

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40088
Docket No. MW-38427
09-3-NRAB-00003-040385
(04-3-385)**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Chicago and
(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 (Charlson Excavating) to perform Maintenance of Way and Structures Department work (fill and level right of way ditch) between Mile Posts 1 and 3 at Mason City, Iowa on April 28, 29, 30 and May 7, 2003, instead of Common Machine Operators R. Buol, D. Bohl, M. Kath, D. Rusinack, and K. Betts (System File 2RM-9454T/1369384 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1 (b).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Buol, D. Bohl, M. Kath, D. Rusinack and K. Betts shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and ten (10) 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.

Claimants R. Buol, D. Bohl, M. Kath, D. Rusinack and K. Betts established and hold various seniority as Machine Operators Common within the Maintenance of Way and Structures Department and were assigned and working as such on the dates involved in the instant case.

On April 28, 29, 30 and May 7, 2003, without notice to the General Chairman, the Carrier allegedly assigned outside forces (Charlson Excavating) to fill in and leveling a ditch on the Carrier's right-of-way with gravel, rock and ballast. The contractor's forces consisted of five employees who utilized two dump trucks, one end loader, two bulldozers and/or rubber tired backhoes and one crawler. The relevant work was performed between Mile Posts 1 and 3 in the vicinity of Mason City, Iowa. The contractor's employees each expended 32 hours straight time and ten hours overtime during the relevant period.

First, the Organization claims that the Carrier did not provide adequate notice to the Organization as is required. Second, it claims that it was improper for the Carrier to contract out the above-mentioned work. This is work that is properly reserved to BMW-represented employees. The Organization argues that because the Claimants were denied the right to perform the relevant work, the Claimants should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that the work in question was performed not at the Carrier's request, but rather at the request of a third party. According to the Carrier, Holcim (US) Inc. hired Charlson Excavating to fill and level off of a ditch and widen a haul road to correct a Mine Safety and Health Administration (MSHA) complaint against Holcim. According to the Carrier, the work was performed for the benefit of Holcim Inc. and was outside the control of the Carrier. This was supported by a statement from Manager Steensen who indicated, ". . . the Carrier did not ask or line up Charlson to do this job. The cement company [Holcim Inc.] asked if it was alright for them to level off the ditch and fill with rock as they had an OSHA complaint towards their company, and needed to do this to correct the complaint. We only have a 15 ft. right-of-way in this area and the contractor was hardly on our property to begin with." Because the work was performed for the benefit of a third party and not ordered by the Carrier, the Carrier contends that there was no need to give notice to the Organization.

After a review of the record, the Board finds that the Organization has been unable to meet its burden of proof. The work was performed for the benefit of a third party and, as such, was not under the control of the Carrier. In Third Division Award 37143 the Board held:

"The determinative issue in this case is whether the disputed work of moving dirt to an area adjacent to the West Chicago station platform was contracted out under the Carrier's control. . . . As noted in Third Division Award 31234, the Board has long held that where work is not performed at the Carrier's instigation, under its control, at its expense or exclusively for its benefit, contracting is not a violation of the Scope Rule of the Agreement. . . . The record also establishes that the Carrier was not involved with the subject contracting, retained no control over the work performed under it, was not exclusively for its benefit, and did not pay for its completion. Under such circumstances, we conclude that the work did not fall within the Scope Rule of the Agreement in this case, and the Carrier was not obligated to give the Organization notice of the disputed contracting."

Form 1
Page 4

Award No. 40088
Docket No. MW-38427
09-3-NRAB-00003-040385
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The instant contracting was done for the benefit of a third party and was not within the control of the Carrier. Therefore, the Carrier was not required to provide notice to the Organization. The Organization has been unable to meet its burden of proof. Accordingly, the claim is denied.

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 19th day of November 2009.