

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43645
Docket No. MW-42828
19-3-NRAB-00003-150020**

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

**(Brotherhood of Maintenance of Way Employees 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 to perform Maintenance of Way and Structures Department work (maintenance and repair of a gravel road) along the right of way in the West Quincy yard on the Hannibal Subdivision of the Springfield Division on July 16, 2013 (System File C-13-C100-351/10-13-0628 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notice of its intent to contract out the aforesaid 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 M. Churchill, S. Constable, J. Clark and T. Maglioacchetti shall each now be compensated for eight (8) hours straight time and two (2) hours overtime at their respective 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 established and hold seniority in various groups and classifications within the Track and Roadway Subdepartments of the Maintenance of Way and Structures Department. This claim concerns the assignment of outside forces (Midwest Railroad) to perform work of repairing a gravel road alongside the right of way in the Carrier's West Quincy Yard located on the Hannibal Subdivision of the Springfield Division. According to the claim, the Carrier used four employees to perform this work, each of whom worked eight hours of straight time and two hours of overtime on July 16, 2013.

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. The Organization contends that it provided a detailed statement from an employee who was on-site and that the Carrier has not denied that Midwest Railroad Company (as opposed to Mid-west Railroad Company) performed the disputed work. 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 actual work was performed by a contractor as alleged. The Carrier contends that since it has submitted a statement refuting the Organization's statement,

at best, there is an irreconcilable dispute in fact as to whether the work occurred, which this Board cannot resolve.

The Carrier contends that the Organization has failed to demonstrate that any 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 August 19, 2013, asserting that fixing of a gravel road, which is customarily performed by Maintenance of Way employees, was done by outside contractors and that no notice was given to the Organization. On October 15, 2013, the Carrier declined the claim. 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. The Organization submitted a statement by one of its members stating that "on July 16, 2013 BNSF contracted with Midwest Railroad to move gravel around that the dump truck was dumping out and the road grader smoothed it all out in the West Quincy yards on the Hannibal Subdivision" and "on July 9- 12, 2013 BNSF contracted with Midwest Railroad to move ties from one end of the Keokuk yards to the other on the Hannibal Subdivision."

The Carrier submitted a statement from Midwest Railroad, to wit, "After a thorough investigation and conversation with Mr. Manuel Meza, our General Manager, Mid-West Railroad Construction (Maintenance and Rehabilitation) LLC did not perform work for BNSF for the dates in question."

These statements cannot both be true, but they concern the crux of the Organization's case. As an appellate forum, this Board is not able to reconcile the inconsistent statements. Without this evidence, the Organization cannot present a prima facie case that the violation occurred. Under such circumstances, the Board must find that the Organization has failed to satisfy its burden of proof, and the claim must be dismissed.

AWARD

Claim dismissed.

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.