

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40772
Docket No. MW-40170
10-3-NRAB-00003-070380
(07-3-380)**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes 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 (Sheehy Construction Co.) to perform Maintenance of Way and Structures Department work (build tank farm/fueling facility and related work) at Lincoln, Nebraska beginning on August 24, 2005 and continuing [System File C-06-C100-7/10-06-0016(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 F. Fankhauser, D. Gwinner, L. Divoll, J. Krouse, T. Lyons, C. Wilson, J. Francke, D. Gerken, G. Tjaden, B. Sullens, J. Scherer, G. Boltz, R. Reimers, W. Brhel and R. Wall shall now each be compensated at their respective and**

applicable rates of pay for an equal proportionate share of the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning August 24, 2005 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.

On May 24, 2005, the Carrier issued notice to the Organization:

“Subject: Lincoln Yard Fuel Facility

In connection with the on going Lincoln Yard through-put and capacity improvement project, the Carrier plans to contract out the installation of a new fueling facility. The new facility will have a new tank farm, pump house, and fueling platform. The contractor will be responsible for all dirt work associated with the site preparation for the installation of these new facilities. The pump house will feed a new platform on the south side of the yard via new underground piping. Contractor will be responsible for building 4 – 25,000 gallon fuel tanks including the construction of full concrete containment pad systems for the tanks. The contractor will be responsible for construction of the Pump house, a 40’ x 60’ steel building on a concrete foundation, to include the electrical power system, and

mechanical pumping system consisting of 3 fuel pumps, filters, piping, valves, meters, and a PLC based system for electrical control of fuel pumping. Contractor will also install all piping in the pump house and the underground piping to the fuel platform. All underground piping will be doubled walled piping laid inside two 1100' x 42" casing pipes that the contractor will bore under the yard, from the pump house to the fueling platform.

The contractor will be responsible for the construction of the new platform, it will be a 4 track fuel dispensing facility with capabilities for lube oil, water, sand, and ther locomotive maintenance materials. It will be 400' long and 125' wide and will include piling for structural support and an HDPE liner system for containment of fuel spills and waste water. The platform will include mechanical equipment for the issue of lube oil, fuel, water, sand. The contractor will also install upgraded lighting fixtures at the new platform. This work will be done in concert with the other upgrades taking place in the Lincoln Yards over the next several years.

This work may begin as soon as June 8, 2005.

Currently, there is no available Carrier equipment to support these projects, and Carrier forces are not available to perform this work even if the equipment were rented or leased. Historically, when faced with the amount of work that the Carrier is currently facing it has contracted to supplement its work force on projects like that herein described. Nevertheless, the Carrier is not adequately equipped or skilled to handle all aspects of this work[.]”

On May 25, 2005, the Organization requested a conference and noted that Carrier forces are skilled to perform this work and are qualified to operate rented or leased equipment that may be needed.

On October 13, 2005, the Organization filed a claim alleging that the Carrier violated “Rules 1, 2, 5, 29, 55, Note to 55, Appendix Y . . . beginning on August 24,

2005 and continuing, when the Carrier contracted for the building of the B-2 Tank Farm in Lincoln, Nebraska.”

On November 29, 2005, the Carrier denied the claim stating it was “out of time limits. Work on the Lincoln B-2 Tank Farm started in July and the Organization’s claim was not received until October 19, 2005.”

On January 9, 2006, the Organization appealed the claim and reiterated its reasons set forth in the claim of October 13, 2005; it provided other details and references to Awards. As for timeliness, the Organization stated “[t]his is a multi-phase project and this is just another phase in the construction of the B-2 Tank Farm and a continuing violation of the Agreement [.]”

On March 2, 2006, the Carrier denied the appeal reiterating that it was not timely under Rule 42A and the claim is not a “continuing claim . . . [c]ertainly this claim has a starting date and a finish date[.]”

The Organization informed the Carrier on April 2, 2007, that the Carrier had not provided any proof that the work began prior to August 24, 2005: “The work on the phase of the project identified as the Tank Farm did not begin until August 24, 2005.” The Organization filed its claim with the Board on June 25, 2007.

Rule 42A provides, in pertinent part, that “[a]ll claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based.”

This claim is dated October 13, 2005, and alleges that commencing August 24, 2005, the Carrier used outside forces in violation of certain provisions in the Agreement. On November 29, 2005, the Carrier denied the claim stating it was “out of time limits. Work on the Lincoln B-2 Tank Farm started in July, and the Organization’s claim was not received until October 19, 2005.”

Contractor forces’ hours show that the claimed work commenced on July 21, 2005. Based on the finding that the work began on July 21 and the claim was filed

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on October 13, the Board concludes that the claim was not filed within 60 days from the date of the occurrence on which the claim is based, and there is inconclusive evidence to find a continuing violation.

Given the wording in Rule 42A, the claim must be dismissed as untimely.
(See Third Division Award 36605.)

AWARD

Claim dismissed.

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.