

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43265
Docket No. MW-42681
18-3-NRAB-00003-140250**

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 (Joe Fischer) to perform Maintenance of Way and Structures work (cut and remove brush) from the end of Knox Plant in the Galesburg Yards on October 9 and 10, 2012 (System File C-13-C100-121/10-13-0158 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 violation referred to in Parts (1) and/or (2) above, Claimants E. Allen, K. Kane and D. Beigler shall now 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.

The Claimants E. Allen, K. Kane and D. Beigler have established and retained seniority in various classifications within the Carrier's Track and Roadway Equipment Sub-departments of the Maintenance of Way and Structures Department. During the time period involved, they were regularly assigned to said positions.

According to the Organization, on October 9 and 10, 2012, the Carrier assigned outside contractor (Joe Fischer) to perform ordinary Maintenance of Way work (cut and remove brush) from the north end of Knox Plant in the Galesburg Yard(s) located on the Chicago Division. The contractor used three employees working eight hours straight time on each of the claim dates. The Carrier admits that it never provided the Organization advanced notice of this contracting transaction.

The Organization asserts that the work of maintaining the Carrier's right of way, including cutting and removing brush, 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.

This dispute arose between BNSF and the Organization when the Organization filed the instant claim. The Carrier denied the Organization's appeal based on several grounds.

- 1. the fact that the Organization did not (and could not) show a past practice of the system wide assignment of the work to BNSF forces, to the exclusion of others – including contractors**
- 2. there was no record of this disputed work occurring as set forth in the Organization's claim; and**

3. the Organization had still failed to provide any evidence of any kind supporting its claim.

Specifically, the Carrier argues that the Organization has failed to meet its initial burden to show that the work was performed and was performed by a contractor, citing various awards. The Organization provided statements from two of the Claimants. In a statement given to the Carrier on November 5, 2013, Claimant Edward Allen provided a detailed description of the work performed by Joe Fischer and his crew on October 9 and 10, 2012, including the equipment used and the location of the brush removed. "I personally witnessed this work both days and I know the hours are accurate." "This letter is 100% accurate from an eyewitness. I get a lot of claims denied on the grounds of no proof. This is 3 pages of 100% accurate and truthful writings."

Claimant Kevin Kane provided another statement also given to the Carrier on November 5, 2013. Kane also wrote that he was an eyewitness to Joe Fischer removing brush along the specific stretch of track and the equipment used. He also described the exact location of the brush and mentioned that Fischer had removed the same brush in 2012.

It is now beyond dispute that cutting and removing brush is Organization work and the Organization should have been provided advance notice of the Carrier's intent to carry out the work. There is nothing in this record to show that the Carrier provided the required notice to the General Chairman and the claim is sustained on that basis. Not having provided the required notice, the Carrier cannot advance other defenses. As a consequence of the violation, Claimants E. Allen, K. Kane and D. Beigler shall now be compensated for sixteen (16) hours at their respective straight time rates of pay.

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 4

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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 26th day of June 2018.