

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33347
Docket No. MW-32313
99-3-95-3-147**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 Carrier violated the Agreement when it assigned or otherwise allowed outside forces (Mikkelson Construction) to perform track removal, reconstruction and repair work on trackage located at Bottineau, North Dakota on the Westhope Subdivision on September 15, 16 and October 27, 1993 (System File T-D-700-H/MWB 94-01-12C).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out said work as required in the Note to Rule 55.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Section Foreman J. F. Lake, Truck Driver C. C. Bachmeier, Sectionmen B. Schultz, K. Smith, B. W. Cammack and Group 2 Machine Operator T. Selfors shall each be allowed pay at their applicable rates for an equal proportionate share of the one hundred fourteen (114) man-hours expended by the outside forces performing the above-described work.”**

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.

By letter dated November 10, 1993, the Organization alleges Carrier's violation of the Agreement in contracting out Scope protected work. The Organization's claim is that the Carrier subcontracted out the work of track removal, track construction and repair at Bottineau, North Dakota. It had two hundred feet of track first removed on September 15 and 16, 1993 by Mikkelson Construction and then reconstructed on October 27, 1993. The Organization alleges that the work performed on the Carrier's right of way was performed without notification. The Organization argues that the employees were denied work opportunity performing work that historically and customarily was protected by Agreement.

The Carrier argues that it had no part to play in the alleged track work and did not contract out the work. It is the Carrier's position that it signed a Lease Agreement with Bottineau Farmers Elevator. All track work performed was undertaken by Bottineau and performed on track for which they were responsible for maintenance and the full expense of projects. As Bottineau initiated, hired and performed the work, it did not come under the Scope of the Agreement. Carrier was therefore neither obligated to give notice, nor in violation of any Rule of the Agreement.

Certain facts are not in dispute. The work performed was the removal of rail, ties and track material and then reconstruction of track utilizing four employees foreign to the Agreement. There is no dispute that the nature of the work falls within the Scope of the Agreement. The work was performed without notification. The central issue upon which this claim turns is the Lease Agreement provided by the Carrier on the property. The Organization argued both that the Lease Agreement was not in effect at the time of the incident and further that it was inapplicable to these facts.

The Board has carefully reviewed the on-property record. The Lease commenced on September 14, 1993 and was in effect. Our full reading of the Lease, including

Section 4 does not provide sufficient proof that the Carrier controlled the trackage; that the work performed was for its benefit or under its direction; or that the actions of the Carrier in Leasing to Bottineau was for the purpose of evading the Agreement. What stands before us is a Lease application of September 17, 1993, that began on September 14, 1993. There is a lack of substantial evidence to move beyond an assumption of subterfuge to a factual showing that the work performed was under the control of the Carrier for its benefit and thereby covered by Agreement. Accordingly the claim must fail.

AWARD

Claim denied.

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 23rd day of June 1999.