Subdivision of the Lake Superior Division instead of Bridge and Building Sub-department Seniority District 12 B&B Foreman W. W. Schadewald, First Class Carpenters D. L. Johnson, G. R. Besvold, W. A. McNair and Truck Driver G. L. Mossberger (System File T-D-1014-B/MWB 95-12-01AJ).**

- (3) The Carrier violated the Agreement when it assigned Track Sub-department employes (Cambridge Section forces) to perform Bridge and Building Sub-department work (drive piling and related work) on August 21, 22, 23, 24, September 18, 19, 20, 21, 25, 26, October 2, 3, 4 and 9, 1995 in the vicinity of Grasston, Minnesota on the Hinkley Subdivision of the Lake Superior Division instead of Bridge and Building Sub-department Seniority District 12 B&B Foreman W. W. Schadewald, First Class Carpenters D. L. Johnson, G. R. Besvold, W. A. McNair and Truck Driver G. L. Mossberger (System File T-D-1031-B/MWB 95-12-27AK).
- (4) The Carrier violated the Agreement when it assigned Track Sub-department employes (Superior and Allouez Section forces) to perform Bridge and Building Sub-department work (drive piling and related work) on November 2, 3, 6, 7, 8, 9, 10, 29, 30, and December 1, 1995 on territory within the Terminal area on the Lakes and Allouez Subdivisions of the Lake Superior Division instead of Bridge and Building Sub-department Seniority District 12 B&B Foreman W. W. Schadewald, First Class Carpenters D. L. Johnson, G. R. Besvold, W. A. McNair and Truck Driver G. L. Mossberger (System File T-D-1084-B/MWB 96-03-28AK).
- (5) As a consequence of the violation referred to in Part (1) above, B&B Foreman W. W. Schadewald, First Class Carpenters D. A. Bender, R. K. Russom, R. A. Magerl, J. F. Goettl, T. M. Auge and M. J. Peterson shall now be compensated for an equal and proportionate share of twenty-four (24) man-hours expended by the Track Sub-department forces in the performance of the above-mentioned work at their respective straight time rates of pay.
- (6) As a consequence of the violation referred to in Part (2) above, B&B Foreman W. W. Schadewald, First Class Carpenters D.

L. Johnson, G. R. Besvold, W. A. McNair and Truck Driver G. L. Mossberger shall now be compensated for an equal and proportionate share of two hundred eighty-eight (288) man-hours expended by the Track Sub-department forces in the performance of the above-mentioned work at their respective straight time rates of pay.

- (7) As a consequence of the violation referred to in Part (3) above, B&B Foreman W. W. Schadewald, First Class Carpenters D. L. Johnson, G. R. Besvold, W. A. McNair and Truck Driver G. L. Mossberger shall now be compensated for an equal and proportionate share of four hundred forty-eight (448) man-hours expended by the Track Sub-department forces in the performance of the above-mentioned work at their respective straight time rates of pay.
- (8) As a consequence of the violation referred to in Part (4) above, B&B Foreman W. W. Schadewald, First Class Carpenters D. L. Johnson, G. R. Besvold, W. A. McNair and Truck Driver G. L. Mossberger shall now be compensated for an equal and proportionate share of three hundred twenty (320) man-hours expended by the Track Sub-department forces in the performance of the above-mentioned work at their respective straight time 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.

This dispute combines four intra-craft claims that were consolidated for handling after the first two levels of handling on the property. The correspondence for the first two levels is present for each claim. Thereafter, the claims were handled together.

The claims all concern essentially the same work in different locations on different dates. The work consisted of driving steel piling into the soil for the purpose of stabilization of banks and roadbed. It is undisputed that the Carrier used Track Sub-department employees to perform the work instead of B&B Sub-department employees.

The Organization relied on Rules 1, 2, 5, and 55 in support of its position. The Scope Rule (Rule 1) is general in that it does not specifically mention reservation of work or the work of pile driving. Rules 2 and 5 are Seniority Rules that similarly do not mention the work in question. The remaining Rule, Rule 55, is a classification of work Rule that, like the others, does not mention the work in question. Indeed, Rule 55F, which pertains to First Class Carpenter, actually restricts the description of work classified to that pertaining to "... construction, repair, maintenance or dismantling of buildings or bridges. . . ." (Emphasis added) On this record, the disputed work did not involve either buildings or bridges.

Given the actual text of the Agreement language cited, the Organization is required to prove reservation of work by past performance. Although the parties sparred over the proper standard of proof, the precedent on this property requires that the Organization prove that B&B Sub-department employees have performed all such pile driving work exclusively on a system-wide basis. See, for examples, Third Division Award 18441 and Award 55 of Public Law Board No. 2206 and Award 17 of Public Law Board No. 3460.

Both parties provided statements to support their respective assertions of exclusive past performance and mixed-practice. The Organization also provided a

1989 letter from a Carrier official purporting to concede reservation of the disputed work to B&B employees according to his understanding. The official's letter pertained to the Montana Division. The Carrier countered that, if true, the local official could not opine system-wide.

As noted previously, both parties submitted documents about past practice consistent with their positions. The bulk of the Organization's statements are from Sectionmen or Trackmen who deny having performed the disputed work in the past. The Carrier's statements, on the other hand, show past performance by other than B&B employees at locations both in and outside of Montana. Accordingly, we have conflicting evidence regarding system-wide past performance of the disputed work. Given the appellate nature of our review authority, we have no effective means of resolving such irreconcilable disputes of material fact. Under the circumstances, we must deny the claims for failing to satisfy the burden of proof to establish exclusive past performance on a system-wide basis.

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 5th day of November 2004.