

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36208
Docket No. MW-35665
02-3-99-3-600**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway (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 (Capital City Construction, Inc.) to perform routine Maintenance of Way and Structures Department work (remodel a storage structure) at Mandan, North Dakota as completed on November 6, 1997 (System File T-D-1462-H/MWB 98-02-04AM BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice of its plans to contract out said work as required by the Note to Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman S. Riehl and Carpenters L. J. Dietz, T. D. Jochim, L. G. Belden, H. L. Doll and J. G. Beehler shall now each be compensated for thirty-eight (38) hours' pay at their respective straight time 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 facts in this case are not in dispute. During October 1997, a Carrier owned container was brought to Capital City Construction, where it was remodeled into a workshop. The remodeling work included adding a garage door, an entry door, windows, metal interior framework, insulation, wall, ceiling and floor coverings. The container was returned to Carrier property on November 6, for use as a Maintenance of Way workshop.

The Organization contends that the remodeling work is covered under the Scope Rule of the Agreement and has been traditionally and historically performed by Maintenance of Way employees. The Organization further contends that the Carrier did not provide the General Chairman with advance notice of such activity. In the Organization's view, the fact that the container was remodeled off of the Carrier's property is immaterial because it is work reserved to Maintenance of Way employees.

The Board agrees that, if the work in question is covered under the Scope Rule of the Agreement, then it accrues to Maintenance of Way forces and the notice requirements apply regardless of whether the contracting work was done on or off of the Carrier's property. The Carrier cannot be permitted to do indirectly, off premises, what it cannot do directly on its premises.

In this case, however, the Organization failed to prove, as a threshold matter, either that the disputed work was within the Scope of its Agreement or that it was customarily performed by Maintenance of Way employees. The Board finds no express language in the Agreement reserving to employees the work of remodeling containers. Moreover, the record is devoid of any evidence that such work had been performed by these employees in the past.

The burden of proof lies with the Organization to establish the elements of its claim. It has not done so here, and therefore the claim must be denied.

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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 24th day of September 2002.