

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40282
Docket No. MW-40521
10-3-NRAB-00003-080282

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(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 allowed and assigned outside forces (Fox Contractors, Inc.) to perform Maintenance of Way and Structures Department work (operate skid loader and grader) in connection with spreading gravel and grading the Carrier service road adjacent to the main track between Mile Posts 87.1 and 88.0 near Janesville, Wisconsin on October 12 and 13, 2006 (System File 8WJ-7503T/1467512 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper 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 D. Kopp and C. Moore shall now each be compensated at their respective rates of pay for an equal and proportionate share of the thirty-two (32) man-hours**

expended by the outside forces in the performance of the
aforesaid work.”

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 Organization claims that the Carrier contracted out scope covered work without prior notice in violation of Rule 1(b). The only probative evidence in the record upon which the Board can rely comes from a statement from a Carrier officer asserting that Seneca Company uses the Carrier's access road to get to its fields; Seneca took it upon itself to make repairs to the road using a contractor; Seneca did not charge the Carrier for the repairs; and Seneca did not advise the Carrier of its actions.

From the record, those are the facts the Board has before it. The Organization is skeptical that the Carrier would allow an outsider to perform the work as described and in the manner described. However, we have nothing before us to refute those assertions. Those facts therefore become the operative facts upon which this case must be decided. Under those facts, the Organization has not carried its burden of proof. See Third Division Award 31013:

“The determinative issue is whether the disputed work of installing the pipe was contracted out under Carrier's control. This Board has consistently held that where work is not performed at Carrier's instigation, nor under its control, is not performed at its expense or

exclusively for its benefit, the Organization cannot claim improper contracting out in violation of the Scope rule. Third Division Awards 23422, 20644, 20280. . . . We find no evidence that Carrier instigated or retained sufficient control over the disputed work performed . . . or that it was performed at Carrier's expense or exclusively for its benefit. Third Division Award 26082. . . ."

This claim shall therefore be 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 1st day of March 2010.