Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41163
Docket No. MW-40340
11-3-NRAB-00003-080139

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

(Brotherhood of Maintenance of Way Employes 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 (Pavers, Inc.) to perform Maintenance of Way and Structures work (haul ballast) from the ballast stockpile in Lincoln, Nebraska to and for the use of the Undercutter Gang working in the vicinity of Hickman, Nebraska on April 17, 2006 [System File C-06-C100-139/10-06-0239(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 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 R. Stoner, M. Lane, R. Hayes, D. Claus, J. Hibler, T. Brandt, R. Brennan, J. Walker, E. Adam, R. Frerking, W. Rogman, R. Drew, L. Johns, D. Klaus, and L. Pralle shall now each be compensated for eight (8) hours at their respective

straight time rates of pay and one-half (.5) hour at their respective time and one-half 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 filed the claim on May 17, 2006, alleging that on April 17, 2006, the Carrier had improperly used a contractor (Pavers, Inc.) to haul ballast rock from the stockpile at "Old 14" in the Lincoln, Nebraska, terminal to Hickman, Nebraska, for use by the Undercutter Gang and that it had failed to provide proper notice of the proposed contracting out as required by the Note to Rule 55. According to the Organization, the contractor used 15 trucks and drivers, who worked eight and one-half hours each. The record developed on the property includes statements from a number of employees who were present in Lincoln and who witnessed the trucks being loaded. According to those statements, the drivers for the trucks told them (the employees) that they were hauling ballast to Hickman. The record also includes a statement from one of the Section Foremen at Hickman, attesting to the fact that he had observed the trucks arriving in Hickman to unload the ballast and that a driver told him that he had come from Lincoln and was also going to Roca, Nebraska.

The Carrier denies that Pavers, Inc. hauled ballast from Old 14 to Hickman on April 17, 2006. The record includes a copy of an invoice from Pavers, Inc., which indicates that on April 17, 2006, it hauled ballast from the Lincoln Yard to Tecumseh, Nebraska, which is some 40 miles from Hickman and in a slightly different direction

from Lincoln. It does not indicate that Pavers, Inc. hauled anything to Hickman on April 17, 2006.

The Organization contends that the work of hauling and distributing ballast is typical Maintenance of Way work and is covered by the Note to Rule 55. As such, the Carrier is required to give advance written notice of its plans to contract out such work, as far in advance as possible, so that the parties can meet in conference to discuss the need for contracting and ways to avoid it. In this case, the Carrier failed to provide any notice whatsoever, and the claim should be sustained on that basis alone. The Carrier's denial that the work occurred is disproven by the five statements from employees who witnessed the trucks being loaded in Lincoln and unloaded in Hickman. The fact that Hickman does not appear on the Pavers, Inc. invoice does not change the reality that its trucks went to Hickman on April 17, 2006. It is possible that some trucks went to Hickman and others to Tecumseh and that the contractor showed only Tecumseh on its invoice. The Carrier did not respond to or deny the employee statements, and they should therefore be credited as fact, leaving the facts undisputed. The Claimants lost a work opportunity and are entitled to monetary compensation as a result. There is ample precedent on the property for sustaining the claim and the Board should do so.

The Carrier argues that the Organization's claim is erroneous and the alleged work never occurred. Pavers, Inc. did not haul ballast to Hickman on April 17, 2006. The Pavers, Inc. invoice for that date establishes that it was hauling ballast to Tecumseh instead. The Carrier did not provide notice to the Organization because it was not planning to use a contractor to haul anything from Old 14 at the Lincoln Terminal to Hickman, so no notice was required. Further, the Carrier did not in fact contract with Pavers, Inc. to haul ballast as claimed by the Organization. The Organization has not carried its burden of proof and the claim should be denied. At best, there is a factual dispute between the parties that requires dismissal of the claim.

The versions of what happened put forth by the Carrier and the Organization are contradictory and cannot both be true. The Pavers, Inc. invoice shows that its trucks hauled ballast to Tecumseh on April 16, 2006, and not to Hickman. As a routine business record, such a document is generally considered reliable. But statements in the record from employees on site in Lincoln and Hickman on April 17, 2006, and who witnessed events at those locations attest to the loading and unloading

that is the basis of the claim. The Organization speculated that perhaps Pavers, Inc. went to two locations on April 17, with the invoice showing only one. But that is only speculation, plausible though it may be. There is nothing in the record to support it, and the Board may not make decisions based on speculation. Based on the written record before the Board, we find an irreconcilable difference in the essential facts of the claim as presented in the record.

The nature of the claims resolution process negotiated by the parties is such that the Board does not have an opportunity to hear witness testimony in person and to make credibility determinations based on that testimony. Instead, the Board only has a written record upon which to make its decision, and must evaluate the evidence as it is presented in that record. As the Board has noted within Third Division Award 40864, without an opportunity to see and hear witness testimony – and to ask questions about matters in the record that are confusing or contradictory – the Board is "not in a position to make informed decisions about which of two competing versions of the facts is the more credible." As a result, when faced with irreconcilable differences over essential facts, the Board has no alternative but to dismiss the claim.

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 21st day of November 2011.