

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37483
Docket No. MW-36419
05-3-00-3-661**

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 Employees
(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 (Cop Construction, Lundeen Construction, Schwartz Construction, Franz Construction and Mitchell Construction) to perform Maintenance of Way work (construct a tank farm and building for an oil-water separator and related work) at Glendive, Montana on the Dakota Division beginning April 26, 1999 and continuing (System File B-M-691-F/11-99-0490 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) The Agreement was further violated when the claim filed by Vice General Chairman G. E. Frank under date of June 23, 1999 to Carrier Representative K. L. Parenteau was not denied by Ms. Parenteau pursuant to Rule 42 and shall now be allowed in accordance with said Rule.**
- (4) As a consequence of the violations referred to in Parts (1), (2) and/or (3) above, Foremen L. A. Strohm, J. W. Pearson, E. E. Ringen, W. D. Sutton, Truck Drivers G. A. Schuman, L. K.**

Roberts, J. F. Beehler, L. L. Watterson, First Class Carpenters O. D. Gaub, D. J. Knoll, E. E. Weidner, R. L. Kellogg, R. C. Doyle, Group 2 Machine Operators R. K. Utgaard, R. A. West and T. G. Kinsey, Water Service Foreman L. Metzger, Water Service Mechanics K. A. Christensen, R. F. Wegman and Group 1 Machine Operator B. J. Brenner shall each ' . . . receive an equal and proportionate amount of pay for all straight time hours and overtime hours worked by the contractor beginning on April 26, 1999 and continuing until the work is completed.'"

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 is the second claim arising from the Carrier's determination to use contractor forces for the construction of a fuel facility in Glendive, Montana. The first claim, the subject of Third Division Award 37433, alleged that the Carrier violated the Agreement by assigning a contractor to construct the new fuel facility. The claim protested the work performed by contractor forces through April 1999. The instant claim contends that, beginning April 26, 1999, contractor forces were improperly assigned to the remaining portion of the project; specifically, the construction of a tank farm and a building for an oil-water separator.

The Carrier argues that the instant claim is untimely and duplicative of the earlier one and therefore should be dismissed. We disagree. The earlier claim clearly encompasses the first phase of the Glendive fuel facility project, while the present claim protests the remainder of the work performed by outside contractors.

In that respect, it does not duplicate the first claim. Moreover, the continuing nature of the claim precludes a finding of untimeliness.

We next turn to the remaining threshold issue in this case. The Organization challenges the claim declination, arguing that it was beyond the 60 days provided for in Rule 42A of the Agreement. Based on our review of the record, we find that the Organization's position is correct. Tracking documentation shows that the claim was received by the Carrier on June 24, 1999. The Carrier was contractually obligated to notify the Organization within 60 days, or by August 23, 1999 of its response. The claim denial, dated August 25, 1999, was untimely.

The Organization acknowledges that National Disputes Committee Decision 16 limits liability of continuing claims based upon default to the date a denial is issued. It asserts, however, that the merits of the case warrant a finding that the claim be fully sustained as presented. This is so, the Organization argues, because the Carrier originally contemplated the assignment of BMW-represented forces to perform some of the specific tasks related to the construction of the tank farm and oil-water separator. In the Organization's view, this is tantamount to an admission that the work is reserved to, and customarily performed by Carrier forces.

It must be remembered, however, that the project originally called for a modification of the existing facility. When the plans were changed, the scope and magnitude of the project became more complex in order to relocate and completely rebuild the facility. We are not convinced that piecemealing the project was required under the circumstances presented. In that regard, Third Division Award 24281 sets forth the well-established rule:

"... The Carrier is on firm ground in assuming it need not fragment work of this obviously large scale and complex nature. Award 20899, citing many previous awards, states:

'... [W]e find no evidence in the record that the disputed work could in fact have reasonably been segregated from the whole construction project and assigned to Claimants; nor is there any Rule in the Agreement requiring Carrier to make such fragmentation of the work.'"

The remaining arguments advanced by the Organization have been addressed in Third Division Award 37433. As in that case, the Board finds that the disputed work at best has been performed by both Carrier and contractor forces. Moreover, the Carrier afforded the Organization notice and opportunity for conference. As a result, the Organization has fallen short of proving the merits of its case.

Based solely on the untimely declination of the claim, we shall issue a sustaining Award. The Claimants are to be awarded an equal share of 1,207 hours at the straight time rate of pay, which we determine to be the hours the contractor performed work from April 26 to August 25, 1999, the date of the Carrier's belated declination. The remaining amounts claimed are denied.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of April 2005.