

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44299  
Docket No. MW- 43640  
20-3-NRAB-00003-200443**

**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 (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 to perform Maintenance of Way and Structures Department work (place 10’ ties for crossings, place crossing planks, place insulated joint rails, set out cross ties for bridges and other Maintenance of Way duties) at various locations on the Panhandle Subdivision beginning on January 26, 2015 and continuing (System File C-15-C100-69/10-15-0160 BNR).**
- (2) The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with the Carrier’s intent to contract out this work or to 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, Claimant K. Wesly shall now ‘... be paid, at the Grapple Truck Driver rate of pay, for all of the above-cited hours worked by the outside contractor, as well as, any additional straight time and overtime hours worked by the outside contractor, during the**

above-cited claim period, and continuing until the violation ceases....’”

**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 Claimant has established and holds seniority within various classifications of the Carrier’s Maintenance of Way (“MOW”) Department. On the dates involved herein, he was regularly assigned as a Regional System Gang Grapple Truck Driver and working with Regional System Construction Gang CG-02. Commencing on January 26, 2015 and continuing, the Carrier assigned outside contractor (LG Pike) to place 10’ ties for crossings, place crossing planks, place insulated joint rails, set out cross ties for bridges, and other duties for Regional System Construction Gang CG-02 at various locations on the Panhandle Sub-Division.

The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Organization contends that the work of track construction, maintenance and repair, including placing 10’ ties for crossings, placing crossing planks, placing insulated joint rails, setting out cross ties for bridges has customarily and historically been assigned to and performed by the Carrier’s Maintenance of Way and Structures Department employees and is contractually reserved to such employees.

The Organization contends that when the Carrier planned to assign such work to be performed by outside forces, it was obligated to properly notify the General Chairman in accordance with the third paragraph of the Note to Rule 55 and Appendix Y. The Organization contends that the Carrier failed to notify the General Chairman of the contracting transaction involved herein. Although the Carrier initially asserted that it properly notified the General Chairman of the contracting transaction, a review of the notices provided shows that none mentions “hiring an outside contractor to use a Grapple Truck with a Driver to place 10’ ties for crossings, place crossing planks, place insulated joint rails, set out cross ties for bridges and to perform other duties for Regional System Construction Gang CG-02 at various locations on the Panhandle SubDivision of the Kansas Division and the Ravenna Sub-Division of the Nebraska Division.”

The Carrier contends that the Organization has failed to show that the work took place as alleged. Further, it contends that the Organization has failed to show that the claimed work was performed exclusively by the Organization’s members.

The Carrier concedes that no notice was given to the Organization when the outside contractor was brought in to assist while CG-02’s grapple truck was in the shop. In the on-property correspondence, the Carrier explained, “In order to continue operating this efficient and highly-valuable construction gang, a grapple truck, with operator was brought in to assist CG-02. The Company could not simply shut this gang down for the 15 days necessary to issue a notice.”

The circumstances of this contracting out confirm that the claimed work was work customarily and historically performed by MOW forces. But for the replacement of the disabled grapple truck, this work would have been performed by the Carrier’s forces. Accordingly, the Carrier could only contract out the work under certain stated exceptions. The parties’ Agreement provides if the Carrier intends to contract out the work based on one of these exceptions listed in the Note, it must give notice to the General Chairman “as far in advance of the date of the contracting transaction as practicable and in any event not less than fifteen (15) days prior thereto...”

It is undisputed that the Carrier did not provide notice to the Organization of its intent to contract out this Scope-covered work. There is no assertion that the work was done “as an emergency.” As a result, the Carrier was obligated to provide

advanced written notice and an opportunity to conference before it contracted out this work, but it failed to do so.

The Claimant is entitled to the claimed remedy, except for the period that the Carrier has shown that he was on a vacation; he should not receive pay for those dates. We believe an appropriate remedy can be accomplished by restricting the remedy to those employees who were actually available to work at the time of contracting. Third Division Award 43970.

**AWARD**

Claim sustained in accordance with the Findings.

**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 23rd day of October 2020.