

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40548
Docket No. MW-39631
10-3-NRAB-00003-060429
(06-3-429)**

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

**(Brotherhood of Maintenance of Way Employes 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 (Kinnley) to perform Maintenance of Way and Structures Department work (replace water main) between the Round House and Operations Building and at the Water Reclamation Facility, all within in the 23rd St. Yards in Denver, Colorado beginning on June 28, 2004 and continuing [System File C-04-C100-106/10-04-0289(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 and failed to 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, with respect to the work performed by the outside forces beginning June 28, 2004 through July 30, 2004 Claimants C. Sutton, R. Conner and M. Baker shall now each be compensated for two hundred (200) hours’ pay at their respective straight time rates of pay and for fifty (50) hours at**

their respective time and one-half rates of pay, Claimant W. Smith shall be compensated for one hundred sixty (160) hours at his respective straight time rate of pay and for forty (40) hours at his respective time and one-half rate of pay, Claimant J. Olmedo shall be compensated for one hundred seventy-six (176) hours at his respective straight time rate of pay and for forty-four (44) hours at his respective time and one-half rate of pay, Claimant C. Subia shall be compensated for one hundred eighty-four (184) hours at his respective straight time rate of pay and for forty-six (46) hours at his respective time and one-half rate of pay, Claimant A. Castillo shall be compensated for sixty-four (64) hours at his respective straight time rate of pay and for sixteen (16) hours at his respective time and one half rate of pay and Claimant C. Bachicha shall be compensated for sixteen (16) hours at his respective straight time rate of pay and for four (4) hours at his respective time and one-half rate of pay, and the Claimants shall each be compensated at their respective and applicable rates for a proportioned share of the total man-hours expended by the outside forces in the performance of the aforesaid work on July 31, 2004 and continuing.”

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 concerns water main replacement work between the Round House and the Operations Building and at the Water Reclamation Facility, all located within the 23rd Street Yards in Denver, Colorado, beginning on June 28, 2004 and continuing thereafter. The Organization contends that the disputed work is reserved to Maintenance of Way employees by clear and unambiguous provisions of the Agreement and by a past practice on this property. The Organization established persuasively that the Carrier failed properly to notify the General Chairman of its specific intent to assign or otherwise permit outside forces to perform the subject work. According to the evidentiary record, advance notice was properly provided.

Bridge and Building Sub-Department Rule 5 Seniority Roster "E" includes Water Service Foreman, Water Service Mechanic, Pump Repairer, Plumber, Steamfitter, Pipefitter, and Water Service Helper classifications. The Organization cites a conference held on June 22, 1978 in which the Carrier and the Organization agreed that:

"Installation of culverts thirty-six inches and over in diameter would be handled by B and B forces. If by open cut, track forces would handle removal and replacement of track structure. If B and B crew requires assistance, track forces in the vicinity may be assigned to help in installation. 2. Installation of culverts of less than thirty-six inches diameter will be handled by either track or B and B forces. If the installation involves jacking or tunneling, [it] would be handled by B and B forces."

This document memorializes the parties' understanding and agreement regarding subcontracting bargaining unit work of the specific nature of a portion of the work at issue in the instant case. Horizontal boring is part of what the bargaining unit does in connection with such projects. The other aspects of the project include many elements of work that the bargaining unit regularly and customarily performs. Consequently, to contract out that work, the Carrier must demonstrate that the criteria of Rule 55 have been satisfied.

In a letter dated December 11, 1981 (the Berge-Hopkins letter) the parties reiterated and reaffirmed that the intent of Article IV of the May 17, 1968 Agreement was that advance notice requirements would be strictly adhered to and in order to

encourage the parties locally to take advantage of the good faith discussions provided for to reconcile their differences. The Carrier reiterated its assurance to the Organization that it would “. . . assert good-faith efforts to reduce the incidence of sub-contracting and increase the use of their Maintenance of Way forces to the extent practicable, including the procurement of rental equipment and operation thereof by Carrier employees.” This document bolsters the Organization’s argument in the instant case.

The Carrier contends that it needed a non-bargaining unit employee of an outside contractor to perform the disputed water main replacement work because a licensed Plumber had to supervise this job. However, the evidentiary record does not effectively refute the Organization’s contention that such licensed employee was available within the bargaining unit and that this employee could pull the requisite permits for performing the job. More particularly, the Carrier contended that Maintenance of Way forces lacked the license “. . . to test all of the excavation and backfill to assure that city and county compaction specifications were met.” This contention by the Carrier was not satisfactorily established in the evidentiary record below.

Neither must the Organization demonstrate exclusive jurisdiction over such work. The record reflects that the bargaining unit had customarily and historically performed similar work in the past. Moreover, the Carrier did not provide adequate notice 15 days prior to the sub-contracting. Consequently, the Carrier violated the Agreement when it failed to demonstrate that the exceptions under the Note to Rule 55 in Appendix Y, which the Carrier must demonstrate in order to subcontract, had been satisfied.

All hours paid shall be at straight time.

AWARD

Claim sustained in accordance with the Findings.

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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.