

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40494
Docket No. MW-39628
10-3-NRAB-00003-060414
(06-3-414)**

The Third Division consisted of the regular members and in addition Referee Daniel F. Brent when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
(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 (Kenley Construction) to perform Maintenance of Way and Structures Department work (excavating and dirt work, placing and welding pipe for fuel lines, digging footings, building forms and pouring concrete and other related construction and repair/replacement work) at the B-1 East, B-1 West and B-2 West Fueling Facility in the Hobson Yards in Lincoln, Nebraska beginning on October 11, 2004 and continuing [System File C-05-C100-21/10-05-0041(MW) BNR].**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out said 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, Claimants F. Fankhauser, R. German, B. Sullens, J. Scherer, G. Tjaden, R. Reimers, L. Divoll, W.**

Flentie, G. Ellis, W. Brhel, J. Francke, R. Musil and D. Gerken shall now each be compensated at their respective straight time rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning October 11, 2004 and continuing.”

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 contends that the Carrier violated the Agreement by assigning Kenley Construction to perform excavating and dirt work, placing and welding pipe for fuel lines, digging footings, building forms and pouring concrete and other related construction and repair/replacement work at the B-1 East, B-1 West, and B-2 West Fueling Facility in the Hobson Yards in Lincoln, Nebraska, beginning on November 11, 2004 and continuing thereafter. The Organization further contends that the Carrier violated the Agreement by failing to provide the General Chairman with proper advance notice of its intention to contract out the disputed work or to make a good faith effort to reduce the incidence of subcontracting.

The Organization further contended that the notice to the General Chairman conveyed that the Carrier had already decided to contract out the work, because it notified the Organization that a subcontractor “will perform” the disputed work. According to the Organization, the notice indicated that bargaining unit employees would be used, but the Carrier decided to give the work to an outside contractor. The General Chairman contended that the Carrier agreed that bargaining unit

employees would do all piping work, but this work was also assigned to the outside contractor.

The disputed work occurred at two locations in the Hobson Yards. The contractor used a bulldozer, a sheep's foot roller and a backhoe and poured concrete. According to the Organization, the disputed work falls squarely within the scope of work customarily performed by bargaining unit employees. The Organization contends that the Carrier failed to demonstrate valid reasons for contracting out the work, because there were no special skills, licenses, materials or equipment necessary to perform the work.

The Carrier defended its action, citing historical practice and the absence of permits for a Master Plumber to oversee or perform the disputed work.

The disputed work involved constructing double walls to control any diesel fuel spills, as well as installing pipe runs inherent in this project. Notwithstanding the Carrier's contention that there might have been some ground contamination requiring special techniques to remove tainted soil, the evidentiary record does not support the Carrier's contention that the work could not be performed by bargaining unit employees, who regularly perform such work according to the record evidence. The record does not show that a special license is required to dispose of the soil unless it is contaminated. Moreover, there is no evidence that a Master Plumber employed by the Carrier as part of the bargaining unit could not have pulled the necessary permits to perform the disputed work. Finally, the Carrier was unable to demonstrate persuasively that the contractor's forces had skills or equipment that bargaining unit employees do not have or that sufficient bargaining unit employees were not available to perform the disputed work.

As the Organization asserted, the Carrier has a duty to maintain a workforce sufficient to perform bargaining unit work that is reasonably foreseeable. There was no emergent or urgent necessity of performing the disputed work immediately. Consequently, the Carrier could have scheduled the work in a manner that permitted bargaining unit employees to perform it.

The Carrier cited an OSHA regulation, but this regulation was not invoked. The Carrier's contention that bargaining unit employees do not have the compaction skills necessary to perform the disputed work was unable to overcome

the more persuasive evidence offered by the Organization that BMW-represented employees could perform such duties, especially if the Carrier rented the equipment necessary to perform the compaction even if the Carrier did not own such equipment. Finally, the quality of compaction is not dispositive of the instant case because it would be prudent for the Carrier to engage the services of a testing company to assure that the compaction was proper whether relying on the efforts of bargaining unit employees or vendors' employees.

Based on the evidence submitted, the instant claim must be sustained. Claimants F. Fankhauser, R. German, B. Sullens, J. Scherer, G. Tjaden, R. Reimers, L. Divoll, W. Flentie, G. Ellis, W. Brhel, J. Francke, R. Musil and D. Gerken shall each be compensated at their respective straight time rates of pay for an equal proportionate share of the total man hours expended by the outside forces in the performance of the disputed work from October 11, 2004 through the completion of this particular project.

AWARD

Claim sustained.

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 15th day of June 2010.