

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42518  
Docket No. MW-41657  
17-3-NRAB-00003-110034**

**The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.**

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it assigned outside forces (AVI Services) to perform Maintenance of Way work (place rip-rap on track shoulders) in the Alliance Yard, Mile Post 362.6, in the vicinity of Haslet, Texas on May 27, 2009 through May 29, 2009 (System File F-09-16C/13-09-0028 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 reach an understanding concerning said contracting as required by Appendix No. 8 and the December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Thweatt, G. Cody, E. Young, J. Tolbert, R. Goodsite and C. McLearn shall now each be compensated for twenty-four (24) 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.

The essential events leading to this claim are not in dispute. On April 15, 2009, the Carrier served notice to the General Chairman, Mark Hemphill, advising him of improvements to be made between Milepost 362.0 and 365.0 at the Alliance Intermodal Facility (IMF). The parties conferenced on April 21, 2009 to discuss the details of the project, but they failed to reach an agreement. The Carrier then proceeded with the project.

The Mountain and Plains Federation of the Organization filed a claim on July 21, 2009. In that claim, the Federation alleged that the Carrier had contracted out work without "prior and proper notice" to its General Chairman. It requested that the Claimants be compensated for the work performed by the contractor's employees – a total of 24 hours for each Claimant. The Carrier denied the claim on September 16, 2009. The Organization appealed that denial on November 20, 2009, and that appeal was denied on January 14, 2010. The claim was subsequently progressed in accordance with the parties' Agreement, including conference on the property on May 13, 2010, after which it remained in dispute. It is thus properly before the Board for resolution.

It is the position of the Organization that, at the outset, the Carrier failed to provide proper notice to the General Chairman and assigned an outside contractor to perform non-emergency Maintenance of Way and Structures Department work. The Organization contends that the equipment used by the contractor is equipment normally and customarily used by its forces. In support of its position the Organization cites Rule 1 – Scope and Rule 2(a) – Establishment of Seniority. It insists that the Claimants are "skilled, qualified, and hold seniority" in the groups and classes listed in Rule 2(a) and should therefore have been offered the work, rather than assigning it to an outside contractor. In addition, the Organization cites Appendix 8 of the Agreement regarding contracting out, and the Hopkins-Berge letter, the latter setting forth the agreement that the carriers' signatory thereto would "assert good-faith efforts" to reduce subcontracting and increase the use of its forces, including

strict adherence to the giving of advance notice (as required by Appendix 8). The Organization insists that the notice issued on April 15, 2009 did not specify the work to be done, nor was it sent to the proper General Chairman. Accordingly, the Organization finds this to be the equivalent of “no notice” and asks that the claim be sustained in its entirety.

With respect to the issue of notice, the Carrier points out that proper notice was given by its April 15, 2009 letter to General Chairman Hemphill. It contends that the fact that he declined or forgot to send the notice on to the General Chairman of the Mountain & Plains Federation (subsumed in the ATSF & F) is not the fault of the Carrier. Thus, it argues, it complied with Appendix 8 and the Hopkins-Berge letter of understanding. The Carrier contends that it did not have the forces or the equipment to complete a construction project of the magnitude at issue here. Moreover, the Carrier maintains that the Organization has not nearly met its burden of proof regarding the nature of the work done, or the hours and equipment used.

The Board carefully reviewed the record in this case. It is certainly not a matter of “first impression”; similar cases have been decided over the years by this and other Boards and the majority of arbitral thinking is well settled on this topic. First, we do not find that the Carrier’s notice was defective. It reasonably described the location and the work to be performed. That it was not, apparently, properly disseminated is not the Carrier’s failure.

Nor has the Organization shown that the work at issue was exclusive province of the Organization. For that matter, they have not offered proof of precisely what work was performed and for how many hours. (The Carrier contends without opposition that the work involved using recycled scrap material to shore up the embankment in question, not rip-rap.) The Organization protests a portion of the entire project in question, but arbitral precedent has rightly held that a Carrier is not obligated to “piecemeal” a project, “which as a whole was properly subject to being contracted out” (Third Division Awards 5521 34213 and 34217).

At bottom line, the Organization has failed to meet its burden of proof in this case. (See Third Division Awards 28543 and 32351; Public Law Board No. 4402, Award 20). Accordingly, the instant claim is denied.

**AWARD**

**Claim denied.**

**Form 1  
Page 4**

**Award No. 42518  
Docket No. MW-41657  
17-3-NRAB-00003-110034**

**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 11th day of January 2017.**