

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41425
Docket No. MW-40396
12-3-NRAB-00003-080196**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
**(BNSF Railway Company (former Atchison, Topeka &
(Santa Fe Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Kelly Hill) to perform Maintenance of Way and Structures Department work (surface track) on the Highline Track 75, west of the Carl River Bridge on April 7 and 8, 2004 [System File C-04-C100-92/10-04-0266(MW) ATS].**
- (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 the aforesaid 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 violation referred to in Parts (1) and/or (2) above, Claimants B. Power, J. Barber and A. Butterfield shall now each be compensated for sixteen (16) 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.

This is a claim that arises under the former Atchison, Topeka & Santa Fe Railway Company (ATSF) Agreement, not Rule 55 or Appendix Y of the parties' current Agreement.

On April 7 and 8, 2004, the Carrier assigned an outside contractor to raise track on the Highline Track west of the Carl River Bridge at the Kansas City Terminal. According to the Carrier, the work in question was part of a larger project. The Highline project was substantial –“a multi-phase, large magnitude expansion and rehabilitation project” – and it had provided notice to the Organization on at least two prior occasions of its intent to contract the large project, beginning in 2002. Moreover, the Carrier contends that the specific job at issue was warranty work on the Argentine Fly Over and Third Main Extension Project. It was undertaken to correct flaws in work the contractor had done previously, but which had not become apparent until after the winter hiatus on track work ended. The Carrier was not charged for the work.

According to the Organization, the work was not properly noticed. It was routine track maintenance work that Carrier forces normally perform and did not require piecemealing of a larger project. Moreover, there is no evidence to support the Carrier's contention that the work was performed under warranty, and the Carrier has the burden of proving its affirmative defense. The work should have been

assigned to members of the Carrier's Track Department and the claim should be sustained.

The parties have argued about which Agreement controls this claim, the nature of the notice that was required, whether the work was routine track work, and whether it required the Carrier to piecemeal a larger project. However, when all is said and done, there is a dispute between the parties over a material fact: whether the work at issue was done under warranty or not. The Carrier has from the beginning asserted that the work in question was done under warranty to correct defects in the original work performed by the contractor, whereas the Organization alleges that the work was not done pursuant to any warranty. This is a material fact, because if the original work was properly contracted out – and that is not at issue in this claim – it is neither unreasonable nor a violation of the parties' Agreement for the Carrier to require the contractor to make good on any defects in its prior work. The only evidence in the record is an e-mail from a Terminal Engineer, stating that the work was done under warranty. There is no evidence from the Organization to the contrary. Under the circumstances, the Board has no way to evaluate the parties' respective factual contentions.

As numerous prior Awards have held, because the Board is unable to resolve disputes of material fact between the parties, we have no alternative but to dismiss the 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 5th day of September 2012.