

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40790
Docket No. MW-40563
10-3-NRAB-00003-080285**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Tompkins Trucking and Excavating) to perform Maintenance of Way and Structures work (operate loader to dig out old ballast, grading and related crossing repair work) on Main Tracks 1 and 2 at Mile Post 139.20, Galva, Illinois on June 7 and 12, 2006 [System File C-06-C100-160/10-06-0283(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 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 D. Furrow shall now be compensated for sixteen (16) hours at his respective straight time rate 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 filed a complaint dated July 13, 2006, alleging that the Carrier improperly hired Tompkins Trucking to dig out old ballast and perform grading work on Main Track No. 1 on June 7, 2006, and on Main Track No. 2 on June 12, 2006, at Milepost 139.20, Galva, Illinois, Mendota Subdivision, Chicago Division. According to the Organization, the contractor had one machine operator who worked eight hours on each of the two dates, using a Caterpillar 914G end loader. The Organization also claimed that the Carrier had not provided proper notice of its intent to contract out under the Note to Rule 55. In support of its allegation, the Organization submitted a statement from an employee who was an eyewitness: "... I can assure you Tompkins Trucking and Excavating did dig the 2 crossings out at Galva, Illinois, on the date [sic] in question. The reason I KNOW THIS TO BE TRUE is because I was there . . . contractor Tompkins dug out the crossing after the panels were removed and leveled the roadbed for the new panel. . . ."

The Carrier denies that any violation of the parties' Agreement could have occurred, because Tompkins Trucking did not perform any work as claimed by the Organization. The Carrier has no records of such work. On August 7, 2006, in response to an investigative query from the M of W Claims Department, the Roadmaster e-mailed back "No work took place in that area on those dates." On July 24, 2006, the Assistant Roadmaster faxed a handwritten note stating "Here are the invoices I have. I have no invoices for work done on June 7 & 12. But here are the

others.” Because there was no contracting out of bargaining unit work, there was no need to provide notice.

The Organization has the burden of proof in contracting cases. If there are irreconcilable factual disputes between the parties, the Board must dismiss the case. Here, the Organization submitted an eyewitness statement that identified the contractor, the nature of the work, its location, and its duration. But there was only one such statement, despite the fact that there supposedly were a number of people in the area, at least one of whom could have submitted a similar statement. For its part, the Carrier submitted statements from the Roadmaster and Assistant Roadmaster, both indicating that no work occurred as described and that the Carrier has no invoices from the contractor for the dates in question. The Organization suggests that the Carrier may have lost, misplaced or deliberately hidden the invoices, and that the Roadmaster was not present in the area, so he could not know whether the work was contracted or not.

The Organization’s arguments are unpersuasive. It appears that the Carrier made a good faith effort to investigate, but was unable to find any corroborating evidence of contracting. Large corporations like the Carrier maintain business records that document payments to outside contractors as a matter of routine accounting. The fact that there are no records supports the Carrier’s position that no work occurred.

Moreover, the Roadmaster is charged with knowing what is going on in his territory, including when and where any contracting occurs. The nature of the claim requires the Carrier to prove a negative, which is always difficult. But there is nothing in the record to suggest that the Carrier acted in anything but good faith in investigating and handling this claim.

This leaves the Board with a record that is split on the one hand between a single eyewitness account of the disputed work, and on the other hand, an utter lack of any records that would corroborate the claim, after a good faith effort to discover them. Because there is an irreconcilable dispute over essential facts, the Board must dismiss the case at hand. It is impossible for the Board to determine on the basis of the record before it which of the two conflicting versions of what happened is the more

likely to have occurred. This is the definition of “irreconcilable facts,” and the Board must dismiss the case without reaching its merits.

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.