

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40562
Docket No. MW-40112
10-3-NRAB-00003-070326
(07-3-326)**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (Marta and Farnsworth) to perform Maintenance of Way and Structures Department work (clean up tracks and bridge walkways) on the Black Hills Subdivision on August 30, 2005 at Mile Post 543, on September 1, 2005 at the Dewey back tracks, on September 6, 2005 at the Woopup Bridge and Mile Post 508, on September 7, 2005 at the bridges at Mile Post 520.8 and on September 13 and 14, 2005, at the bridges between Mile Posts 581.4 and 555.5 [System File C-06-C100-18/10-06-0028(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 W. Nairn and R. Rainbolt shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and Claimant M. Miller shall be compensated for thirty-two (32) hours at his respective straight time rate of pay and for two (2) 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.

On May 24, 2005, the Carrier issued written notice to the Organization:

“The Carrier will contract out for a vacuum truck to remove coal spills and other environmentally sensitive materials spilt in and around the switches in the Gillette Yard, Wyoming, and on the Black Hills, Campbell, Reno and Orin Subdivisions. The spilled coal is considered an environmental waste and must be cleaned up and disposed of by qualified personnel. Moreover, the Carrier does not have the type of equipment that will be used to perform this work. It is critical this spillage be cleaned up as soon after the incident as possible, because coal is highly flammable and past coal fires have quickly escalated to tie fires.

The work may begin as soon as June 8, 2005.

Currently there is no available Carrier equipment to support these projects, and Carrier forces are not available to perform this work if even the equipment were rented or leased. Historically, when faced with the amount of work that the Carrier is currently facing it has contracted to supplement its work force on projects like that herein described. Nevertheless the Carrier is not adequately equipped or skilled to handle all aspects of this work.”

On May 25, 2005, the Organization notified the Carrier of its disagreement with the notice and requested a conference. A conference to discuss this matter was held on June 13, 2005. No resolution was forthcoming; an appeal was filed by the Organization and denied by the Carrier. Thereafter a claim was filed with the Board; each party submitted numerous Awards, including Third Division Awards, in support of their positions and arguments.

The Carrier “takes exception to this claim being out of time limits” because the “claim alleges a violation ‘starting on 08-17-05’ but the Organization’s claim was not received until October 27, 2005” - more than “sixty (60) days from the date of occurrence on which the claim...is based[.]” (Rule 42A) After listing August 17 the Carrier states that the Organization’s “next paragraph proceeds with a different set of dates, so the Carrier also takes exception to this being an invalid claim as two different sets of dates were given.”

There is some lack of clarity as to the particular disputed dates. A review of the claim shows that the Organization alleges violations of Rules 1, 2, 5 and 55 and Appendix Y “starting on 08-17-05 and ending on 09-07-05.” The next paragraph identifies the disputed dates as August 30, September 1, 6, 7, 13 and 14, 2005. Clearly identified in the corpus of the claim are events occurring on August 30, September 1, 6, 7, 13 and 14. Pursuant to Rule 42A the Board finds the claim timely for these dates. The Carrier had notice and has not shown how it was prejudiced by addressing these dates during conference and the appeals process. Finding the entire claim invalid, as the Carrier seeks, due to an awkward presentation of dates would result in a forfeiture of rights under the Rules and Agreement. A forfeiture is

to be avoided when there is a reasonable interpretation readily present from reading the entire claim.

The burden of proof resides with the Organization to demonstrate that the work performed is reserved to BMW-employees. Tailings is dirty ballast removed from the track by the undercutter consisting of dirt and rock. This fundamental and routine maintenance work - cleaning the right-of-way including the removal of undercutting tailings - performed by outside forces is encompassed within the scope of the Agreement and customarily performed by Carrier forces.

In this regard, paragraphs 1 and 2 of the Note to Rule 55 stipulate that employees included within the scope of this Agreement perform work in connection with the "... construction and maintenance or repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service." When contracting out work, the standard is customarily performed and not exclusively performed.

The Third Division has frequently interpreted Rules similar to Rule 1 and repeatedly held that work traditionally performed by classes of employees covered thereby cannot be removed from the scope of the Agreement. See Third Division Awards 6305 and 757. With respect to Rule 2, the contractor's employees do not possess seniority under the Agreement whereas Maintenance of Way employees do have seniority in the Track Sub-Department which was earned performing this kind of maintenance work.

There is no dispute that outside forces performed all the work such as removing tailings from undercutting as well as other work which required the use of vacuum trucks to remove coal spills and other environmentally sensitive materials. The Carrier does not own the type of specialized equipment (side dump semi-trailers) needed to perform this work when environmentally sensitive contaminants are present.

The Board finds that the disagreement centers on that portion of the Note to Rule 55 which sanctions contracting in instances requiring "special equipment not

owned by the Company.” The record reflects that the side dump semi-trailers are not owned or available to the Carrier to perform this work which involves more than cleaning the walkways (Maintenance of Way work) but removal of environmentally sensitive materials and contaminants such as coals spills. Weather was a contributing and complicating factor although it did not give rise to an emergency situation. Satisfying one of the exceptions in the Note to Rule 55 enables and authorizes the Carrier to assign maintenance work to outside forces yet remain compliant with the Rules and Agreement. The Carrier met that exception.

In sum the Organization received advance written notice of the Carrier’s reasons for contracting and the Organization has not proven that the Carrier’s reasons for its actions are a breach of the Rules and Agreement, including the Note to Rule 55 and Appendix Y. Therefore, the Board will deny the claim.

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 29th day of June 2010.