

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40200
Docket No. MW-38241
09-3-NRAB-00003-040166
(04-3-166)**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

The Carrier violated Article XV of the September 26, 1996 National Agreement when it contracted out the work of installing crossing signs between Mile Posts 526 and 625.50 on the Limon Subdivision within the Kansas Division beginning on March 3, 2003 and continuing and failed to afford furloughed Kansas Division Track Subdepartment employees J. L. Montgomery and D. S. Reza the level of protection which New York Dock provides for a dismissed employee (System File C-03XV-102/1361192).

As a consequence of the violation referred to in Part (1) above, Claimants J. L. Montgomery and D. S. Reza shall ‘. . . each be allowed New York Dock level protection benefits for a dismissed employee while they have been and are furloughed/dismissed employees.’”

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 instant claim alleges that Claimants J. L. Montgomery and D. S. Reza were furloughed as a result of subcontracting, beginning March 3, 2003. According to the Carrier, the Claimants work on seasonal production gangs and these gangs shut down each year because of weather. Both Claimants' work histories show a pattern of being furloughed.

The claim was filed on March 10, 2003 alleging that Article XV of the September 26, 1996 National Agreement had been violated when the Carrier contracted with Railroad Specialties, Inc. to install stop/private property/railroad crossing signs on the Limon Subdivision on the Kansas Seniority Division. The Organization requested the remedy of New York Dock level protection benefits for the Claimants.

Article XV states, in relevant part:

"The amount of subcontracting on a carrier, measured by the ratio of adjusted engineering department purchased services (such services reduced by costs not related to contracting) to the total engineering department budget for the five-year period 1992-1996, will not be increased without employee protective consequences. In the event that subcontracting increases beyond that level, any employee covered by this Agreement who is furloughed as a direct result of such increased subcontracting shall be provided New York Dock level protection for a dismissed employee, subject to the responsibilities associated with such protection."

The Organization argues that Claimants Montgomery and Reza would not have been laid off had it not been for the subcontracting at issue. It claims that the Carrier failed to provide the relevant information to enable the Organization to properly ascertain the amount of work subcontracted between 1992 and 1996 in order for it to properly make its claim. It argues that because the Claimants were furloughed as a direct result of the Carrier's subcontracting of the work of installing signs to Railroad Specialties, Inc. the Claimants are entitled to New York Dock protection benefits.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. First, it contends that the Organization's argument regarding the lack of information provided to the Organization was not properly raised on the property and, therefore, cannot be considered. Second, even if said argument was properly raised by the Organization, it must nonetheless fail based on the decision in the United States District Court for the Northern District of Texas, captioned BNSF Railway Co. v. BMW, No. 4:07-CV-071-A (11/16/07) in which the Court specifically rejected the same argument that the Organization made in the instant case. In that case, the Court overturned Third Division Awards 36983 and 36984. Finally, the Carrier contends that the Organization failed to meet its burden of proof to show that the subcontracting by the Carrier directly led to the furlough of Claimants Montgomery and Reza.

After a review of the record, we find that the Organization has been unable to meet its burden of proof. First, it is apparent that the Organization's argument regarding the lack of information provided by the Carrier concerning the 1992-1996 period was not raised on the property and, therefore, the Board will not consider said argument. Beyond said argument, we cannot find that the Organization has been able to prove that the subcontracting of the sign installation to Railroad Specialties, Inc. directly led to the furlough of Claimants Montgomery and Reza. Because the Organization has been unable to meet its burden of proof, the claim is 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 21st day of December 2009.