

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38011
Docket No. MW-37107
06-3-01-3-694**

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 Employes
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it utilized outside forces (Railway Equipment Company) to perform Maintenance of Way work (cutting brush) at the Sioux Falls Yard on the Canton and Madison Subdivisions on September 12, 13 and 14, 2000 (System File T-D-2190-B/11-00-0011 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, Group 2 Machine Operators S. A. Ahnberg and W. E. Silkenson shall each be compensated twenty-four (24) hours' pay at their respective straight time rate of pay and twelve (12) hours' pay at their respective time and one-half 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 Organization submitted a claim on October 18, 2000 stating that the Carrier utilized an outside contractor on the Dakota Division, specifically on September 12, 13 and 14, 2000 in the Yard at Sioux Falls, South Dakota, and on the Canton and Madison Subdivisions of the Dakota Division. The Organization alleges that brush cutting was customarily and contractually the work of the employees in the Roadway Equipment Sub-department. The alleged subcontracting of cutting brush from the right-of-way was on the same Line Segments as in companion Third Division Award 38010. The Carrier's defenses herein include all those previously considered. Additionally, the issues and Rules allegedly violated are the same, including the Note to Rule 55 which states in part:

"By agreement . . . work . . . customarily performed by employees described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that . . . special equipment not owned by the Company, or . . . beyond the capacity of the Company's forces."

The Organization argued that the Rules support that the instant work not only belonged to the employees, but the Note to Rule 55 prohibited the contracting out of this work. The Organization argues that the central requirement to the Note, supra, is notification in advance to the General Chairman and this was not done.

The Board studied the record and finds that the instant case differs little from the facts decided in Award 38010. We find a note in the Organization's evidence

about the Carrier's use of specialized equipment indicating that the "brontosaurus head was used one day . . . and only after they broke the other head," as a response to an actual need for the specialized equipment. We also find that this claim is on all fours with the substantive facts necessary for our resolution of Award 38010.

As such, because the very same issues of fact and Rule interpretation have been considered and determined by that Award, the Board finds similarly in this case, that:

"The work performed involved cutting tree limbs on the Carrier's right-of-way on segments of the Dakota Division over three days in 2000. It was work classified and included in the duties of BMW-represented employees which could be contracted out if special equipment was needed. However, that is to be determined by discussion prior to contracting out with proper notice. The overwhelming documentation carefully reviewed by the Board revealed numerous instances of felling trees, cutting trees, utilizing chain saws and doing work that could arguably be similar to the instant work. Whether the disputed work could or could not have been performed in part or in total by the Carrier's forces; whether special designed equipment was or was in no way necessary; these are the matters to which the Agreement mandates discussion. In the absence of proper notice, the Board concludes that the Carrier violated the Agreement.

The Board reviewed the Carrier's discussion of appropriate remedy for the violation. We also reviewed the numerous Awards on this subject. The Board holds that the claim will be sustained as presented. This demonstrated violation adversely affected the Claimants in causing a loss of work opportunity."

AWARD

Claim sustained.

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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 25th day of October 2006.