

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44418  
Docket No. MW-43384  
21-3-NRAB-00003-200398**

**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 (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 (R. J. Corman) to perform Maintenance of Way and Structures Department work (unload ballast cars and stockpile ballast) at Track 6411 in the Gavin Yard near Minot, North Dakota on the KO Subdivision, Montana East Division on August 2 and 3, 2014 (System File T-D-4492-E/11-15- 0051 BNR).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding 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 the Note to Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. Brandt and D. Dahm shall now each “\*\*\* receive twenty (20) hours as worked by the contractor, with pay to be at their respective rate 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 case arose when the Carrier allegedly used an outside contractor, R. J. Corman, to unload ballast from rail cars and stockpile it in the Gavin Yard, near Minot, North Dakota, on August 2 and 3, 2014. According to the Organization, unloading and stockpiling ballast is work that has traditionally, historically and customarily been performed by the Carrier's MoW forces. It is subject to the constraints placed on contracting out that the parties negotiated in the Note to Rule 55, which limits the reasons under which the Carrier can contract out work and also requires advance notice of the Carrier's intent to do so. The Organization contends that (1) there was no notice here, and (2) there was no basis under Rule 55 for contracting the work out instead of having it performed by the Carrier's MoW forces. The Carrier responds that the Organization has acknowledged in other claims that the delivery of ballast is properly performed by outside contractors and is not reserved to Carrier forces. Even if the work is Scope-covered, the Organization has not met its burden of proof: Foreman Miller's statements regarding the work that occurred and the hours involved are inconsistent with the hours that he worked on the dates in question, based on his payroll records. At best, this case involves a dispute in facts, which requires that the Board dismiss the claim.

The Board's initial task is to determine whether the disputed work falls within the scope of the parties' Agreement. After reviewing the record, the Board concludes that it does. The Carrier referenced other ballast cases, but they all involved the *delivery* of ballast, not its unloading. The claim in this case is limited to unloading ballast that is already on Carrier property. The record includes two Carrier documents, "Typical Section Gang" and "Typical District Maintenance Gang." The

Section Gang description lists among gang duties: “Unloading ballast — This can be any amount from one car load to an entire ballast train ‘54 cars’.” The District Gang description includes similar language: “Unloading ballast — Can be any amount from one car load to an entire train load of ballast.” In light of those statements, which the Carrier authored, it is inconsistent for the Carrier now to argue that the work of unloading ballast is not work historically assigned to and performed by its own forces.

The Carrier next argues that the Organization has failed to meet its burden to establish that the work occurred as claimed. The record includes two statements from a Section Foreman, who described in some detail what he saw on the two dates at issue here. The Carrier points out that, according to his payroll records, Foreman Miller was not at work during all of the hours that he alleged the contractor was working, and it suggests that his statements are not credible and do not establish the Organization’s case. The Board has previously addressed the shifting burdens of proof that can occur during the processing of claims. In Third Division Award 40785 (Knapp 2010), the Board held:

The Carrier has argued that there is insufficient evidence that the work occurred. This argument is not persuasive... [T]he record includes statements from two of the Claimants about what work occurred, when and where. This is sufficient for the Carrier to have investigated and, if the work did not take place as alleged, to have presented evidence to that effect, as it has done in prior cases. After the Organization has presented evidence sufficient to infer that the work occurred as claimed, the Carrier cannot expect a generic denial to be enough to rebut that evidence.

The Carrier is the party that has the actual records of what work has been performed by contractors on its property and because of that, it is in a unique position to be able to counter testimonial evidence submitted by the Organization. The Board is aware of cases where the Carrier has presented its records to show that there is no record of work being performed by a contractor on the date in question, or of the type alleged. There is no such submission by the Carrier in this case; only a “generic denial” that the work occurred, which is not enough when the Organization has made a *prima facie* case that the work in dispute did occur. The Carrier contends that this case presents a dispute in facts that would require the Board to dismiss it. But the “dispute in facts” could be resolved by the Carrier: if it had records showing that the work did not occur, it should produce them. As it stands, the Organization has met its initial burden

to establish that the work in dispute is more likely than not to have occurred, and the Carrier has not presented its own evidence to rebut the Organization's case.

Finally, there is no evidence in the record that the Carrier notified the Organization of its intent to contract out the work in dispute. Failing notice, the Board will sustain the claim.

By way of remedy, the Statement of Claim seeks to have the two Claimants each paid twenty hours. While the Carrier failed to rebut that the work occurred, it has legitimately called into question how many hours the contractor's employees worked: Foreman Miller was not present on the premises during the entire time the work was being done, so his statement can only be an estimate. The Claim is remanded back to the parties for more exact determination of the number of hours worked by Corman's employees. The Carrier should be able to review its records to find that information.

**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 13th day of April 2021.