

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40793
Docket No. MW-40621
10-3-NRAB-00003-080484**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 Agreement was violated when the Carrier assigned outside forces (Hulcher) to perform Maintenance of Way and Structures Department work (track line change and switch removal) at Mile Post 576 on the Black Hills Subdivision on November 28, 2006 [System File C-07-C100-74/10-07-0118 (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 G. Griffie, C. Lynn, B. Kutschara, T. Jacobs, T. Anderson, K. Brandt, D. Penfield, D. Neely, T. Wickham, T. Lathrop, C. McCormick, and H. Sulzbach shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for six (6) 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.

By letter dated July 12, 2006, the Carrier gave notice to the Organization of its intent to contract out certain work associated with its facilities expansion in the Powder River Basin:

“As information, the Carrier is continuing its efforts to expand capacity on the Orin Sub-Division due to the continued increase in coal traffic flowing out of the Powder River Basin area. As you are aware, the Carrier has numerous capacity expansion projects underway on the Orin Sub-Division.

* * *

The Carrier is planning to construct 7.60 track miles of a 2nd Main between MP 568.91 & MP 576.51 (Moorcroft to Rozet).

* * *

The Carrier is not adequately equipped to perform this project as Carrier resources are being fully utilized on the other capacity expansion projects on this seniority district 400. Moreover, Carrier forces do not possess all of the necessary skills. In light of the foregoing, and as has been done in the past, the Carrier plans to contract the sub-grade construction and related work for this capacity expansion project. The

work to be performed by the contractor includes, but is not limited to the following¹:

* * *

All track and signal work will be performed by BNSF forces.***”

The Organization filed this claim alleging that the contractor’s forces performed a 600-foot line change, including removal of a No. 11 switch and a No. 22 switch, at MP 576 on the Black Hills Sub-Division on November 28, 2006. Specifically, the claim alleges that on the date in question, the contractor had “District 82 Group 2 type machine operators one (1) loader, five (5) excavators, two (2) side load machines, one (1) Foreman, one (1) Assistant Foreman, and three (3) Laborer type personnel that each worked eight (8) hours straight time and six (6) overtime hours for a grand total of one hundred sixty-eight (168) [hours] performing this work at the exclusion of the Claimants.” According to the Organization, the work done is “customarily performed” by bargaining unit employees, which brings it under the Note to Rule 55 and Appendix Y of the parties’ Agreement. The Organization further contends that the work done did not qualify under any of the exceptions to the Rule that would permit contracting out the work. Moreover, the Carrier did not provide proper notice of the contracting out. The notice that the Carrier alleges it gave to the Organization is for another project at a different geographic location. The Organization does not seek to have the work piecemealed; it is claiming all work that was done on November 28, 2006. Finally, the Carrier’s argument regarding the date of the work must be rejected. There was a typographical error in the original claim that was immediately corrected, and the case proceeded through the grievance steps with the correct date, with no disadvantage accruing to the Carrier.

The Carrier, for its part, contends that the contractor only did dirt work, on which there is a mixed practice that does not invoke the Note to Rule 55 or Appendix Y. Moreover, there is a past practice of contracting this type of work. In addition, the Carrier did provide proper notice to the Organization. Even if the Note to Rule 55 applies, the work falls under one of the contracting exceptions: the scope of the Powder River Basin expansion project is such that the Carrier is “inadequately equipped” to perform the work with its existing forces and equipment. The Carrier does not have

¹ The work to be performed by the contractor was what is characterized as “dirt work” and included excavation, embankment fill, stabilization, clear and grub acreage, install fencing, place sub-ballast, seeding and mulching, and so on.

adequate equipment or available employees to complete the many projects on the Powder River in a timely manner; the contractor only provided additional equipment and manpower to assist Carrier forces in order to complete the work as quickly as possible. The work complained of is part of a larger project, and the Carrier is not required to piecemeal projects. The Claimants were fully employed and earning overtime on the date in question, so they are not appropriate candidates for any kind of monetary compensation. Finally, the November 22, 2006, date of occurrence on the original claim makes the claim untimely, because it was not received by the Carrier until January 22, 2007, more than 60 days after the occurrence.

The parties presented a number of arguments and counterarguments: whether the notice was for the geographic area in question or another location altogether; whether the notice was even presented to the Organization; which of the two dates set forth in the original claim was correct (which could affect the timeliness of the filing) whether the Carrier had adequate equipment and forces to perform the work; whether the Claimants were already working both straight time and overtime on the date at issue; and so on. But there is one insurmountable problem that the Board must deal with before it can address any other issue: there is an irreconcilable dispute in the basic facts. The Organization alleges that the contractor's forces performed track and switch work (such as removing switch panels) while the Carrier contends that they only did dirt work at MP 576.

The difference is critical. Per the Carrier's notice, the dirt work on the project was to be contracted out, while "All track and signal work will be performed by BNSF forces." If the contractor did perform track and signal work, the Carrier would be in violation of its own notice. The original claim alleged that the contractor's forces performed track and switch work: "a 600 foot line change as well as removal of two in track switches one #11, and one #20 switch at milepost 576 on the Black Hills Sub-Division on 11/28/2006." However, by letter dated June 19, 2007, the Carrier challenged the Organization's characterization of the contractor's work: "The Organization is very careful not mentioning dirt work in this claim but this is dirt work involved with the line change and the laying of switches. . . ." Then later: "Carrier employees performed the track work, and the equipment only assisted Carrier employees. . . . The Organization is wrong when it claims that Carrier employees did not do the track work. Carrier employees did the track work and the claim is the equipment [sic] to assist Carrier employees. It is not proper for the Organization to misstate its claim to the reader." In its response, the Organization dismissed the Carrier's contentions: "In Carrier letter dated June 19, 2007, the Carrier goes on a rant about dirt work, this was not a claim for dirt work. This was a claim for moving and lining track and removing switches. . . . This absurd argument by

the Carrier is intended to mislead an uninformed reader of the record as to the facts in this case. There was no dirt work as referenced by the Carrier in this case. There was nothing more than normal maintenance of moving and lining track and removing switches.”

The parties clearly engaged in trading allegations about the exact nature of the work that was done, so that both sides were on notice regarding the factual dispute at a time when they could have introduced objective evidence into the record to buttress their positions. Despite this, the record is devoid of any evidence from either side to corroborate their contentions regarding the nature of the work: no statements from witnesses to the work, no invoices from the contractor specifying what was done, nothing. This leaves the Board with no basis on which to make a determination about the facts, only allegations from both sides. Allegations alone are not enough to establish facts. Moreover, where there is an irreconcilable dispute between the parties about the facts, the proper course of action is for the Board to dismiss the claim. Accordingly, the Board is compelled to dismiss this claim.

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.