

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40547
Docket No. MW-39586
10-3-NRAB-00003-060291
(06-3-291)**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (Osmose) to perform Maintenance of Way and Structures Department work (tunnel repair/reinforcement and related work) in Tunnel #1 in the vicinity of Mile Post 97 near Guernsey, Wyoming beginning on March 1, 2004 and continuing through April 30, 2004 [System Files C-04-C100-74/10-04-0226(MW) and C-04-C100-90/10-04-0254(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 S. Childs, L. Galvan, J. Johnson, A. Ramos, G. Null, J. Branson, R. Green, T. Lewis, R. Martinez, J. Gentry, K. Brandt, P. Bratt, Jr. and K. Reeves shall now each be compensated at their respective straight time rates of pay for an equal and proportionate share of the total man-hours expended**

by the outside forces in the performance of the aforesaid work beginning March 1, 2004 and continuing through April 30, 2004.”

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 case involves the Carrier's use of a sub-contractor to operate a special concrete car with pressurized concrete to perform tunnel reinforcement work. The Organization contends that the Carrier violated the Agreement by assigning outside forces employed by Osmose Company to perform Maintenance of Way and Structures Department work, more particularly tunnel repair and reinforcement and related work in Tunnel No. 1 in the vicinity of Mile Post 97 near Guernsey, Wyoming, beginning on March 1 and continuing through April 30, 2004. According to the Organization, the Carrier's notice regarding sub-contracting was defective.

The Organization contends that 11 employees of the outside contractor, Osmose Company, performed bargaining unit work for at least ten hours per day, five days per week from March 1 through and including April 30, 2004. According to the Organization, the Bridge and Building Sub-Department had historically participated in performing just this type of work. The Organization cited the Note to Rule 55 and the Amendments thereto embodied in the December 11, 1981 Letter of Understanding (Appendix Y).

The Note to Rule 55 and Appendix Y provide, in relevant part, that:

“However, such work may only be contracted providing that special skills not possessed by the Company’s employees, special equipment not owned by the Company, or special material available only when work is such that the Company is not adequately equipped to handle the work or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company’s forces. In the event that the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event, not less than fifteen (15) days prior thereto except in ‘emergency time requirements’ cases. . . .”

The Carrier contends there has been an historical practice of using outside forces and that it did not have the skilled forces or special equipment necessary to perform this tunnel repair work.

The Carrier asserted persuasively in this case that a special concrete car handling pressurized concrete is required for this job. However, the Carrier was months late in explaining the special nature of this work. Moreover, the notice to the Organization inaccurately cited the type of special equipment necessary to perform this tunnel reinforcement project. If the Carrier’s notice to the Organization had correctly cited the special equipment and had been submitted to the Organization at least 15 days before the subcontracting commenced, the Carrier would have had a valid explanation and been entitled to subcontract out the work. However, because of the failure to provide accurate information in a timely manner so that the Organization could properly intervene on behalf of the bargaining unit, the Carrier’s action constituted a violation of the Agreement.

The issue of remedy is problematic, because the employees whom the Organization asserts should have been awarded the work were not “tunnel qualified” according to the evidentiary record. Therefore, no monetary award is applicable in the instant case, because the record does not clearly demonstrate that the Claimants would have performed the work if the Organization had successfully intervened on their behalf.

The Carrier violated the Agreement by failing to provide timely notice of its decision to contract out the disputed work and to discuss the decision with the General Chairman. The Carrier shall comply with the applicable mandated time frames for announcing proposed contracting out and for meeting with the Organization to discuss such contracting.

AWARD

Claim sustained in accordance with the Findings.

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 29th day of June 2010.