

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40492  
Docket No. MW-39588  
10-3-NRAB-00003-060391  
(06-3-391)**

**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 (Hulcher and Matthews) to perform Maintenance of Way and Structures Department work (replace crossing diamond and related work) at Mile Post 65.5 in the vicinity of Litchfield, Illinois on October 25, 2004 [System File C-05-C100-5/10-05-0019(MW) BNR].**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an 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 M. Collier, J. Ruepke, R. Burr, R. Reed, V. Smith, G. Bronson, J. Eveland, J. Shopinski, B. Ceglinski, W. Hoxsey and C. Anderson shall now each be compensated for eight (8) 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 Organization contends that the Carrier violated the Agreement by assigning outside forces employed by Hulcher and Matthews Company to replaced a crossing diamond and related work at Mile Post 65.5 in the vicinity of Litchfield, Illinois, on October 25, 2004. The Organization further contends that the Carrier failed to provide the General Chairman with sufficient advance notice of its intent to contract out the disputed work and also failed to make a good faith effort to confer in order to avoid contracting out the work. According to the Organization, the instant claim is governed by the Note to Rule 55 and the December 11, 1981 Letter of Understanding (Appendix Y) as well as Rules 1, 2, 5, and 55, which define the scope of maintenance-of-way work. The Organization contends that replacing a crossing diamond is clearly encompassed within the scope of the Agreement and is customarily performed by Carrier forces.

The Carrier denied the claim, contending that it was entitled to contract out the work and did so with proper advance notice, having satisfied the requirements for such contracting out. The Carrier further contends that the disputed work has not exclusively been performed by Maintenance of Way bargaining unit employees.

The evidentiary record established that similar work was performed using bridge, derrick and loader Trucks belonging to the Carrier only 55 miles away from the location of the disputed work five weeks after the disputed work was performed by the outside contractor. The Carrier's July 14, 2004 letter states that ". . . the Carrier does not have the available skilled forces or equipment to perform all

aspects of this work.” This contention is contradicted by the fact that the Carrier was able to perform virtually identical work in the same timeframe. The Organization demonstrated persuasively that the Carrier could have rented the necessary equipment and that the requisite employees were available. Therefore, the Carrier’s contention that it did not have skilled forces or equipment available for the work is invalid and not supported by the record of the instant dispute.

The Note to Rule 55 provides that work regularly performed by the bargaining unit may be contracted out if special skills needed to perform the work are not possessed by the Carrier’s employees, special equipment necessary to perform the work is not owned by the Carrier, or special material is available only when applied or installed through a supplier, or when the work is such that the Carrier is not adequately equipped to handle the work. None of these factors was adequately presented by the Carrier in a timely manner in the instant case. The Organization presented a valid claim, including a detailed description of the disputed work performed on particular dates. The Carrier has not been able to demonstrate persuasively that the exceptions applicable to the Note to Rule 55 have been satisfied.

The Organization further alleged that the Carrier violated the provisions of the Note to Rule 55 in the December 11, 1981 Letter of Understanding (Appendix Y) because the notices conveyed to the Organization involving the claimed work, although dated July 14 and July 20, 2004, did not sufficiently identify the work to be contracted and the reason therefore. The Organization cited 74 arbitration Awards issued by 21 Arbitrators in support of the proposition that the December 11, 1981 Berge-Hopkins Letter of Understanding (Appendix Y) applies and constitutes a valid basis for sustaining contracting out claims. Given the inadequate description of the work in the Carrier’s July 2004 letters of advance notice, the Organization met its burden of persuasion in this regard as well.

The relief sought by the claim of paying Claimants M. Collier, J. Ruepke, R. Burr, R. Reed, V. Smith, G. Bronson, J. Eveland, J. Shopinski, B. Ceglinski, W. Hoxsey and C. Anderson for eight hours at their respective straight-time rates of pay shall be implemented.

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**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.