

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44421  
Docket No. MW-43420  
21-3-NRAB-00003-200401**

**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 (Lakeside Constructors, Inc.) to perform Maintenance of Way and Structures Department work (weed control, brush control and mowing) at the Taconite Facility in Allouez, Wisconsin on the Twin Cities Division beginning on August 13, 2014 through September 5, 2014 (System File T-D4515-M/11-15-0063 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 S. Muellner, M. Anecki and N. Wilkin shall now ‘ ... each receive two hundred eighty eight (288) hours worked by the contractors, with pay to be at the (sic) their respective overtime 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.

The Board notes first a typographical error that needs to be addressed. The Statement of Claim refers to "Lakeside Constructors, Inc." However, the Claim as originally filed identified the contractor as "Lakehead Constructors." Throughout the record below, the contractor was referred to as Lakehead Constructors, and the Board will assume that that is the correct name of the contractor involved.

This Claim arose when the Carrier hired an outside contractor to remove weeds and vegetation and perform brush control and mowing at the Allouez Taconite facility. The record includes photographs of the work being done, as well as statements from a number of Claimants attesting both to the fact of the work and to the fact they Carrier forces have traditionally, customarily and historically performed such work.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of bargaining unit work. If the disputed work is work "customarily performed" by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

"[S]uch work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces."

In addition, if the Carrier plans to contract out work on one of these bases, the Note requires the Carrier to notify the Organization “as far in advance of the date on the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in ‘emergency time requirements’ cases.”

The Board finds that the work in dispute falls within the parameters of Rule 55. This means that the Carrier was obligated to provide notice prior to contracting out the work. In its November 25, 2014, declination, the Carrier asserted:

Multiple notification letters of BNSF’s intent to contract the vegetation control have been sent to the General Chairman of the Organization. On December 17, 2013, BNSF send a notice to the Organization informing of BNSF’s plans to continue the ongoing program of application of vegetation control at various locations in the BNSF rail network in 2014. The Organization was advised in BNSF’s notification letters dated August 12, 2012, August 25, 2012, February 19, 2013, and September 12, 2013, of intent to contract facility improvements at the Allouez Taconite facility. The multi-phase, multi-year Allouez Taconite Facility improvements project is still ongoing.

It may well be that the Carrier provided notice to the Organization as it alleged in its November 25, 2014, letter. However, there is no evidence of any of the notices cited in the record before the Board. It is well settled at the Board that allegations do not substitute for actual evidence. In the absence of any evidence of notice, the Board must conclude that notice as required by Rule 55 was not given, and the claim must be sustained.

The Statement of Claim seeks for Claimants to be paid at their respective overtime rates of pay. Had the Carrier assigned the work to the Claimants, however, it would have done so at their straight-time rates of pay. Accordingly, Claimants are entitled to compensation for the appropriate number of hours at their straight-time, not overtime, rates of pay.

### **AWARD**

**Claim sustained.**

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**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.**