

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40768
Docket No. MW-40149
10-3-NRAB-00003-070394
(07-3-394)**

The Third Division consisted of the regular members and in addition Referee Patrick Halter 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 (Hulcher) to perform Maintenance of Way and Structures Department work (remove track switches/install track panels and related work) at Shawnee Junction on the Orin Subdivision on June 9, 2005 [System File C-05-C100-100/10-05-0242(MW) BNR].

(1) 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.

(2) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant B. Kutschara, G. Griffie, L. Garniss, K. Rager, G. Hagen, J. Sisneros, M. Narramore and M. Brueckner shall now each be compensated for six (6) hours and fifteen (15) minutes 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.

This claim is timely under Rule 42. The certified return receipt shows delivery to the Carrier's post office box with the correct zip code on Sunday, August 7, 2005, and the claimed incident commencing on June 9, 2005. Receipt at the postal service box was within 60 days from the date of the occurrence on which the claim is based as required by Rule 42.

The Organization states in its August 1, 2005 claim that the disputed work is "remove track switches/install track panels and related work." Specifically, the two track switches were removed and 250 feet of track panel were installed. The contractor deployed two track hoe excavators, one front end loader and four Laborers to cut existing rail, remove switches, smooth the roadbed and install new track panels. According to the Organization, the Claimants do this kind of work all the time.

The Board finds that the removal and installation of track panels is routine maintenance work customarily performed by Carrier forces, such as the Claimants, assigned to Group 1 and Group 2 machines. This work falls within the scope of the Agreement. Because the work is within the scope of the Agreement, Carrier forces have a contractual right to be assigned to and perform the work before the Carrier resorts to employ forces from outside the Agreement.

When contracting out, the Carrier is contractually obligated to notify the General Chairman “in writing, as far in advance of the contemplated transaction as is practicable and, in any event, not less than fifteen (15) days prior thereto except in emergency time requirements[.]”

The Carrier issued advance written notices to the Organization on May 24, June 7 and 8, 2005, informing it of switches and sub-grade problems on one 100 miles of track on the Orin Subdivision. The issuance of several notices informed the Organization of the Carrier’s on-going maintenance plans and construction needs, as well as when outside forces would be deployed to assist Carrier forces. The notices are sufficient in form and content.

In this claim the Carrier states that it faced an emergency on the Orin Subdivision due to weather and derailments. The situation called for extra equipment and operators to assist Carrier forces with dirt work and switch installation; all Carrier-owned crawlers were engaged with this emergency. The contractor used two of its operators on crawler track hoes to assist Carrier forces; however, Carrier forces performed the majority of the work. According to the Carrier, the issue was the emergency, special equipment, full employment, volume of work and availability of equipment and employees.

Although the weather complicated and flummoxed the parties’ efforts to have Carrier forces perform as much of the claimed work as is possible, the weather did not constitute an emergency. Nevertheless, the Carrier’s deployment of contract forces satisfies two criteria in the Note to Rule 55 and Appendix Y. That is, the crawler track hoe equipment owned by the Carrier was not available for use and Carrier forces were not available. The Organization failed to prove otherwise.

Because the Carrier complied with the Note to Rule 55 and Appendix Y, the claim is denied.

AWARD

Claim denied.

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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 15th day of December 2010.