

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43283
Docket No. MW-42579
18-3-NRAB-00003-140241**

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 (Buel/Pavers) to perform Maintenance of Way and Structures work (deliver ballast to Mile Post 16.20) on January 25, 2013 (System File C-13-C100-183/10-13-0255 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 C. Lindholm, T. Brandt, A. Peterson, J. Gleason, A. Ewoldt, D. Ficke, P. Hayek, A. Salinas, M. Riggert, W. Pohlmeier, R. Burhoop, and D. Rockenbach shall now be compensated for eight (8) hours at their respective straight time rates of pay and for one (1) hour time 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.

The Claimants were regularly assigned as Truck Drivers (Claimant Lindhom as a Foreman), maintained seniority and worked on District 400.

According to the Organization, on January 25, 2013, the Carrier assigned outside forces from Buel-Pavers to perform the work of hauling rock to Mile Post 16.20 on the Ravenna Subdivision of the Nebraska Division. The contractor used one foreman and eleven truck drivers and operating regular dump trucks for eight hours at straight time and one hour of overtime.

The Organization asserts that the work of hauling materials in connection with Maintenance of Way track and bridge and Building (B&B) construction, repair and maintenance operations is railroad work which has customarily been performed by Maintenance of Way forces. See, 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 claim based on several grounds including that not only was the Organization's claim incredibly vague but it was also devoid of any evidence to support its allegations. The Organization then appealed BNSF's denial on April 25, 2013. BNSF denied the Organization's appeal based on the fact that the Organization did not show a past practice of the system wide assignment of the work to BNSF forces, to the exclusion of others – including contractors. Further, BNSF's declination informed the Organization that it had still failed to provide any evidence of any kind supporting its claim.

In claiming that the work in question should not have been subcontracted, the Organization has a heavy burden of showing a system-wide exclusive assignment of a particular type of work before the work falls under the Scope of the Agreement. See, for example, Public Law Board 2206, Award 8, (Eischen). Referee Eischen stated:

“Under well established principles, reservation of work under such rules must be established by clear and convincing evidence of exclusive system-wide performance of the disputed work. The only conclusion to be drawn from the foregoing is that in order to prevail under Rule 69(c) the Organization must establish that it exclusively performed car cleaning on a system-wide basis on the former NP. Indeed, that very question has already been litigated between these same parties and Rule 69(c) has been construed in just that way. . . .

This Award refers to a long list of past Awards supporting the same decision reached in Public Law Board 2206, Award 8. This principle was reaffirmed by Third Division Award 36021 (Bierig) that states in pertinent part: While this statement by Smith is some evidence to show that the Organization has historically been involved in this work, it is not sufficient to meet its burden of proof. There must be more evidence to show that the Organization has historically and customarily engaged in the work. . . .

The Board identified the standard for how much evidence must be presented in order for the Organization to sustain its burden of proof in prior Awards. . . .

Thus, the Organization has neither identified clear Agreement language reserving the work to the Organization nor has it proved with specific evidence that said work was traditionally performed by these forces. Because the Organization has not met its burden of proof, the claim must be denied.”

More specifically, the Carrier asserts, “And since the Organization is claiming the exclusive right to do the work in question, they must prove their

constituents have performed the work, *system-wide, to the exclusion of others*. And as previously shown, the Organization cannot accomplish this task of system-wide exclusion of others. Clearly, this claim must fail.”

In pursuing this claim, the Organization presented extensive argument and precedent for its position. As to the factual basis for its claim, however, it only presented a summary of statements from the Claimants that they observed a contractor haul ballast to Mile Post 16.20 on the Ravenna Subdivision of the Nebraska Division on January 30, 2013.

In her declination of the Claim dated March 25, 2013, Director of Maintenance Support Melodi Tripp stated one of the reasons for the declination was:

“The Organization has not provided any documentation to support their allegations of a Contractor (Buel Pavers) performing the claimed work on January 25, 2013 at MP 16.20. Certainly they should provide statements of who witnessed the work, or how they came up with the hours for which they are asking. The Organization did not provide any statements to back up their allegations and this claim is devoid of any support or evidence. The Organization would have included proof to support its claim if proof existed. The Organization's allegations are ambiguous and without support. Furthermore, the Organization must substantiate every element of their claim; not send out general statements so they can later try to pin burden of proof on the BNSF.

Further, there are eight sub-divisions with a MP 16.20 on the Nebraska Division. This claim does not specify at which MP 16.20 this violation allegedly occurred. It is the Organization's responsibility to provide this type information so that BNSF can fully research and determine the validity of the claim.

Finally, BNSF does have a purchase agreement with Buel/Pavers (FOB) that includes the delivery of ballast purchased. This is an invalid claim that should be withdrawn.

The Organization has failed to provide any evidence in support of its claimed damages. A claim by the Organization is not evidence, and it does not satisfy the Organization's burden of proving up every element of their claim. The Organization has provided no evidence to support their allegation. The Agreement has not been violated and the Organization has not proven otherwise. This claim is denied in its entirety. Your request that the Claimants receive eight (8) hours straight time and one (1) hour overtime is without merit."

In her appeal of Tripp's declination, General Chairwoman Staci Moody-Gilbert addressed this asserted lack of evidence as follows:

"Ms. Tripp further asserts that the Organization has not provided any documentation to support the initial claim.

The date, number of hours, and number of contractor employees claimed were based on direct observation of the contractors by BMWED represented employees who worked in the vicinity of the contractors. If the Carrier has records which contradict the hours claimed, it is incumbent that Carrier produce those records. Claim handling is not a game of hide the ball and the NRAB has consistently held that neither party is permitted to frustrate the administration of the Agreement by hiding relevant records solely in their possession."

In his declination of the appeal, dated June 19, 2013, General Director William Osborn also gave as one of his reasons for the declination:

"First, the claim as presented to BNSF offers little information and no evidence to support the Organization's alleged violation of the Agreement. The burden of proof lies with the Organization. The Organization has provided no proof in either the initial claim or the appeal. In fact, the Organization provided no evidence to support any part of their claim. At this point the claim is only an unsubstantiated allegation with no evidence. And as the Organization has pointed out to BNSF in other appeals, a mere statement is not evidence or proof.

The Organization questioned Ms. Tripp's statement that the Organization had failed to provide adequate proof of what was being claimed, contending that she had failed to specify what was lacking. Ms. Tripp clearly stated: BNSF objects to the Organization listing Rules 1, 2, 5, 29, 55, Note to Rule 55, and Appendix Y as being violated. The Organization has not stated how any of these Rules have been violated. . . . It is the Organization's responsibility to provide specific reasons how any rules were violated. . . . A claim by the Organization is not evidence, and it does not satisfy the Organization's burden of proving up every element of their claim. The Organization has provided no evidence to support their allegation.

This claim is representative of other claims filed by this Organization. It submits a claim with no evidence and then expects and demands BNSF to provide the evidence. The Organization should not be allowed to evade its responsibility of providing the proper evidence with its claims. BNSF is not required to prove the Organization's allegations. It is the Organization's responsibility to provide proof in support of its claim. And the Organization has failed to do so in this case. This claim should be withdrawn or the Organization should provide the evidence to support its claim.”

In this matter, the Carrier is disputing that it assigned outside forces to haul ballast on January 25, 2013, as alleged by the Carrier. It does not have a contract with Buel/Pavers and no other record of using Buel/Pavers to haul ballast on January 25, 2013. Absent a concession by the Carrier that it utilized an outside contractor to do the work in question, the Organization has an affirmative burden to show exactly what work was performed, when and by whom. There should be contemporary accounts from witnesses that identify the factual basis for the claim. In the absence of such evidence, the Organization cannot overcome its initial burden to show that the work in question actually took place and by whom. There is no claim to resolve in the absence of such evidence. If there is no evidence of the facts giving rise to the claim, there is no need to address the contractual issues raised by the Organization and the claim must be denied in its entirety.

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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 25th day of September 2018.