

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37851
Docket No. MW-36829
06-3-01-3-341**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Chicago
(North Western Transportation 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&S Construction) to perform routine Maintenance of Way and Structures Department work (remove and rebuild track) near Mile Post 351.6 in Council Bluffs, Iowa beginning on March 6, 2000 and continuing, instead of W. J. Wenninghoff, S. D. Barr, M. D. Bonham, J. L. Paulson and R. K. Jensen (System File NDRM-9147T/1234314).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants W. J. Wenninghoff, S. D. Barr, M. D. Bonham, J. L. Paulson and R. K. Jensen shall now "**** each be compensated for the hours the contractor has worked. Fifty (50) hours per week, forty (40) hours of straight time and ten (10) hours of overtime, as shown earlier in this claim, at the**

applicable rates of pay, plus all other hours the contractor has and continues to work on this project.'"

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.

On September 11, 1998, the Carrier notified the General Chairman for the Union Pacific System that it intended to contract the construction of a short connecting track between the Iowa Interstate Railroad and UP trackage in Council Bluffs, Iowa. On September 14, 1998, the General Chairman requested a meeting to discuss the notice. On September 23, 1998, a meeting was held in accordance with Rule 52(a). No agreement was reached at that meeting and the Carrier proceeded with the contract as it had the right to do under Rule 52(a).

On May 2, 2000, more than one year after the meeting to discuss the Carrier's proposal, the BMW System Federation representing former Chicago & North Western (C&NW) employees submitted a claim on behalf of a Foreman, an Assistant Foreman, a Sectionman, a Truck Driver, and a Track Machine Operator. Council Bluffs, Iowa, is former C&NW territory.

The Organization contends that R&S Construction removed approximately 202 feet of old track and then replaced it with new track. It is the Organization's position that removing and rebuilding track has customarily, historically, and traditionally been assigned to BMW-represented employees. The Organization requests that the Claimants be compensated the hours worked by the contractor removing and rebuilding this track.

The Organization contends that the Carrier failed to provide a proper advance notice of its plan to contract out the construction of a short connecting track at Council Bluffs, Iowa. This contention was also advanced by the General Chairman of the UP System in 1998. A meeting was held with the General Chairman to discuss the Carrier's notice. Nothing was heard from the UP General Chairman after that meeting. Presumably, he was not dissatisfied with the explanation given by the Carrier at the September 23, 1998 meeting. The C&NW Federation has no basis to revisit what occurred in September 1998.

There is an essential factual dispute in this claim which unfortunately the Board is unable to resolve. The Organization insists that the contractor removed and rebuilt 202 feet of track on former C&NW property owned by the Carrier. However, the Carrier insists that this property was sold to the Midwest Walnut Company of Iowa and that it was merely allowed to use the track.

This is a critical factual matter because if the Carrier had sold the trackage in question before construction began then its BMW-employees have no claim to this work. Based on the record before us, the Board is unable to resolve this conflict. Therefore, we are constrained to dismiss the claim without deciding if the Agreement was violated as alleged by the Organization.

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 1st day of August 2006.