

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41168
Docket No. MW-40979
11-3-NRAB-00003-090266**

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

**(Brotherhood of Maintenance of Way Employes 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 (Caylor and Gentz Construction) to perform Maintenance of Way and Structures Department work (dismantle switch panels, grading, install switch panels and related work) at Mile Post 343.75 on the Sidney Subdivision on November 20, 2007 (System File D-0752U-223/1493555).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants N. Bokoskie, R. Gruber, B. Nienhueser, A. Schliz and M. Welch shall now each be compensated for ten (10) hours at their respective straight time 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.

The claim is for work performed by a contractor (Caylor and Gentz Construction) on November 20, 2007. The work at issue, removal, renewal and installation of track panels, frogs and the associated work of grading digging and clearing, the Organization asserts is reserved work. The Carrier asserts the existence of a "mixed practice" on this property; it may use its own or contractor forces and equipment to perform this work. The Carrier contends it provided notice of its intent to contract this work on the North Platte Service Unit on January 10, 2007. In addition to challenging the sufficiency of the notice, the Organization presented evidence in the form of a letter dated January 31, 2007 that on January 16, 2007 it requested a conference concerning the notice. The Carrier ignored this request.

During the on-property processing of this claim, the Carrier disputed the occurrence of the claimed contracting. It put the Organization to its proof. In response, the Organization submitted a statement from B. Nienhueser. Although there are lines on the form used by the employee for his signature and date, the document is unsigned and undated. In addition, the statement does not refer specifically to the events of November 20, 2007, the date of the claim. Instead, the Claimant refers to work referenced in the claim by claim number. Claimant Nienhueser adds:

"The contractor was identified as Caylor and Gentz and utilized three crawler hoes, one grader, one loader and two dump trucks. They were working ten hours a day. I know this is true because they were at the site when we went to work and they were always there when we got off. . . . The contractors were retained to do clean up for several days. This is work that is assigned to me and my fellow REO operators on a daily basis. There was no need for the contractors to be hired to do any of this work. We have the equipment and the operators to perform this work."

The claim sets out the date of the work. However, the statement covers more than one day. It is not clear from the statement whether it covers November 20, 2007. The absence of a signature and date are not explained. The evidence in the dispute decided in Third Division Award 40965, which involves the same notice and contractor as in this case, differs in one important respect. In Award 40965, the Organization submitted on the property a handwritten statement specifically setting forth the dates of the work involved in the claim. It established that the claimed work occurred.

The Organization bears the burden of proof to establish each element of its claim. (Third Division Award 31930.) Without evidence that the work in question occurred, there can be no claim of a violation. The Organization failed to meet its burden of proof to establish that the contracting complained of occurred as claimed. With this finding, the Board does not reach the notice and conference issues raised by the Organization.

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 21st day of November 2011.