

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41108
Docket No. MW-40978
11-3-NRAB-00003-090264**

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud 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 (Belle Fore Company) to perform Maintenance of Way and Structures Department work (dismantle buildings and site clean up) at the Denver North Yard, Mile Post 2.5, in the vicinity of Denver, Colorado, on October 29, 2007 (System File D-07-60C/1495222).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract the aforesaid work or 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 D. Daniels, D. Lamarine, J. Almanza, L. Valdivia and Z. Mascarenas shall ‘. . . now be compensated an equal and proportionate share of all straight time and overtime hours, at their respective rates of pay,**

worked by contractor's employees in the performance of the claimed work on October 29, 2007.'"

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, who hold seniority in several Sub-departments on the Wyoming Division, claim that beginning on October 29, 2007, contractor forces demolished old buildings at Denver North Yard. The Organization charges that the Carrier failed to provide notice of its intention to contract out the subject work, and on that basis alone the Board should issue a sustaining award. In addition, the Organization claims that the work is reserved to employees covered by the Agreement.

The Carrier contends that it assigned the work at issue to be performed by its own forces, including some of the Claimants. During handling of the claim on the property, it presented a statement from Manager Unbehaun, who stated:

"Buildings were torn down by maintenance of way employees including some of those mentioned in the claim."

In its Submission to the Board, the Carrier acknowledges that an environmental contractor removed and disposed of the debris that resulted from the demolition.

The Organization responded through an on-property statement provided by BMW-represented employee C. M. Morgan, who is not a Claimant in this case. Morgan asserts:

“In response to the company saying we were there, they’re correct. But, we weren’t helping to tear down those buildings. We were moving track material, and doing other track related repairs.”

The central and material fact at issue requires a determination as to which forces demolished the old buildings, i.e., the Carrier’s or the contractor’s? If the Carrier’s forces performed the work, there would be no basis for a claim. The Carrier asserts that its forces performed the work. The Organization claims the contractor’s forces performed the work.

In support of its position that the claim involves an irreconcilable dispute in facts requiring a dismissed award, the Carrier cited Third Division Award 37204, wherein the Board concluded:

“A careful review of the record convinces the Board that this case does present an irreconcilable dispute of material fact with respect to the determinative issue whether the Claimant was offered the opportunity to work the disputed overtime. We have no way of measuring the validity of the Claimant’s statement or that of Supervisor Davis. As repeatedly noted by the Board in such circumstances, we function as an appellate body and have no way of resolving evidentiary conflicts or factual disputes. See Third Division Awards 28790 and 21436. Because this dispute of fact prevents the Organization from sustaining its burden of proving that the Carrier violated the Agreement as alleged, the claim must be dismissed. See Third Division Award 36406.”

The Board is confronted, here, by a circumstance similar to the one faced by the Board in Award 37204, quoted above. The Board has no method of analysis to determine whether Manager Unbehaun or employee Morgan’s account of the demolition of the buildings should be credited. As a result, the Organization failed to meet its burden to prove that the work in question was performed by contractor

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forces instead of the Claimants in violation of the parties' Agreement. Accordingly, the Board is compelled to dismiss the claim.

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 18th day of October 2011.