

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40413
Docket No. MW-39853
10-3-NRAB-00003-060670
(06-3-670)**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(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 (Lunda Construction) to perform Maintenance of Way and Structures Department work (bore and install culverts) between Mile Posts 67.75 and 68.25 on the Kenosha Subdivision beginning on October 10 and continuing through October 20, 2005, instead of System Pipe Jacking and Boring Gang employees R. Knipfel, J. Peterson and A. Scavo (System File 2RM-9698T/1437808 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. Knipfel, J. Peterson and A. Scavo shall now ‘*** each be compensated for an appropriate share of four hundred (400) hours of straight time for the time**

the Contractor's employees spent performing Maintenance of Way work, at the applicable 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.

This matter involves a contractor's performance of culvert boring and installation on an overpass project in the area of Caledonia, Wisconsin. The Carrier entered into a Public Highway Underpass Agreement with the Town of Caledonia, Wisconsin, and a construction contractor for the Town, "ERS." The Organization maintains that the boring work on the project is covered by the Scope Rule and is, therefore, reserved to BMW-ER represented employees. The Organization asserts that the Carrier is required to provide a 15-day notice of subcontracting. The Carrier did not provide notice of this subcontracting. This failure to provide notice, standing alone, is sufficient to sustain the claim. Further, the Carrier's initial defense of exclusivity is invalid in the instant situation where no notice of subcontracting has been provided to the Organization. Moreover, the defense of exclusivity is not a valid defense in subcontracting matters. Further, the Organization claims that, although the Carrier argues that the underpass was not constructed by the Town of Caledonia, the contract between the Carrier and the Town of Caledonia indicates that the Carrier will be performing the work. As to the remedy, the Organization argues that a monetary remedy is appropriate because of the loss of work opportunity.

The Carrier initially responded that the work at issue was work that was usually performed by contractors. The Carrier then responded that the work was not work of the Carrier. Specifically, the Director of Labor Relations stated, in pertinent part:

“According to the information provided to me, the work in question was associated with a public highway underpass-crossing project, which was agreed between the Carrier and the Town of Caledonia, Wisconsin (‘Town’). This agreement allowed the Town the right to operate, maintain and repair the permanent and temporary roadways and drainage structures to perform the work associated with this project. Therefore the work in question was not at the request or benefit of the Carrier. Attached for you to review is a copy of the Public Highway Underpass Agreement.

In regards to your statement ‘the Carrier is the one who arranges their work forces to complete various projects,’ as referenced above, the work in question was not a part of the Carrier’s normal operations. Further, this work does not fall under the scope of your agreement as you claim since it is not under the control of the Carrier.

In both your initial claim and appeal correspondence, you alleged that the Carrier contracted out work involving boring and installing culverts, when in fact, the work was part of a public highway underpass crossing project at the request of the Town. To further complicate the matter, you are alleging that such work was performed at an excessive amount of hours without any supporting documentation.”

The Carrier argues that no Agreement violation can occur when a controlling third party contracts out work that is not for the benefit of the Carrier. According to the Carrier, the work was paid for by the Town of Caledonia and was neither initiated nor paid for by the Carrier. Because the work performed was not for the Carrier’s benefit or under the Carrier’s control, there is no Agreement violation.

The Organization counters that section 11.2.1 of the Public Highway Underpass Agreement (“Underpass Agreement”) shows that the Carrier was going to perform the work, not the Town or its construction contractor.

The relevant portions of the Public Highway Underpass Agreement provide:

“Article 2.0 Union Pacific Grant

2.1 Town. Union Pacific hereby grants to the Town the right to operate, maintain, and repair the permanent and temporary roadways, and drainage structures constructed as part of the Project within the Crossing Area subject to the UP easements.

2.2 ERS. Union Pacific hereby grants to ERS the right to construct the temporary road, permanent road, railroad bridge structure and drainage structures required for the Project with the Crossing Area and subject to the UP Easements.

Article 11.0 Distribution of Work

11.1 Work by ERS. ERS, in substantial accordance with the Plans and Specifications will provide, through its Contractors, all the labor, materials, and equipment required to perform and complete the project. . . .

11.2 Work by Union Pacific. Union Pacific shall furnish or cause to be furnished, at the expense of ERS and in accordance with the Plans and Specifications, all labor, material and equipment required to perform and complete:

11.2.1 All temporary and permanent alterations or relocations of mainline, passing track and shoofly track, north and south switch connections for shoofly, railway communication and signal wire lines, signals, and railroad appurtenances and supporting electric power lines

connecting to and on its right-of-way as may be necessitated by the Project, after ERS has completed the applicable work under Article 11.1. This work is covered by the Track Construction Agreement.

11.2.2 Removal of existing crossing signals and surface crossing panels at Six Mile Road including hardware, communication and power lines and installation and subsequent removal of crossing signals at Six mile temporary bypass road including hardware, and contacting the local electric company.”

The Board carefully reviewed the record evidence. In Third Division Awards 37143 and 37144, involving the instant parties, the Board found the determinative factor to be whether the disputed work was contracted out under the Carrier’s control. Relevant here is the following from Award 37143:

“As noted in Third Division Award 31234, the Board has long held that where the 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. See also Third Division Awards 33294, 32810, 30965, and 26103. . . .”

In the instant case, an examination of the Public Highway Underpass Agreement shows that the Carrier entered into an agreement with the Town and ERS. ERS was to construct the underpass for the Town and the Town would then maintain it. According to section 11.2.1 and other sections of the Public Highway Underpass Agreement, the Carrier was going to be responsible for the track work and ERS was to construct the underpass and the temporary and permanent roadways needed for the project, as well as the drainage structures for the project. The Underpass Project was under the control of the Town and ERS. It was not a Carrier project.

The Public Highway Underpass Agreement reveals that the work at issue fell within ERS’s area of control and responsibility. It indicates that, other than the

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track work, the Carrier retained no control over the Public Highway Underpass Project. The project was not exclusively for the benefit of the Carrier – rather, it benefitted the Town. Moreover, the Carrier did not pay for the project – it was paid for by the Town. Accordingly, the instant claim lacks merit and 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 14th day of May 2010.