

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40929
Docket No. MW-41078
11-3-NRAB-00003-090432**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned forces (Harry Carlyle Excavating) to perform Maintenance of Way and Structures Department work (ditching and right of way cleaning) in the vicinity of Mile Post 250 on the Ayer Subdivision on March 31 and April 1, 2008 (System File D-0852U-204/1502822).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out the aforesaid work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Braddock, R. Brown and D. Ehrhard shall now each be compensated for fifteen (15) hours at their respective straight time rates of pay and for three (3) 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.

There is no dispute between the parties that in November 2007 there was a mudslide that flowed onto the Carrier's property that came from adjacent property. The Carrier Manager contacted the property owner who apologized and said he would clean it up. This claim concerns outside forces (Harry Carlyle Excavating) performing the work of ditching and cleaning the right-of-way at/near Mile Post 250 on the Ayer Subdivision because of the mud and debris from the adjacent property. The contractor used three employees who operated a front end loader, excavator, and skid loader on March 31 and April 1, 2008.

It is the position of the Organization that the work in dispute has customarily and traditionally been assigned to and performed by BMW-E-represented employees under Rules 4 and 8 of the Agreement and is protected by the Scope Rule that is specific in nature. It further argued that the Carrier violated Rule 52 - Contracting and the good faith obligations set forth in the December 11, 1981 Letter of Understanding. Lastly, it argued that no notice was served on the Organization concerning the work and on that basis alone the claim should be sustained. It concluded by requesting that the claim be sustained either procedurally and/or on the merits as presented.

It is the Carrier's position that the Organization failed to meet its burden of proof to show any contractual violation occurred. It argued that in the instant dispute it did not pay for the work to be done, but instead the owner of the adjacent property from where the mud and debris slid on the Carrier's property arranged for its removal. In its letter of September 26, 2008, it stated in pertinent part:

“ . . . In numerous cases involving contractors clearing and removing material from the Carrier's right-of-way, the determination of whether the property was sold "as is where is" and ownership of the material transferred determines if a violation occurred, see Third Division Awards 37499 and 37119. Therefore, ownership of the material does matter and is determinative to the issue at hand.”

The Carrier further contended that the Scope Rule is general in nature and does not grant specific work or activities including the work grieved. It asserted that the December 11, 1981 Letter of Understanding commonly referred to as the Berge/Hopkins Letter is solely dependent upon the applicability of the Subcontracting Rule - it did not create a separate new contracting Rule, nor did it supersede the past practice exception. According to it, the Letter of Understanding merely re-affirmed the notice requirement and encouraged the parties to resolve at the local level the parties' differences over contracting. It further suggested that the Understanding contained a reciprocal obligation that the Organization committed to, but never followed up on by working with carriers to “explore ways of achieving more efficient and economic utilization of the work force.” It argued because the Organization failed to satisfy its reciprocal obligation that destroyed mutual consideration and absent mutual consideration the status of the Understanding was lost. Lastly, it argued that the Claimants were fully employed on the dates of the claim and suffered no monetary loss. It closed by asking that the claim remain denied.

For the same reasons expressed in Third Division Awards 40922 and 40923, the Board has determined that the December 11, 1981 Letter of Understanding has not lost its applicability and the Organization is not required to prove exclusive reservation of scope covered work when the dispute involves the assignment of work to outside contractors.

The thrust of the Carrier's argument was that the work associated with the ditching was not under its control because the mudslide came off of a neighboring field onto its toe path and the mud and debris was the property of its neighbor and his responsibility to remove because he retained ownership, whereas the Organization countered that argument by stating that it did not matter who owned the material that invaded the right-of-way as that did not give the Carrier the right

to shed its obligation for maintaining its own right-of-way, which was reserved to being done by BMW-employees.

The parties offered various Awards for the Board's consideration that, according to each, should resolve the dispute in their respective favor. A sampling of the Awards offered by the Carrier for the Board's consideration included Third Division Awards 39388, 40282 and 40817. Award 40817 stated, in pertinent part, the following:

"It was effectively undisputed in the record that the fencing in question was installed on property that was leased from the Carrier by the local municipality. The local municipality hired the contractor to install the fencing for its own purpose. Moreover, the Carrier does not own or have responsibility to maintain the fencing." (Emphasis added)

Award 39388 ruled as follows:

"The Carrier points out that the work in question consisted of seating benches installed for the benefit of the Village of Cary, Illinois, and the Commuter Rail Division of the Regional Transportation Authority (Metra). . . .

The Board reviewed the record. We do not find that, under the circumstances, the Carrier had any control or authority. . . ." (Emphasis added)

The logic and reasoning of Award 40282 was based upon the prior ruling of Third Division Award 31013 that determined the following:

"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. . . .”
(Emphasis added)

Third Division Award 37901 offered by the Organization determined in pertinent part:

“Thus, the work performed by the landowner clearly inured to the benefit of the Carrier.” (Emphasis added)

In the Carrier's Dissent to Award 37901 it stated in part:

“The Carrier is not a beneficiary in this case.”

One of the recurring themes to the aforementioned Awards “is that if the work was not exclusively done for the benefit of the Carrier the Organization cannot prevail.” However, in this case the exclusive beneficiary of the contractor's work was the Carrier, as its right-of-way was cleared. With respect to the Carrier's contention that the disputed work was tantamount to an “as is, where is” sale that argument is not persuasive in this instance, nor is its argument that because it did not pay any monies for the contractor's work it is relieved of any responsibility for having allegedly violated the Agreement. The Carrier had it within its ability to advise property owner Klinker that it was going to clear the mud and debris after which it could have billed him for the cost of using its own forces. The record further indicates that the mudslide occurred in September 2007 and was not cleared until March 31 and April 1, 2008, which substantiates there was no emergency conditions. The lack of an emergency coupled with a showing by the Organization that there was a likely probability that the work in dispute was customarily performed by BMW-employees necessitated the serving of a notice.

The Board finds and holds that because no notice was served and the work in dispute was done for the sole benefit of the Carrier, the Agreement was violated. The Claimants are to be compensated as requested in Part (3) of the claim as there was a showing of lost work opportunities.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 24th day of March 2011.