

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40688
Docket No. MW-39543
10-3-NRAB-00003-060328
(06-3-328)**

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 Roadway Equipment Sub-department employees F. Music, T. Heemeyer, J. Brockel, L. Lindsey, K. Pinder and A. Christman to perform Track Subdepartment work of removing a switch and replacing it with track panels at Decker, Montana on September 15 and 16, 2004 instead of Track Sub-department employees T. Mines, R. Deluna, C. Stark, G. Pinder, E. Moore and V. Pacheco [System File C-05-J010-5/10-05-0043 (MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants T. Mines, R. Deluna, C. Stark, G. Pinder, E. Moore and V. Pacheco shall now each be compensated at their respective straight time rates of pay for an equal and proportionate share of the one hundred (100) man-hours expended by the Roadway-Equipment Sub-department employees in the performance of the aforesaid work.”**

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 when it assigned Roadway Equipment Sub-department employees F. Music, T. Heemeyer, J. Brockel, L. Lindsey, K. Pinder and A. Christman to perform Track Sub-department work of removing a switch and replacing it with track panels at Decker, Montana, on September 15 and 16, 2004, instead of using Track Sub-department employees T. Mines, R. Deluna, C. Stark, G. Pinder, E. Moore and V. Pacheco. The Organization seeks pay for 100 man-hours of work to be divided among the aggrieved employees. The aggrieved employees were regularly assigned to the Sheridan Section as part of a Montana Division section gang. All aggrieved employees were allegedly readily available to perform any and all track labor necessary as part of their normal duties.

According to the Organization, the Carrier assigned other employees to forego their regular Machine Operator duties and perform Track Sub-department work of removing an old switch and replacing it with straight track panels, which they built on-site at Decker, Montana. The Organization contends that the Machine Operators performed no Machine Operator work on September 15 and 16, 2004, but were assigned as Laborers/Sectionmen performing physical hand labor work removing the old switch, consisting of ties, plates, rail, etc. and preparing the replacement track panels. The Organization contends that assigning six Machine Operators for ten hours each on September 15, 2004, and four Machine Operators

for ten hours each on September 16, 2004, violated the Agreement because such work is quintessential Track Sub-department work, which is performed by the Claimants on a regular daily basis. The Organization contends that assigning Machine Operators to perform such work deprived the Claimants of this work opportunity.

The Carrier denied the claim, contending that the contested work did not belong exclusively to the classification of employees claiming the work. The Carrier further contends that it was not obligated to assign the work to the Claimants because the track was owned by an industrial entity that paid for all work to be done. The Carrier contends that Roadway Equipment Sub-department employees routinely repair track in the course of their duties because such work as driving spikes, shoveling ballast or assisting with the unloading of ballast is incidental to the work of repairing track, and all BMWWE-represented employees repair track as part of their duties.

The Carrier contends that the claim should be denied predicated on the proposition that work performed for a third party where all material and labor was reimbursed to the Carrier, as was done by Decker Coal in the instant case, places the work outside the exclusive jurisdiction of the bargaining unit. The Board has ruled repeatedly that bargaining unit employees should be utilized for third party work where the Carrier exercises control over the design and implementation of the work, and where it is related to the Carrier's operations. However, the Carrier did utilize bargaining unit employees to perform the work. The instant dispute complains that the Carrier assigned the work to the wrong classification of bargaining unit employees.

Among the criteria described by the Carrier that the Organization must satisfy in order to prevail in the instant case is proving that the work was within the control and dominion of the Carrier. Who reimburses the Carrier for work is immaterial. Unlike Public Law Board No. 4768, Award 12 cited by the Carrier, in which it was held that the third party owner of the track was responsible for its maintenance with "control over who is to perform the construction and how, subject to certain normal minimal standards," the coal company in the instant case cannot reasonably be construed as controlling how the repairs and replacement of the track

and switches would be effectuated. The record does not adequately reflect that a third party controlled the work performed by the Carrier, because the third party is in the coal business, whereas the Carrier is in the railroad business. However, neither has the Organization demonstrated persuasively that the disputed work has been performed exclusively by BNSF employees in the Claimants' classification.

The three-prong test established in Third Division Award 26212 created the criterion that work may be assigned to other classifications "where the work, while perhaps within the control of [the] Carrier, is totally unrelated to railroad operations." The work in the instant case is essential railroad work and is mandatory for the passage of trains in and out of the customer's property in furtherance of the Carrier's railroad operations.

Neither has the second criterion been satisfied where the Carrier has shown that "the work is for the ultimate benefit of others, and is made necessary by the impact of the operations of others on [the] Carrier's property and is undertaken at the sole expense of that other party." There has been no showing in the instant case that the repairs were made necessary by the impact of the operations of others on the Carrier's property. Thus, the second leg of the three-part test has not been satisfied. The third leg requires that the Carrier "has no control over the work for reasons unrelated to having itself contracted out the work." This test has not been satisfied in the instant case. Thus, the ownership of the track by Decker and the reimbursement to the Carrier are immaterial in determining the propriety of the assignment that is disputed in the instant case.

Rule 78 - Intra-craft work jurisdiction, provides that:

"Employees will be allowed to perform incidental tasks which are directly related to the service being performed and which they are capable of performing, provided the tasks are within the jurisdiction of the BMW. Compensation shall be at the applicable rate for the employee performing the service and shall not constitute a basis for any time claims by other employees. This provision is not intended to alter the establishment and manning of work forces accomplished

in accordance with existing assignment, seniority, scope and classification rules.”

The Carrier persuasively contends that the performance of incidental work is not restricted to any particular sub-department. The Carrier further asserts that it did not violate the Agreement when it used its forces to work away from the Carrier’s right-of-way on a privately-owned industry track.

The Organization cites Rule 55 - Classification of Work. It does not reserve work for a particular classification of employee unless the Organization can demonstrate that the work has been done exclusively by that classification of employees. No such demonstration has been made in the instant case. Consequently, based on the evidence submitted, the Carrier did not violate the Agreement. The claim is hereby denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of November 2010.