

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43239
Docket No. MW-43905
18-3-NRAB-00003-160463**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

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

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former St. Louis – San
(Francisco 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 to perform Maintenance of Way work of loading six hundred (600) concrete ties at Thayer, Missouri and transporting those ties to Williford, Arkansas where the ties were unloaded along the Carrier’s right of way beginning on January 29, 2015 and continuing through February 4, 2015 (System File 2433-FR99-1535/12-15-0075 SLF).**
- (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 99 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 T. Bunch shall now be compensated for seventy (70) hours at his 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 Organization filed a claim alleging that the Carrier used outside forces to unload concrete ties without prior notification to the General Chairman and opportunity for discussion between the parties. This requirement is pursuant to Rule 99 of the National Letter of Agreement. There is no record of notification in the record to support any Carrier claim that there was proper notification to the Organization.

In its initial response dated May 18, 2015, the Carrier stated, among other defenses, that there was no supporting statements for the alleged violation and that Carrier's Investigation revealed no contractors being used as alleged by the Organization.

The Organization's appeal of June 19, 2015, did not address the Carrier's assertion that there was no record of contractors being used at that location.

The Carrier's response of August 18, 2015, restates that there is no record of contracting for the cited work and, even if, there had been notice provided.

The Organization submitted a copy of an email from Claimant dated November 10, 2015, that provided:

"Between January 29 2015 and February 4 2015 I witnessed a RJ Corrman truck loading concrete ties in the Thayer yard and hauling the same ties to NSS Williford MP 367.8 on Thayer Subdivision and unloading them in preparation for a mini-mech tie gang."

This Division has reviewed the record. The Organization alleges a violation of the December 11, 1981 National Letter of Agreement, which provides:

“Rule 99. Contracting Out

- (a) In the event the Carrier plans to contract out work within the scope of the applicable schedule agreement, the Carrier shall notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
- (b) If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Carrier shall promptly meet with him for that purpose. Said Carrier and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Carrier may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.”

Although there was an allegation of a violation of the Agreement, the Carrier responded that they had no record that a contractor had done the work, as well as that there had been proper notice. During the on-property handling, the Organization did not address the issue of the Carrier’s denial of the subcontracted work. The Organization only addressed that issue after the written appeals had run their course. The record does not discuss whether the email was discussed at the conference on the claim.

In the instant matter, the Carrier put the Organization on notice that there was no record of the contractor work. The Organization only responded after the written handling. This was too late for the Carrier to address the matter. Based on the facts presented to the Board, the Organization failed to make a prima facie case.

This Division notes that this matter differs from Award 32440, cited by the Organization, where this Division noted that the Carrier simply rejected the

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Organization's facts. Here, the Carrier put the Organization on notice that the facts were in dispute.

AWARD

Claim denied.

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 26th day of June 2018.