

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40769
Docket No. MW-40150
10-3-NRAB-00003-070395
(07-3-395)**

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 (Hulcher) to perform Maintenance of Way and Structures Department work (replace crossing diamond and related work) at Mile Post 114.9 as (sic) Shattuc, Illinois on November 8, 2005 [System File C-06-C100-35/10-06-0057(MW) BNR].**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an 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 G. Bronson, M. Collier, J. Ruepke, T. Pruett, J. Shopinski and D. Schmidt shall now each be compensated for eight (8) hours at their respective straight time 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 October 4, 2005, the Carrier notified the Organization:

“The Carrier will be replacing the crossing diamonds at 3 locations on the Beardstown Sub-Division: MP 144.6 (Waltonville); MP 93.2 (Smithboro); and MP 114.9 (Shattuck). The Carrier will contract special equipment, such as side booms and loader, with operators to assist Carrier forces with this work. The work to be performed by the contracted equipment includes, but is not limited to the removal of the crossing panels, digging out crossing for placement of asphalt, debris removal, placement of asphalt, and setting of crossing panels. The Carrier does not have the necessary equipment available to perform this work because the Carrier’s on-track crane is tied up on other projects. Additionally, at Smithboro the overpass precludes the use of an on-track crane due to the height limitation. Carrier forces will perform remaining work.

It is anticipated that this work will begin on approximately October 20, 2005.

The contracting of the 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 special equipment or skilled operators to perform all aspects of this work[.]”

On October 14, 2005, the Organization acknowledged receipt of the Carrier’s intent to contract out work at Waltonville, Smithboro and Shattuc. It requested “a contracting-out conference per the Note to Rule 55 to truly make a good faith attempt to reach an agreement on what work should be contracted out, if any, and what should be performed by the Carrier forces.”

On November 16, 2005, the Organization filed a claim alleging that the Carrier breached the Agreement when it contracted out replacement of the railroad crossing diamond on the Beardstown Subdivision. Specifically, “[t]he violation occurred on November 1, 2005 at Milepost 93.2 at Smithboro Illinois.”

On December 23, 2005, the Carrier denied the claim stating that the “[c]laim states that Carrier contracted with Hulcher’s Inc. to tear out and replace a railroad crossing diamond at M.P. 93.2 in Smithboro, Illinois, on the Beardstown Subdivision.”

On February 14, 2006, the Organization appealed the claim stating that the “facts surrounding this case are that the Carrier contracted with Hulchers Inc. to remove and replace a crossing diamond at Mile Post 93.2, at Smithboro, Illinois on the Beardstown Subdivision.” The Organization stated that the disputed work began on November 1, 2005.

On April 10, 2006, the Carrier denied the appeal. The subject matter of the claim centered on “when the Carrier contracted with Hulcher’s Inc. to tear out and replace a railroad crossing diamond at M.P. 93.2 in Smithboro, Illinois, on the Beardstown Subdivision.” The Carrier referred to the notice of October 4, 2005, and the work at Smithboro where an overpass precluded the use of an on-track crane due to height limitations.

On January 25, 2007, the parties discussed the claim as to the work at Smithboro. When the Organization issued a confirmation-of-conference letter to

the Carrier on April 3, 2007, it stated that the “claim identified the work location as Mile Post 114.9 at Shattuc, Illinois, on the Beardstown Sub-division.”

The Organization states:

“. . . [the Carrier] tries to mislead an uniformed reader of this record wherein the letter of April 10, 2006, you refer to Smithboro and an overpass. The claim before us deals with a contractor performing work at Shattuc not Smithboro. Instead of referring to different work and a different location the Carrier should admit there was no notice on this project and pay the claim as presented.”

On June 28, 2007, the Organization filed a claim with the NRAB:

“The Agreement was violated when the Carrier assigned outside forces (Hulcher) to perform Maintenance of Way and Structures Department work (replace crossing diamond and related work) at Mile Post 114.9 as (sic) Shattuc, Illinois on November 8, 2005[.]”

The Board finds that the initial claim and appeal by the Organization (as well as the Carrier’s declinations and conference) refer to replacement of a crossing diamond on November 1, 2005, at Mile Post 93.2 in Smithboro, Illinois.

The Organization’s claim before the NRAB stated that the work occurred at MP 114.9 at Shattuc, Illinois, on November 8, 2005. In other words, the Organization presented a different claim to the Board than the claim it presented to and conferenced with the Carrier on property. The Board finds that the Organization switched the locations (Smithboro to Shattuc) and Mile Post (93.2 to 114.9) and the date (November 1 to November 8). These changes are material in nature. Where, as here, a claim filed with the Board is materially different from the claim presented on the property, the Board must dismiss the claim before it. (See Third Division Award 35967.)

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Because the Organization presented a different claim to the Board, a procedural issue bars this case from disposition on the merits. Accordingly, the claim is dismissed.

AWARD

Claim dismissed.

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.