

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40670
Docket No. MW-40111
10-3-NRAB-00003-070325
(07-3-325)**

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

**(Brotherhood of Maintenance of Way Employes 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 Agreement was violated when the Carrier assigned outside forces (Railroad Equipment Services) to perform Maintenance of Way and Structures Department work (operate on-track brush cutters to cut brush) between Mile Posts 38.4 and 143.7 on the Aurora Subdivision beginning on November 1 and continuing through November 24, 2004 [System File C-05-C100-37/10-05-0067(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 D. Kimball, R. Nelson, M. Lowe and R. Freeman shall now each be compensated for one hundred forty-four (144) hours at their respective straight time rates of pay and for sixty-six (66) 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.

On September 1, 2004, the Carrier issued a letter of intent to contract to the Organization:

“Subject: Tree, Brush, and Debris Clearing along Right-of-Way,
Chicago East Division

There are several locations along the Aurora, Barstow, Mendota, and Chillicothe Subdivisions where the trees, brush, and other collected debris, needs to be removed from the Carrier right-of-way. In order to cut and clear the trees, some of which may be growing into, under, and over the signal pole lines, and the other right-of-way brush and debris, the Carrier will contract out the project to a qualified contractor who has the special skills and equipment necessary to complete all aspects of the project.

The project will begin on or after September 20, 2004.

The contracting of this work here involved is consistent with Carrier policy and the historical practice of contracting out such work. Moreover, the Carrier does not have the available forces or equipment to perform this work[.]”

On September 3, 2004, the Organization requested a conference that occurred on October 7, 2004, with no resolution.

The Organization filed a claim on December 7, 2004, alleging violations of “Rules 1, 2, 5, 29, 55, the Note to Rule 55 and Appendix Y but not limited thereto” when the Carrier contracted for two on-track brush cutters. It contended the claimed work is customarily performed by BMW-represented employees and falls within the scope of the Agreement. BMW-represented employees have a contractual right to be assigned to and perform the work before the Carrier resorts to employ forces from outside the Agreement. In this regard, the Carrier is required to notify the General Chairman “in writing, as far in advance of the contemplated transaction as is practicable and, in any event, not less than fifteen (15) days prior thereto[.]”

On February 9, 2005, the Carrier denied the claim stating the Organization provided no evidence and the Carrier lacked the manpower and equipment to accomplish the work with its forces. Also, the Organization does not have the exclusive right to handle this work and its requested relief was excessive.

An appeal was filed on March 7, 2005. Therein, the Organization reiterated its arguments as set forth in the claim with citations to Awards and noted that a “letter of intent does not relieve the Carrier of the responsibility to make a good faith effort to discuss these contracting issues with . . . [BMW].”

The Carrier denied the appeal on May 2, 2005. By letter dated March 24, the Organization confirmed the conference of March 15, 2006; another letter dated September 5, confirmed a second conference on May 24, 2006, at which time the Organization provided pictures of equipment the Carrier owns or can lease and a Track Inspector’s statement.

Control of vegetation by mowing and brush cutting on and around the right-of-way is part of track maintenance. This work enhances visibility of and access to the track and right-of-way structures. BMW-represented employees use on-track equipment, ordinary tools (mowers, weed eaters, chain saws) and off-track equipment (brush cutters, weed burners, tractor mowers) to clear and control vegetation. Employee statements, copies of bulletins and photographs of Carrier-owned equipment constitute clear and convincing evidence that the Carrier’s forces

customarily and historically perform this work and were available with the skills and qualifications to operate Carrier-owned equipment, as well as rental or leased equipment.

The Organization received proper notice from the Carrier, and the parties engaged in good faith discussions over the letter of intent. The organizational imperative to perform this maintenance work as scheduled is not apparent because no special skill or equipment was required and Carrier-owned equipment is routinely deployed for this work. There is no indication that rental or leased equipment was unavailable. The Carrier states its forces were fully employed. That statement is a tautology because the Claimants encumber full-time positions and, by definition, are always fully employed by the Carrier. Given these findings, the Board concludes that the reasons for contracting fall short of the Agreement and Appendix Y. Parts (1) and (2) of the Organization's claim are sustained.

The Carrier is aware that a decision to contract work which is customarily performed by Carrier forces may result in an award of compensation. The Claimants were subjected to a loss of work opportunity due to the Rules violations. Full employment or vacation during the claim period does not relieve the Carrier from compliance with the Agreement. Monetary relief is appropriate to preserve and protect the integrity of the Agreement and Appendix Y.

The parties disagree about the calculations and bases for the requested monetary relief. To resolve that disagreement, the claim is remanded to the parties for a determination of the amount of hours of contractor assigned work. In making that determination, the parties are to review the Daily Work Reports submitted by the contractor and, under Rule 5, to calculate relief as Group Three Operators and apportion it accordingly.

AWARD

Claim sustained in accordance with the Findings.

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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 1st day of November 2010.