

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40663
Docket No. MW-40100
10-3-NRAB-00003-070286
(07-3-286)

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon 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 Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way work (install a new switch) at Mile Post 46.68 on the Aurora Subdivision on June 11, 2005 [System File C-05-C100-106/10-05-0249(MW) BNR].
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman an advance written notice of its plans to contract out the above-described work as stipulated in the Note to Rule 55 and Appendix Y.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Reed, D. Anders, D. Furrow, R. Freeman, J. Komater and G. Sheldon shall now each be compensated for eight and one-half (8.5) hours’ pay 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.

On August 19, 2004, the Carrier entered an Industry Track Agreement and Lease of Land with Great Lakes Building Materials, Inc. ("Great Lakes") giving it limited control over certain industry tracks (including those involved here) at Sugar Grove, Illinois. The contracts provided that Great Lakes could control changes, repairs, and alterations to the industry track that might be necessary to it.

On June 11, 2005, a switch was installed at Mile Post 46.68 on the Aurora Subdivision by six employees of Miller Excavating, Inc. and/or Moring Construction working eight and one-half hours each. The work used four crawler hoes, one bull dozer, and one bobcat. Great Lakes hired and fully funded Miller and Moring costs.

The Carrier provided no prior notice to the Organization about the disputed work.

The Claimants are Machine Operators in the Carrier's Roadway Equipment Sub-Department or Sectionmen in its Track Sub-Department.

The Organization grieved on July 21, 2005. It asserts a violation occurred because (1) installation of mainline track switches is historically, traditionally and customarily done by the Track Sub-Department and Roadway Equipment Sub-Department employees and is reserved to them under Rules 1, 2, 5, 55, the Note to Rule 55 and Appendix Y (2) advance written notice to the Organization is mandatory when subcontracting is planned (3) the Carrier has a good faith duty to attempt to reduce subcontracting and to increase the use of BMWE-represented forces (4) the switch was used in the Carrier's operation in performing common carrier service within the Note to Rule 55 (5) the Carrier maintained control over the project and benefited from it by subsequently receiving revenue and fees from the project (6) this customary Organization work did not meet a specific exception that permits subcontracting under

the Note to Rule 55 (7) the Claimants are entitled to the requested remedy in full and (8) arbitration Awards support the Organization.

The Carrier responds: (1) the disputed work is outside the scope of the Organization's Agreement because it was sponsored by Great Lakes under its written lease on track under its control, for its benefit, at its expense and to impact its operations (2) no Note to Rule 55 notification was required because the disputed work was outside the scope of the Organization's work jurisdiction because its members do not customarily perform work on property leased to third parties (3) no notice is required for work performed on leased property for the benefit of a third party (4) Rule 55 is not a reservation of work (5) Appendix Y was not violated (6) the Carrier acted in good faith (7) damage claims are unproven and (8) arbitration Awards support the Carrier.

Replacement of track switches by the Carrier is presumptively within the Organization's reserved jurisdiction. Any subcontracting of Carrier work obliges the Carrier to comply with relevant Rules and contractual notice and assignment requirements, including the Note to Rule 55 and Appendix Y, or to fit within a specific applicable exception. Here, the core question is whether the Carrier is responsible for this particular switch replacement or whether it was the decision and act of Great Lakes, as lessee under an industrial track agreement. If attributable to Great Lakes, the switch was not replaced by the Carrier and the Carrier's promises to the Organization do not apply.

The weight of evidence shows Great Lakes is responsible for the disputed work. Thus, pre-existing written industry contracts gave relevant effective control and responsibility to Great Lakes. Great Lakes decided to do the work, chose the subcontractors and paid for it. The work accrued to Great Lakes' primary benefit. This combination of important factors strongly favors the Carrier's present position.

The Organization cites a Carrier authorization for an expenditure at Mile Post 46.78 to construct industry track. Even assuming the payment covered the location and work at Mile Post 46.68, the authorization does not negate the uncontroverted fact that Great Lakes ultimately paid for all disputed work.

The Organization also questions the Carrier's motivation and asserts the Carrier benefited from higher fees and charges because the new switch allowed more traffic on

connecting Carrier tracks. There is no evidence of subterfuge or other improper purpose. Without proof, the Organization's questions lead to no particular answer. At least on this record, the fact the Carrier ultimately may receive more revenue from decisions made and paid for by a lessee, does not show enough Carrier control or interest to attribute Great Lake's subcontracting decisions to the Carrier.

In sum, subcontracting not performed at the Carrier's initiative, not under its control or at its expense but which may result in an indirect benefit is outside the Agreement's scope and notice provisions. It is not subject to the Carrier's promises to the Organization. See Third Division Award 40501.

Accordingly, the claim is denied.

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 1st day of November 2010.