

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40546
Docket No. MW-39544
10-3-NRAB-00003-060330
(06-3-330)

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 (Fisher/Tompkins) to perform Maintenance of Way and Structures Department work (remove crossing and track panels, dump ballast, replace crossing and related work) at Route 26 road in the vicinity of Mile Post 104 near Princeton, Illinois on August 26, 27, 30, 31, September 1, 2 and 3, 2004 [System File C-05-C100-15/10-05-0033(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, Claimant J. Ashlock shall now be compensated for twenty-four (24) hours at his respective straight time rate of pay and for two (2) hours at his respective time and one-half rate of pay, Claimants R. Freeman and M. Lowe shall now each be compensated for fifty-four (54) hours at their respective straight

time rates of pay and for six and one-half (6.5) hours at their respective time and one-half rates of pay and Claimant L. Benner shall be compensated for forty-eight (48) hours at his respective straight time rate of pay and for six and one-half (6.5) hours at his respective time and one-half rate 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 work at issue was the removing and replacement of crossing and track panels along with the dumping of ballast and related work on Route 26 in the vicinity of Mile Post 104 near Princeton, Illinois, on August 26, 27, 30, 31, September 1, 2 and 3, 2004. The Organization contends that the Carrier failed to establish its burden of proof justifying sub-contracting out of work consistent with the exceptions contained within the Note to Rule 55. The Carrier is obligated to demonstrate that its employees do not possess the special skills or that the Carrier does not own or cannot easily rent the special material necessary to perform the disputed work, which is customarily performed by bargaining unit Maintenance of Way employees.

The evidentiary record established clearly that the disputed work is within the scope of work that the bargaining unit regularly performs and could have been effectuated with the type of equipment that the Carrier either owns or readily could rent for use by bargaining unit employees. The Organization is not grieving the application of asphalt, which requires special equipment not customarily used by bargaining unit employees. The work necessary for the placement and rolling of the

asphalt could be accomplished by outside forces without unduly fragmenting the job.

Moreover, the Organization established persuasively that the Carrier failed to provide the General Chairman with proper advance notice of its intent to contract out the specific work as required by Rule 55 and Appendix Y. Although the General Chairman met with representatives of the Carrier on February 11, 2004, thus satisfying the requirement that such a meeting take place, the Carrier's letter of January 15, 2004 failed to list with specificity where the asphalt work was expected to occur in 2004, because the letter listed more than 1,800 separate locations across the Carrier's rail system where asphalt work was anticipated.

Even if the contracting out of the asphalt work to an outside vendor is deemed to be proper, the specific work at issue in the instant case - consisting of the removal of crossing/track panels, dumping ballast, replacing crossing/track panels and the operation of vehicles, machinery and equipment, such as dump trucks, skid loaders, rubber tire loader excavator and a D-4 bulldozer, all of which are regularly operated by bargaining unit employees - could have and thus should have been performed by bargaining unit employees.

The Carrier's assertion that the involvement of the State of Illinois in the project exempts the Carrier from assigning the work to bargaining unit employees because the Carrier would be required to "piecemeal" the work has not been substantiated. Absent compelling proof by the Carrier that the criteria in the Note to Rule 55 have been satisfied, the prima facie claim established by the Organization must be sustained.

The Organization quoted Third Division Awards 16440 and 29310 persuasively. In Award 16440, the Board held that "... the Carrier can prevail on this theory only if it is shown that the parts or phases of the work are so interrelated and dependent that a contract could not be entered into absent any one of the parts or phases." The asphalt work is distinguishable from the type of work claimed by the bargaining unit in the instant case and readily can be parceled out to outside forces while the traditional components of the job historically performed by Carrier forces was assigned to bargaining unit employees.

The Organization cited Third Division Award 20633, in which the Board held that “. . . Claimants who lose a rightful opportunity to perform work they are entitled to perform should be compensated with a monetary remedy.” This argument is persuasive, given the lost work opportunity for bargaining unit employees.

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 29th day of June 2010.