

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40766
Docket No. MW-40147
10-3-NRAB-00003-070392
(07-3-392)**

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 Agreement was violated when the Carrier assigned outside forces (GPC Perrett Construction Ltd.) to perform Maintenance of Way and Structures Department work (drive piling) at Mile Posts 67.5, 69.5 and 70.1 on the Orin Subdivision beginning on June 13, 2005 and continuing through July 29, 2005 [System File C-05-C100-104/10-05-0247(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 P. Rodriguez shall now be compensated for two hundred and seventy-two (272) hours at his respective straight time rate of pay and for sixty-eight (68) 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 June 7, 2005, the Carrier issued written notice to the Organization:

“Subject: Off Track Crane to assist in Stability Projects on the Orin Subdivision

As information, the Carrier will need to contract out for an off track crane with hydraulic pile driver and operator to drive sheet piling in support of stability operations on the Powder River Division. As the Organization is aware, recent weather related problems have caused sever disruption to operation on the ‘coal loop’ on the Powder River Division; currently on the Orin Subdivision, at mile posts 35 and 67-71, the Carrier is attempting to stabilize the roadbed and has determined that it needs to drive sheet piling for retaining walls at these locations. Due to the volume of rail traffic it is imperative that the work be done with off track equipment. The Carrier does not own the equipment and will therefore contract out for this service.

Due to the urgent nature of the work and to prevent a catastrophic failure that would cause a loss of service on the line, the work must proceed on an emergency basis and may start as soon as June 13, 2005.” (Emphasis added)

On June 9, 2005, the Organization disputed the notice and requested a conference. During conference it submitted that the work could be performed with Carrier equipment and personnel. The Carrier contended that its employees were fully employed and it had no qualified Operator for the off-track crane inasmuch as the Carrier does not own one. The Carrier subsequently denied the Organization's appeal.

On August 2, 2005, a claim was filed wherein the Organization asserted a contract operator on an off-track crane began driving sheet piling, which is work customarily performed by Structures Department personnel; this work did not involve special skills, equipment or materials. The Carrier disputed equipment availability, special equipment, full employment, volume of work and availability of employees, so it denied the claim. The claim is properly before the Board.

The burden of proof rests with the Organization to demonstrate that the disputed work performed is reserved to BMW-represented employees. A Bridge and Building crew assisted the off-track crane operator driving sheet piling to stabilize the sub-grade and track structure at several locations on the Orin Subdivision. This fundamental and routine maintenance work (Group 1 Machine Operator to drive sheet piling to create retaining walls to stabilize the sub-grade for new switches) performed by outside forces is encompassed with the scope of the Agreement and customarily performed by Carrier forces.

Because the work is within the scope of the Agreement covering BMW-represented employees, they have a contractual right to be assigned to and perform that work before the Carrier resorts to employ forces from outside the Agreement. Prior to contracting this work, the Carrier issued written notice and conferenced with the Organization, but there was no resolution.

Two criteria under the Note to Rule 55 and Appendix Y are the need for special equipment and special skills. The Carrier does not own an off-track crane of the type used for this project. BMW-represented employees have operated small capacity rubber tired and crawler cranes (which are retired from service) and high capacity locomotive cranes on the track, but no one has been trained and is qualified to operate a high capacity (200 - 300 ton range) hydraulic boomed crane as was used

for this work. OSHA regulations are different from when the Carrier operated crawler cranes; it now requires that a crane operator be qualified in the specific type of crane operated and demonstrate proficiency in handling a heavy suspended load in close proximity of the work performed. Renting such a crane with the operator was necessary for the service recovery and expansion effort on the Orin Subdivision.

The Note to Rule 55 and Appendix Y enable and authorize the Carrier to assign this work to outside forces yet remain compliant with the Agreement when special equipment and special skills are required. The Carrier met those criteria and the Organization failed to prove otherwise. 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 15th day of December 2010.