

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40378
Docket No. MW-38677
08-3-NRAB-00003-050067
(05-3-67)**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 assigned outside forces (Wright Tree Service) to perform Maintenance of Way and Structures Department work (cut and clear trees and brush on right of way) between Mile Posts 10.0 and 13.0 on the Mankato Subdivision and between Mile Posts 339 and 340.8 on the Albert Lea Subdivision on September 18 and 19, 2003 instead of Seniority District T-7 employees assigned to the Valley Park, Minnesota Section Gang and the Roseport, Minnesota Section Gang (System File 7WJ-7391T/1380802 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, the Claimants shall now “*** each be compensated at their applicable rate of pay for an equal and proportionate share**

of the eighteen (18) man/hours of work performed on each of the dates under claim by Contractor forces in performance of the cutting trees from the Carrier right of way between MP 10.0 and MP 13.0 on the Mankato Subdivision (Valley Park Section Gang territory) on September 18, 2003 and between MP 339 and MP 340.8 on the Albert Lea Subdivision (Roseport Section Gang territory) on September 19, 2003.”

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 Claimants are Track Sub-department employees who were assigned to Valley Park, Minnesota, and Roseport, Minnesota, Section Gangs on September 18 and 19, 2003.

On September 18 and 19, allegedly without notice to the General Chairman, the Carrier assigned outside forces (Wright Tree Service) to perform work on Seniority District T-7. Three employees of the contractor expended eight hours each on both of the claim dates using chain saws to cut trees and brush from the right-of-way between Mile Posts 10.0 and 13.0 on the Mankato Subdivision and between Mile Posts 339 and 440.8 on the Albert Lea Subdivision.

First, the Organization claims that the Carrier did not provide proper notice to the General Chairman and thus did not act in good faith. Second, the

Organization claims that it was improper for the Carrier to contract out the above-mentioned work. This is work that is properly reserved to the Organization.

According to the Organization, the Carrier had customarily assigned work of this nature to its Maintenance of Way forces. The Organization further claims that this work is covered by the Scope Rule. According to the Organization, the Carrier's forces were fully qualified and capable of performing the designated work. Because the Claimants were denied the right to perform the relevant work, the Organization argues that 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. First, it contends that the claim was untimely. The work was performed on September 18 and 19, 2003 and the claim was received by the Carrier on November 20, 2003, 63 days subsequent to the event. Further, the Carrier contends that the contracted work consisted of cutting trees and brush, which the Carrier alleges does not belong to its BMW-represented employees under either the express language of the Scope Rule or any binding past practice. According to the Carrier, controlling precedent involving similar issues has upheld the Carrier's position.

Rule 90 (a) (1) provides that a claim must be presented in writing "by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based." In the instant case, the initial claim was dated November 20, 2003. The work commenced on September 18, 2003. Thus, the claim was filed beyond the 60-day time limit set forth in Rule 90(a)(1). In Third Division Award 36605, the Board held:

"... The claim in this matter is dated June 26, 1996 and alleges that commencing April 29, 1996, the Carrier improperly used outside forces. The claim was not received by the Carrier until July 1, 1996. The claim was therefore not received by the Carrier within 60 days from the date of the occurrence on which the claim is based.

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Between these parties under the language found in Rule 90(a)(1), the claim must therefore be dismissed as untimely.”

See also Third Division Awards 37364, 28918, 25538, 23953 and 18667.

In the instant matter, because the claim was filed in an untimely fashion, it must be dismissed.

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 25th day of March 2010.