

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43149
Docket No. MW-42682
18-3-NRAB-00003-140251**

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 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 to perform Maintenance of Way and Structures Department work (trim trees with chainsaws and load brush onto truck) on the St. Joe Line, Main 2, Mile Post 207.3 on the Nebraska City Line on October 3, 2012 (System File C-13-C100-29/10-13-0048 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 D. Mohnike, M. Sailors, J. Covarrubias and W. Schenk shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for two (2) 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.

Claimants D. Mohnike, M. Sailors, J. Covarrubias and W. Schenk have established and hold seniority in various classifications and sub-departments within the Maintenance of Way and Structures Department. On the dates pertinent hereto, they were regularly assigned and working their respective assignments, were readily available for duty and were fully qualified to perform all aspects of the routine track maintenance and related work involved in the instant dispute.

On October 3, 2012, the Carrier assigned outside forces (Asplundt) to perform routine Maintenance of Way work of cutting and removing brush at Mile Post 207.3 on Main 2 on the St. Joe Line and on the Nebraska City Line. The routine track maintenance and right of way work was performed by four (4) employees of the contractor using common ordinary equipment, hand tools and vehicles, i.e., chainsaws and one (1) truck of the type already owned by the Carrier or readily available for rent/lease for operation by Carrier employees. The contractor's employees, who hold no seniority nor work rights under the Agreement, each expended a total of eight (8) straight time hours and two (2) hours at the time and one-half rate in the performance of said work. The Claimants maintain proper seniority under the Agreement to be assigned to this work, were fully qualified and were readily available.

According to the Organization, the work of maintaining the Carrier's roadway, track, right of way and other work incidental thereto, including brush cutting and removal, as well as the operation machinery, equipment and vehicles used to perform such work, has customarily, historically and traditionally been performed by Maintenance of Way forces 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 asserts that it gave appropriate notice to the General Chairman in May, 2008. The Carrier informed the Organization that it needed to subcontract the work (as it had done in the past) because it would include regulated herbicide application and special equipment. The Organization challenges this assertion, arguing that the notice applied to many different locations on 7 subdivisions.

The Carrier denied the claim because it had no record that the claimed work occurred and provided the Organization with an email that the work did not occur. In emails exchanged on October 23, 2012, the Carrier asserted that Asplundh did not work on the St. Joe/Nebraska City Line. The only evidence submitted by the Organization was an email signed by three employees asserting that the facts in the claim were true.

Of course, the Organization has the burden of proof to show that the underlying facts supporting its position that there was a contractual violation actually occurred. When, as here, the Carrier denies that the events occurred, the Organization is obligated to provide evidence of the events before it can proceed to its claims that a violation occurred. A driver cannot be convicted of speeding if there is no proof that he or she was driving in excess of a posted speed limit. Similarly, an employer cannot be found to have violated a contract if there is insufficient proof that the facts giving rise to the claim actually occurred. Here, the evidence is simply insufficient. As asserted by the Carrier, the statement is “self-serving” “form” statement submitted almost a year after the events in question. It does not give any specifics concerning who did the work in question and when or indicate where the signees were working at the time.

Given the Organization’s failure to meet this initial burden of proof, the claim must be denied.

AWARD

Claim denied.

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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 30th day of May 2018.