

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41055
Docket No. MW-41171
11-3-NRAB-00003-100010**

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 outside forces (John Henry Construction) to perform Maintenance of Way work (framing walls, installing and painting sheet rock and installing a door) at Building 45 at Pocatello, Idaho beginning on June 2, 2008 and continuing (System File J-0852U-267/1508725).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman a proper advance written notice of its intent to contract out said work and when it failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52 and the national December 11, 1981 Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Young, W. Wallace and R. Lewis shall now each be compensated at their respective and applicable rates of pay for an equal and proportionate share of the total straight time and overtime man-hours expended by the outside forces in the performance of the aforesaid work beginning June 2, 2008 and continuing.”**

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 claim concerns the use of an outside contractor to perform various building construction functions as described in the claim at Building 45 in Pocatello, Idaho, beginning June 2, 2008, and continuing until the project was completed and whether such Carrier action infringed upon work protected to the Maintenance of Way craft.

The facts indicate that on May 9, 2008, the Carrier sent the Organization Service Order No. 40431 advising of its intent to contract out the following work stating, in pertinent part:

“... Location: Building 45, Idaho Falls, ID

Specific Work: frame cafeteria, sheetrock, install doors, paint and trim room. . . .”

Pursuant to the Organization's May 14, 2008 request, the parties discussed the notice in conference on May 28, but failed to reach a mutual understanding. The Organization subsequently confirmed that the Carrier had stated that it would proceed with the work being performed by a contractor. The record further reveals that the parties made the same respective arguments that they made in several other cases regarding the vitality and applicability of the December 11, 1981 Letter of Understanding and whether the Organization was required to prove exclusive

reservation of scope-covered work when the dispute involves the assignment of work to outside contractors. For the sake of brevity, the Board will not re-plow old ground regarding these issues, but instead refers the parties to Third Division Awards 40922, 40923, 40929, 40930 and 41048 wherein the Board ruled in favor of the Organization regarding those questions.

It is the position of the Organization that beginning on June 2, 2008, the Carrier assigned three employees of an outside contractor to perform ordinary Maintenance of Way and Structures Department B&B work of framing walls, installing and painting sheet rock and installing a door in Pocatello Yard B&B Shop Building 45 on the Idaho Division. It argued that the disputed work involved neither special equipment nor special skills that were not already possessed by the experienced and fully qualified Claimants. It further asserted that this type of work has customarily, historically, and traditionally been assigned to BMW-employees. It concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that it has a strong mixed practice of contracting out the disputed work and it properly served a 15-day notice, after which a conference was held. It argued that the Scope Rule is general in nature, the Organization cannot prove system-wide exclusivity and contrary to the Organization's argument that it failed to establish any conditions listed in Rule 52(a) it was not required to do so in this instance because Rule 52(b) specifically states: "Nothing contained in this rule will affect prior and existing rights and practices of either party in connection with contracting out." The Carrier asserted that the same and/or similar work has consistently been performed by outsiders as well as BMW-employees; therefore, unless the Organization can substantiate that the work has never been contracted out, or it has historically and consistently taken exception to the Carrier contracting out such work, the Carrier is allowed to continue to contract for such services, which was the situation in the instant dispute. It closed by asking that the claim remain denied.

The Board thoroughly reviewed the record evidence, which substantiates that the Carrier has shown there was historical proof of a mixed practice of the disputed work being performed by covered employees and outside contractors. Therefore, in view of the fact that the Carrier served a notice in accordance with the Agreement

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prior to beginning the work, the Board finds and holds that the claim must 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 23rd day of August 2011.