

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43637  
Docket No. MW-42757  
19-3-NRAB-00003-140462**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.**

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

**PARTIES TO DISPUTE: (**  
**(BNSF 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 (Buel Trucking, Inc.) to perform Maintenance of Way and Structures work (deliver ballast and/or sub-ballast) to various locations on the Powder River Basin beginning on June 12, 2013 and continuing (System File C-13-C100-308/10-13-0492 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with proper 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 H. Gentry, Jr., P. Fries and V. Havorka shall now each be compensated ‘... all hours, straight time and overtime, worked by these contractors. Furthermore, I am requesting that the company discontinue the use of contractors for this work and assign the work to the claimants.’”**

**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 established and hold seniority in the Carrier's Maintenance of Way Department. This claim concerns delivery of ballast and sub-ballast to various locations on the Powder River Division beginning on June 12, 2013. According to the claim, the Carrier used three employees to perform this work, working an indefinite number of hours.

The Organization contends that the work performed is historically and customarily work performed by the Carrier's Maintenance of Way forces and is reserved to them by Rules 1, 2, 5, 55, and the Note to Rule 55. The Organization contends that the Carrier failed to notify the General Chairman of its decision to assign outside forces to perform this work. The Organization contends that the Carrier may only assign its work to outside contractors under certain specified conditions and after notice to and conferencing with the Organization. The Organization contends that proper advance notice was not provided.

The Organization contends that it has met its burden of proof to demonstrate that the work occurred. Further, the Carrier failed to prove its affirmative defense that it was not properly equipped to handle the work and could not efficiently purchase the ballast without delivery being included. The Organization contends that its members were available to perform the work and that the Carrier could have hired additional employees. Finally, the Organization contends that the Claimants are entitled to the requested remedy.

**The Carrier contends that the Organization has failed to meet its burden of proving that the work that occurred was work belonging to the employees. The Carrier further contends that the Organization has failed to prove that the disputed work was reserved to its members, because it has not shown that the work is exclusively performed system-wide by BMW-represented forces. The Carrier contends that none of the Claimants are entitled to any monetary remedy.**

**The Organization filed this claim on June 21, 2013, asserting that delivery of ballast, which is customarily performed by Maintenance of Way employees, was done by outside contractors and that no notice was given to the Organization. The claim states, in part:**

**“The facts of this claim are that the company has contracted with [Buel] Trucking Inc. from Eagle, Nebraska to deliver ballast to numerous locations on the Powder River Division. This claim will also contemplate that the company might contract with other vendors to perform this same work. Therefore, even though another vendor may perform this work on other dates at other location this [claim] shall apply the same. Likewise, on some dates at some location there might be more truck contracted at various locations. In those situations the Organization will reserve the right to name additional claimants when warranted.”**

**On August 19, 2013, the Carrier declined the claim, stating, in part,**

**“The Organization has not provided any documentation to support their allegations of Buel Trucking performing the claimed work at the claimed location(s) on June 12, 2013 and continuing. Certainly they should provide statements of who witnessed the work, or how they came up with the hours for which they are asking.”**

**The parties were unable to resolve this claim on-property, and it is now properly before this Board for final adjudication.**

**The Organization bears the burden of proving its prima facie case, that the work was done by outside contractors was work customarily performed by the Organization’s members. While it provided several statements regarding the work customarily performed by its members, there is insufficient proof of the work that was**

alleged to have occurred. The statements do not describe the work that was allegedly done.

As a result, the Organization has failed to meet the initial threshold of showing that the complained of work was actually performed as alleged. The Organization's statements are insufficient to back up their initial allegations. As a result, this claim must be denied for lack of support or evidence.

**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 17th day of May 2019.