

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40495
Docket No. MW-39632
10-3-NRAB-00003-060435
(06-3-435)**

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 Employees 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 (Newman Excavating) to perform Maintenance of Way and Structures Department work (load and haul ballast) from the Carrier ballast stockpile at Zearing, Illinois to the Carrier forces job site at road crossing on Route 26 at Princeton, Illinois on August 27 and 31, 2004 [System File C-05-C100-14/10-05-0032(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 R. Nelson and J. Okland shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and for four (4) hours 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 cites Rules 1, 2, 5, 29 and 55 in claiming that the Carrier violated the Agreement by assigning outside forces to load and haul ballast from the Carrier's ballast stockpile at Zearing, Illinois, to the Carrier force's job site at a road crossing on Route 26 in Princeton, Illinois, on August 27 and August 31, 2004. The Organization further alleges that the Carrier violated the Agreement by failing to provide the General Chairman the requisite 15-day advance notice of its intent to contract the work so that the parties could discuss the proposed subcontracting. As a result, the Organization claims that two employees were deprived of 16 hours' straight time wages and four hours at time and one-half because two subcontractor employees performed the disputed work.

The Carrier contends that the System Notice advising the Organization that asphalt was to be placed at grade crossings was sent to the Organization on December 16, 2003, and that the disputed work is part of a crossing project cited in that notice, thereby providing the requisite notice to the Organization in a timely manner.

The Carrier must make a good faith effort to advise the Organization in a timely manner before each instance of contracting out work that the bargaining unit is qualified to perform and that can be performed using either the Carrier's equipment or readily obtained rental equipment. It is undisputed that loading and transporting material to job sites is bargaining unit work. The Organization argued persuasively that the December 16, 2003 letter from the Carrier recites only the Carrier's plans to continue placing asphalt at grade crossings, but does not refer to the ballast for the track. Moreover, the location of the subcontracting and the dates were not specified in

the Carrier's December 2003 notification of intent to perform the disputed work in sufficient detail for the Organization to discern and reasonably identify with specificity the exact duties to be contracted out. Therefore, the Carrier's reliance on this letter as adequate notice as required by Rule 55 and Appendix Y was misplaced. By failing to advise the General Chairman of the proposed contracting out of the work to be done on or about August 27 and 31, 2004 at Princeton, Illinois, the Carrier deprived the Organization of an opportunity to intervene and seek to persuade the Carrier to use bargaining unit forces to perform the work.

The Organization contends persuasively that the necessary equipment, essentially dump trucks, were readily available for rental on the days the disputed work was contracted out, and that bargaining unit employees were available to perform the work. The evidentiary record does not establish persuasively that the Carrier could not have rented the equipment necessary to haul the ballast from the Carrier's ballast stockpile at Zearing, Illinois, to the Carrier force's job site at a road crossing at Princeton, Illinois, or that renting the equipment and assigning the work to bargaining unit employees was impractical or financially onerous. Thus, the contracting out of the disputed work was improper and violated the Agreement between the parties. Consequently, bargaining unit employees who were available on straight time and overtime were deprived of a total of 22 hours' wages. The Carrier shall pay such wages to the two employees identified by the Organization as the persons who were deprived of this work opportunity.

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.