

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 36808  
Docket No. MW-36287  
03-3-00-3-513

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(Burlington Northern Santa Fe 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 to perform routine Maintenance of Way machine operator work (operate trackhoe, front end loader and dozer) to load Carrier air dump cars at the granite fill at Mile Post 26.5 beginning May 4, 1998 through May 12, 1998 (System File S-P-647-O/MWB 98-09-09AD BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper notice of its intent to contract out 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, Group 2 Machine Operators E. F. Worley, H. A. Peters and C. J. Skiles, Jr., shall now each ‘. . . receive an equal and proportionate amount of pay for all hours straight time and overtime worked by the contractors (sic) the project is over or the violation is stopped.’”**

**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 contention of the Organization is that the Carrier violated the Scope of the Agreement when it allowed an outside contractor to load air dump cars with granite fill at MP 26.5 from May 4 to May 12, 1998. The Organization argues that this work was customarily performed by the Claimants and that the Carrier violated Rule 55 by contracting out the work out without notice and further violated Appendix Y in its failure to reduce reliance on outside contractors.

The Carrier maintains that it provided notice of its intent to perform the contested work as part of a project between SP Junction and Algoma. It maintains that it acted in good faith in utilizing the employees to the extent practicable. It further asserts that the work at bar was not work within the Scope of the Agreement inasmuch as the employees failed to show that the work was exclusively performed on a system-wide basis.

The record reflects that the Carrier provided proper notice of its intent to perform new construction of a double track between SP Junction and Algoma, MP 2.9 and MP 10.1. The Organization's central dispute is that the notice makes no mention "of any work to be performed by subcontractors at MP 26.5 on the Pend Oreille Subdivision." The Organization argues that this project did not include the loading of granite fill "in excess of sixteen miles" away from the notice. Further, because this work was scope protected, the Carrier had no authority to contract out work reserved to BMW-represented employees.

After careful examination of all the evidence in this extensive case, the Board finds that notice was given for the instant work and when it was conferenced, the Organization raised no issues whatsoever with the work herein disputed. As for the location of the work being at MP 26.5, the Carrier asserted on more than one occasion that:

“Originally the contractor was going to use materials from the immediate area to perform the bank stabilization. However, Lake Pend Oreille began to rise so quickly that this was impossible, therefore, the contractor traveled to a Carrier rock stockpile to obtain the needed materials. . . the work contained in the notice just had to be performed in a slightly different fashion than how it was originally planned.”

The Board finds no rebuttal and it stands as fact. We also find no evidence to suggest that this disputed work was performed by another contractor; was a part of another project; or was anything other than associated with the SP Junction and Algoma work referenced.

Further, the Board finds no proof of the Organization’s right to the disputed work for the reasons we have previously held on this property (See Third Division Award 34149). There is clearly no proof that the Carrier violated Rule 55 and Appendix Y under both issues of applicability and evidence. The Carrier provided a long list of similar projects that were performed by outside contractors documenting customary performance.

The record before us is devoid of evidence to prove scope control of the disputed work, or that it was customarily performed by Maintenance of Way employees. The claim must therefore 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 29th day of December 2003.**