

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40487
Docket No. MW-39533
10-3-NRAB-00003-060303
(06-3-303)**

The Third Division consisted of the regular members and in addition Referee Daniel F. Brent when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Balfour Beatty) to perform Maintenance of Way and Structures Department work (clean switches and track) at Murray Yard in Kansas City, Missouri on August 27, 30, 31, September 1 and 2, 2004 [System File C-05-C100-2/10-05-0016(MW) BNR].**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out said 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 B. Hurst and N. Barron shall now each be compensated for forty (40) hours 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.

The instant dispute arose when the Carrier engaged the services of an outside contractor to use its vacuum truck to clean switches and tracks in the Murray Yard in Kansas City, Missouri. This work was performed in August and September 2004. It was undisputed that the Carrier did not give individualized advanced notice, but the Carrier contended that it had provided system-wide notice to the Organization in December 2003 for the following year. According to the Organization, the system-wide notice listed locations, but did not list Kansas City, Missouri, and was therefore invalid as to the disputed work.

The Carrier contended that the subcontracting was justified because the coal dust in the yard constituted a special material. The Organization contends that this dust was piled on the ground and sat for two years in the open before being moved, and therefore was not the kind of special material requiring invoking exceptional circumstances or an emergent response in order to justify the disputed subcontracting.

The Carrier argued that the claim should be denied because the Organization failed to demonstrate that this work had been exclusively performed by the bargaining unit. In support of its position, the Carrier cited Third Division Award 16640. The Carrier further asserted that it was unable to rent vacuum trucks without also hiring operators employed by the owner of such specialized equipment. This fact was disputed by the Organization, which contended that such vacuum truck were available for rent.

A key factor in the instant case is a dispute between the parties whether the Carrier could have rented a vacuum truck to be used by bargaining unit employees. If the Carrier did not own such equipment and if such equipment was not readily available without also having to pay an operator employed by the equipment vendor, then the threshold criterion for permitting subcontracting of work that was regularly performed by bargaining unit employees has been established. According to the evidentiary record, the Carrier contacted the firm to whom the Carrier was referred by the Organization, but was unable to rent a vacuum truck without an operator. The Carrier cited a decision by Referee Herbert Marx in Public Law Board No. 4768, Award 21, where the Board held that ditching equipment constituted special equipment not readily available to the Carrier because it was new technology that the supplier would not lease without also providing an operator.

The Organization bears the burden of persuasion as the grieving party in the instant case. The apparent inability of the Carrier to rent a vacuum truck without paying the vendor's employee, and thus incurring unnecessary duplicate costs, in order that bargaining unit employees could perform the disputed work supports the Carrier's position.

The Organization's assertion that the coal dust had been lying for two years and, therefore, did not qualify as a special material was persuasive, as was the Organization's contention that this was not an emergent situation. Nevertheless, the absence of proof that vacuum trucks could be rented by the Carrier to be used by bargaining unit employees mandates a finding in favor of the Carrier on this aspect of the instant case.

The Organization also established persuasively that the notice it received from the Carrier in December 2003 for sub-contracting during 2004 did not adequately identify the work disputed in the instant case as a topic of intended sub-contracting either as to substance or location. Thus, the notice and the ensuing contracting out of the work were procedurally defective. But for this defect, the Carrier's position would be correct and the Organization's claim denied. The Carrier's failure to provide appropriate advance notice mandates that the Organization's claim be granted.

Based on the evidence submitted, the instant claim must be sustained. Claimants B. Hurst and N. Barron shall now each be compensated for 40 hours at their respective straight time rates of pay.

AWARD

Claim sustained.

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 15th day of June 2010.