

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40551
Docket No. MW-39686
10-3-NRAB-00003-060484
(06-3-484)**

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 Construction and Marta Construction) to perform Maintenance of Way and Structures Department work (clean switches, frogs and track) on the Orin, Black Hills and Campbell Subdivisions beginning on October 15, 2003 and continuing through November 21, 2003 [System File C-04-C100-41/10-04-0108(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 (the employees assigned to the Donkey Creek Section on October 22, 23, 24, 27, 28, 29, November 10, 11, 13, 14, 17, 18, 19 and 20, 2003) shall now be compensated for one hundred twelve (112) hours at their respective straight time rates of pay and for sixteen and one-half (16.5) hours at their respective time and one-half rates of pay, Claimants (the employees assigned to the Reno Section on October 15, 16, 17, 18, 20, 21, November 5,

6, 10 and 11, 2003) shall now be compensated seventy-two (72) hours at their respective straight time rates of pay and for forty-six (46) hours at their respective time and one-half rates of pay, and Claimants (the employees assigned to the Gillette Section on October 30, November 7, 12 and 21, 2003) shall now each be compensated for thirty-two (32) 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 grieved the Carrier’s use of outside forces employed by Hulcher and Marta to perform routine track work of a nature regularly and historically performed by bargaining unit BMW-represented employees. The Organization contends that the Carrier failed to identify with sufficient specificity the sites and dates of contracting out in the Carrier’s December 16, 2002 notice to the General Chairman proposing an extensive list of yard cleaning locations without identifying the mainline locations where such work was to be performed.

The disputed work consists of cleaning switches, a routine component of maintaining track that falls within the scope of the Maintenance of Way and Structures Department. The Organization persuasively contends that this work falls so squarely within the ambit of the classifications represented by BMW that the Carrier was obligated to demonstrate compliance with the standards articulated in the Note to Rule 55 and the Berge/Hopkins letter of December 11, 1981, which established applicable prerequisites for assigning such work to outside forces. The Organization cited multiple Third Division Awards in support of its position. These Awards are sufficient to validate the Organization’s assertion that the Carrier acted improperly.

The notice to the General Chairman provided by the Carrier in the instant case did not satisfy the requirements set forth by the applicable criteria. Contrary to the Carrier's assertion, the Organization need not demonstrate exclusive jurisdiction over the disputed work in order to demand and receive compliance with the prerequisite criteria established in the Note to Rule 55 and as reflected in the Agreement. Had the Carrier complied with the specific notice requirements, the Carrier's contention about vacuum trucks, including the difficulty in renting such trucks without the vendor's employee as operator may have been persuasive regarding this aspect of the disputed work if the Carrier could demonstrate that such vehicles could not be rented without a vendor employee to operate the vacuum truck. The evidentiary record, however, precludes finding in favor of the Carrier because of the procedural infirmities discussed above, specifically the omission of specific notice of the intent to contract out switch cleaning work on the Campbell Subdivision, Orin Subdivision, and the Black Hills Subdivision of the Powder River Division.

The Carrier contends that the Organization must demonstrate system-wide exclusivity of performing these tasks in order to prevail. This standard is erroneous. If the work falls within the historic and customary jurisdiction of the BMW bargaining unit, then the Carrier must demonstrate compliance with the standards for minimizing contracting out negotiated by the parties as expressed in the Note to Rule 55.

The Carrier's objection that the claim was untimely is not dispositive, because the work was ongoing and continued until November 20, 2003. If the project began on September 15 and the claim first referred to October 15, 2003, then the scope of recovery shall be limited to October 15 onward through November 20, 2003 because the claim was timely filed as to a 60-day interval before the claim was received by the Carrier on December 8, 2003.

The failure to name specific Claimants is not fatal to the Organization's claim, because the applicable records necessary to identify which bargaining unit employees were both available to work and adversely affected by the Carrier's actions rest in the Carrier's control.

The Claimants shall be identified and paid at the then applicable straight time rates.

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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.