

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32316
Docket No. MW-31622
97-3-93-3-635

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier contracted out Maintenance of Way work to the Box Butte County Road Department for the removal of a grade crossing at Mile Post 371.79 and the building of a grade crossing at Mile Post 371.87 on August 10, 11, 12, 14, 17, 18 and 21, 1992 (System File C-92-C100-41/MWA 92-11-13C).
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out any of the above-described work, as stipulated in the Note to Rule 55.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman D. E. Didier shall be allowed fifty-two (52) hours' pay at his respective straight time rate, Group 2 Machine Operators L. Haines, R. E. Huss, T. L. Anderson, L. A. Garniss and C. R. Kelley shall each be allowed pay for an equal proportionate share of the two hundred eighty-eight (288) hours expended by the outside forces at their respective straight time rates and Truck Drivers G. L. Griffie and P. J. Webster shall each be allowed pay for an equal proportionate share of the thirty-two (32) hours expended by the outside forces at their respective straight time rates."

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 arose when the Organization took exception to the Carrier's assignment of an outside contractor to remove a crossing at Mile Post 371.79 and construct a new crossing at Mile Post 371.87 in August of 1992. The Organization argues that this type of work has customarily, historically, and traditionally been performed by Carrier forces. The Claimants in this case were fully qualified and available to perform the work had they been given the opportunity to do so. Furthermore, the Organization argues that the Carrier did not give the General Chairman advance written notice of its intent to contract out the work in question, thereby, violating the Note to Rule 55 and the December 11, 1981, Letter of Agreement.

The Carrier denied the claim contending that it was requested by the Box Butte County Road Department to move its grade crossing so that the Road Department could make safer the public road adjacent to the Carrier's track. The Carrier contends that the work was solely performed by its Hemmingford Section and not by anyone else. The Carrier points out that the Box Butte County Road Department installed a new approach to the grade crossing but that was exclusively performed, controlled and paid for by the Road Department.

The parties being unable to resolve the issues at hand, this matter came before this Board.

This Board has reviewed the record in this case and we find that the Organization has not met its burden of proof that the Carrier violated the Agreement when the County Road Department made certain repairs to the approaches to grade crossings at the same time that the Carrier employees were performing work on those grade crossings. The Carrier is correct that when the Organization filed the claim it did not even mention the work on the approaches. The only challenge was to the grade crossing work and the Carrier has shown that the grade crossing work was performed by the Organization members who work in the Carrier's Hemmingford Section. Consequently, there was no violation relating to the grade crossing work.

With respect to the approaches, the Carrier argues that that work was performed, controlled, and paid for exclusively by Box Butte County in accordance with its responsibility for keeping the roads safe. The Organization has not come forward with any evidence that there was a contract between the Carrier and the County or that the approaches were under the control of the Carrier at the time that the work was performed by County employees.

With respect to the Organization's argument relating to the Note to Rule 55 that the Carrier did not give the Organization notice and meet with the Organization prior to any subcontracting, this Board must agree with the Carrier that it is not required to give the Organization notice relating to work that is outside of the control of the Carrier. The Carrier did not contract out the work here, and therefore, no notice was required.

The Organization bears the burden of proof in cases involving subcontracting to show that there was some violation of the Collective Bargaining Agreement. In this case, the Organization has not met that burden, and therefore, the claim must be 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 13th day of November 1997.