

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40202
Docket No. MW-38243
09-3-NRAB-00003-040148
(04-3-148)**

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

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated Article XV of the September 26, 1996 National Agreement when it contracted out the work of unloading and stockpiling ties between Mile Posts 0.0 and 7.1 on the Fort Collins Subdivision and between Mile Posts 57.0 and 79.0 on the Greeley Subdivision from February 13 through March 8, 2003 and failed to afford furloughed Roadway Equipment Operator M. L. Savor the level of protection which New York Dock provides for a dismissed employee (System File C-03XV-104/1361196).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. L. Savor shall be ‘. . . allowed New York Dock level protection benefits for a dismissed employee while he has been and is a furloughed/dismissed employee.’”**

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, which was filed on March 20, 2004, alleges that Claimant M. L. Savor was furloughed as a result of subcontracting during the period of February 13 - March 8, 2004, when the Carrier hired a contractor to unload and stockpile ties at Fort Collins and Greeley, Colorado, in violation of Article XV of the September 26, 1996 National Agreement.

The Organization requested the remedy of New York Dock level protection benefits for the Claimants. According to the Carrier, the Claimant was fully employed from February 13 - March 8, 2004, and was not furloughed as direct result of said subcontracting.

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 Claimant Savor 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 Claimant was furloughed as a direct result of the Carrier's subcontracting of the work of unloading and stockpiling ties, the Claimant is 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 this claim is a duplicate of another claim. In addition, 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. Further, 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 the Claimant.

After a review of the record, we find that the Organization has been unable to meet its burden of proof. First, it is unclear whether the Claimant was even furloughed during the relevant time period. Further, 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 directly led to the furlough of the Claimant. Because the Organization has been unable to meet its burden of proof, the claim is 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 21st day of December 2009.