

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40550
Docket No. MW-39636
10-3-NRAB-00003-060446
(06-3-446)

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 Employees 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) to perform Maintenance of Way and Structures Department work (remove and cover smoldering coal dust and other material from the right of way) in the vicinity of Mile Posts 556.4, 558.3, 559.5, 561.4 and 562.2 on the Blackhills Subdivision on September 25 and 26, 2004 [System File C-05-C100-22/10-05-0045(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 the aforesaid 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, Claimant M. Roloff and T. Ratigan shall now each be compensated for twenty-two (22) hours at their respective time and one-half 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.

On September 18, 2004, dry grass between Mile Posts 556.4 and 562.2 was ignited by a passing eastbound train. These fires caused accumulated coal dust along the tracks to smolder and burn. Bargaining unit personnel were assigned initially to drag the coal dust from around the area of the tracks and bury the dust to extinguish the combustion. On Saturday, September 25 and Sunday, September 26, 2004, the Carrier assigned this work to an outside contractor, thus precipitating the instant claim. The Organization contends that the weekend work should have been assigned to bargaining unit employees rather than contracted out and further asserted that the Carrier failed to provide adequate advance notice of contracting out as required by the Agreement and by the Note to Rule 55. A claim for 22 hours overtime was submitted by Claimants M. Roloff and T. Ratigan.

The advance notice aspect of the claim is easily dismissed because the fires constituted the type of emergent situation contemplated as an exception to the 15-day advance notice Rule. A brush fire accidentally ignited by a passing train is an unanticipated condition that requires swift response to minimize the damage and potential aftermath.

Nevertheless, the type of work in dispute is clearly what BMW-represented employees do. The Carrier had the tools and the Claimants had been working on this project. The Carrier's decision to utilize Hulcher employees appears to be economic in an attempt to avoid overtime. The Claimants do not necessarily have a right to overtime, but the Carrier is obligated by the Note to Rule 55 and

innumerable prior Awards to minimize subcontracting when the Carrier has the personnel and equipment to perform the work regularly and historically performed by this bargaining unit. These cases were cited by the Organization.

The Carrier has not demonstrated that this work should not have been assigned to the Claimants because the criteria articulated in Rule 55 applied to justify contracting out the work. There is no compelling evidence that the Claimants were unavailable and thus that the work was “beyond the capacity of the Company’s forces.”

The Carrier contends that the bargaining unit employees assigned to deal with the fire had been unsuccessful earlier in the week and that the Claimants were not equipped to perform the work. These contentions were not supported by credible evidence in the record. The Carrier also cited Public Law Board No. 2206, Award 58, between the parties to this dispute, holding that removal of coal from the right-of-way is not exclusively bargaining unit work. However, the Organization need not establish exclusivity in order to prevail. Moreover, the same coal dust removal and burial work was initially assigned to Claimants Roloff and Ratigan. Such work clearly can be construed as maintenance of track and way activity, and is distinguishable from removal of “spilled demurrage” caused by a derailment of a coal car. The PLB reasonably concluded that removal of such material was more properly categorized as salvage or recovery of spilled material than maintenance-of-way work.

The movement of smoldering accumulated coal dust to avoid damage to the tracks and right-of-way, and the burying of the smoldering embers to extinguish the potential danger to the tracks, is clearly work that falls within the scope of the bargaining unit’s jurisdiction. Thus, the Carrier cannot assign the work to outside contractors without first satisfying the criteria set forth in the Note to Rule 55. The Carrier has not persuasively demonstrated that these factors justified its action. Therefore, the instant claim must be sustained.

AWARD

Claim sustained.

**Form 1
Page 4**

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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.