

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43148
Docket No. MW-42680
18-3-NRAB-00003-140249**

The Third Division consisted of the regular members and in addition Referee Randall M. Kelly when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company former Burlington
(Northern 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 (Wells Trucking, Inc.) to perform Maintenance of Way and Structures Department work (mowing grass) along the right of way crossings from G.I. Mile Post 180.00 in Galesburg, Illinois to Mile Post 195.00 near Smithshire on the Chillecothe Subdivision on July 24, 25 and 26, 2012 (System File C-12-C100-466/10-12-0716 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 E. Allen and K. Kane 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.

Claimants E. Allen and K. Kane have established and hold seniority in various classifications within the Carrier's Track and Roadway Equipment Sub-department(s) of the Maintenance of Way and Structures Department on the Galesburg District 500. During the time period involved here, the Claimant E. Allen was assigned as a Foreman and Claimant K. Kane was assigned as Group 3/4 Machine Operator.

The Organization asserts that on July 24, 25 and 26, 2012, the Carrier acquired the services of outside contractor (Wells Trucking, Inc.) to perform ordinary Maintenance of Way work (mowing/cutting grass) alongside the right of way. This work was performed at road crossings from GI Mile Post 180.00 in Galesburg, Illinois to Mile Post 195.00 in the vicinity of Smithshire, Illinois, located on the Chillecothe Subdivision of the Chicago Division. The contractor utilized two (2) employees working eight (8) hours on each of the claim dates. The Organization described the work at length within the initial claim letter and subsequent appeals. Claimant Foreman E. Allen provided a statement dated July 17, 2013 in which he wrote:

“On July 24, 25 and 26th of 2012 BNSF contracted with Wells Trucking from Donnellson IA to mow the right of ways from Station G.I to station Smithshire. Wells Trucking used a Group 3/4 skid loader with a mower attachment and a foreman to perform the work. Wells Trucking mowed weeds on either side of road crossings along the RR right of way.

* * *

I witnessed Wells Trucking doing this work on these dates. The hours are accurate. Somebody had to do the mowing. There was no weed

mower bid on this territory until a later date.”

The Carrier only had an invoice from Wells Trucking for work on July 12 for three hours. It denies that work was performed on the dates in question.

The Carrier never provided the General Chairman with advance notice of the contracting.

According to the Organization, the work of maintaining the Carrier’s right of way, including mowing grass, has customarily, historically and traditionally been performed by Maintenance of Way forces such as the Claimants and is contractually reserved to them in accordance with Rules 1, 2, 5, 55 and the Note to Rule 55 of the Agreement.

The Carrier denied the claim based on:

- “1. The Organization did not show a past practice of the system-wide assignment of the work to BNS forces, to the exclusion of others – including contractors;**
- 2. There was no record of this disputed work occurring as the set forth in the Organization’s claim; and**
- 3. The Organization had still failed to provide any evidence of any kind supporting the claim.”**

Prior Board decisions have made clear that routine mowing and brush cutting along the right of way is Organization work. For example, in Award No. 40670 (Referee Patrick Halter), the Third Division stated:

“Control of vegetation by mowing and brush cutting on and around the right-of-way is part of track maintenance. This work enhances visibility of and access to the track and right-of-way structures. BMWF represented employees use on-track equipment, ordinary tools (mowers, weed eaters, chain saws) and off-track equipment (brush cutters, weed burners, tractor mowers) to clear and control vegetation. Employee statements, copies of bulletins and photographs of Carrier-owned equipment constitute clear and convincing evidence that the Carrier’s forces customarily and historically perform this work and were available with the skills and qualifications to operate Carrier-

owned equipment, as well as rental equipment.”

See also, Award No. 3-38010.

The Carrier defense that the Organization could not show that there was a “past practice of the system-wide assignment of the work to BNSF forces, to the exclusion of others – including contractors” was last addressed by the Third Division in 2011 by Referee Andrea S. Knapp. In Award 41164 Knapp held:

“The Note to Rule 55 establishes the parties’ rights and obligations regarding contracting out bargaining unit work. If the disputed work is work “customarily performed” by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

“. .. [S]uch work may only be contracted provided that special skills not possessed by the Company’s employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company’s forces”

The Carrier did not meet its “heavy burden” of showing one of the exceptions which might justify the subcontracting of routine mowing.

As to whether the work occurred as claimed, the Claimant provided a detailed first person statement. The statement does not detail the hours involved. The invoice for July 12 shows that the Carrier and Wells Trucking had a contractual relationship.

In the absence of required advance notice, we find that Wells Trucking performed mowing work on July 24, 25 and 26, 2012. The Claim is therefore sustained. However, in the absence of any allocation of the hours claimed, we find that Wells Trucking only worked three hours on each day. Claimants E. Allen and K. Kane shall now each be compensated for nine (9) hours at their respective

straight time rates of pay.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 30th day of May 2018.