

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43716
Docket No. MW-42635
19-3-NRAB-00003-140348**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 Carrier violated the Agreement when it assigned outside forces (Buel/Pavers) to perform Maintenance of Way and Structures Department work (deliver rock) on the Ravenna Subdivision, Mile Post 16.3 on April 4, 2013 (System File C-13-C100-246/10-13-0348 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 violations referred to in Parts (1) and/or (2) above, Claimants J. Covarrubias, M. Lane and M. Sailors shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for three (3) hours 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.

This dispute arose on April 13, 2013, when the Organization filed a claim that the Carrier violated the Agreement when it contracted with Buel/Pavers to deliver rock from Eagle Rock, Nebraska, to the Ravenna Subdivision, Mile Post 16.3, on April 4, 2013. According to the Organization, contractor forces included one foreman and two truck drivers who worked eight hours at straight time and three hours at overtime rates of pay. The Carrier responded that the Organization had failed to substantiate that the work occurred as claimed. Moreover, the rock had been purchased FOB, and the Carrier did not take possession of the rock until after it was delivered. The Organization asked for a copy of any invoice, but there is none in the record.

The Organization argues that the work of hauling ballast is “quintessential” track work that has customarily, historically, and traditionally been performed by the Carrier’s Maintenance of Way forces. This brings it under the Note to Rule 55, which requires the Carrier to provide the Organization with advance notice of its intent to contract out such work. The Carrier provided no such notice, and the Claim should be sustained. Moreover, the work did not fall under any of the exceptions to the notice provision. There was no emergency. The work was performed using ordinary dump trucks, so there were no specialized equipment or skills required that would authorize contracting under the Note to Rule 55, nor were Carrier forces inadequately equipped to perform the work. Finally, the Carrier failed to establish its affirmative defense by providing proof of its claim that the rock was purchased FOB.

The Carrier contends that the Organization has failed to meet its burden of proof. First, it has not established that the work in dispute belongs exclusively to MoW forces. At best, there is a mixed practice, which permits the Carrier to assign the work to a contractor. Second, there is no evidence that the work occurred as alleged, especially the number of contractor forces or the hours involved. In the end, this case involves an irreconcilable dispute in facts, which requires the Board to dismiss the case.

Having reviewed the record in this case, the Board concludes that the Organization has not met its burden of proof. The Carrier's assertion that it had purchased the rock FOB is sufficient to conclude that rock was delivered by the contractor, presumably on the date alleged. But there is insufficient evidence upon which the Board can conclude that the work was accomplished by a foreman and two truck drivers, or that they worked a total of eleven hours. The statements in the record from the Claimants are simply too general. The statement from Claimant Corrubias states only that he "agree[s] with the hours on this claim." There is no indication that he observed the work being done or what the basis for his agreement is. The second statement, from Claimant Sailors, states: "I was not witness to this violation but do have CDL and know how to drive these trucks." As Sailors did not witness the violation, his statement proves nothing with respect to when, how or under what circumstances the work may have occurred. While the Board may not require the Organization to submit evidence in the form of payroll records, contractor invoices and the like in order to establish a *prima facie* case, there has to be more than the vague allegations presented here.

Even if the Board were to conclude that the Organization had made a *prima facie* case that the work occurred as alleged, the Claim would still be denied. This case involves the initial delivery of rock from a quarry or rock yard, which the Board has previously distinguished from hauling rock that is already on-site. There is at best a mixed practice regarding who makes such deliveries, and established Board precedent has held that the Carrier does not violate the Agreement when it assigns a contractor to perform such work (see Award 43700).

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 18th day of June 2019.