

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41396  
Docket No. MW-40948  
12-3-NRAB-00003-090219**

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 (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 (PCI) to perform Maintenance of Way and Structures Department work (construct and install through plate girder and related work) at the bridge at Mile Post 7.21 on the Fort Dodge Subdivision beginning on December 3, 2007 and continuing (System File R-0801C-301/1494452 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 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 K. Brink, J. Marshall, C. Siemens, C. Eastman, J. Miller, M. Pruitt, D. Murphy, E. Lindloff, P. Asleson and D. Austin shall now each be compensated at their respective and applicable rates of pay for an appropriate share of the total straight time and overtime man-hours expended by**

the outside forces in the performance of the aforesaid work beginning December 3, 2007 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.

As Third Party in Interest, the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers Local 89, hereinafter the Ironworkers, was advised of the pendency of this dispute and chose to file a Submission with the Board. The Ironworkers appeared at the Referee Hearing on January 13, 2012.

Although the Organization states in its claim that the Carrier failed to properly notify the General Chairman of the contracting, the record evidence establishes that the Carrier did provide advance written notice. On November 6, 2007, the Carrier notified the Organization by Service Order No. 38753 of its intent to contract out the construction and installation of a 34 foot through plate girder over the mainline track at M.P. 7.21 on the Fort Dodge Subdivision. By letter dated, November 13, 2007, the Organization objected and requested a conference regarding the planned contracting out. The Carrier did not respond to the request for a conference. PCI, the contractor, commenced working on this project on December 3, 2007.

The Organization claims that the Carrier's failure to respond to and schedule the requested conference, in and of itself, justifies the Board's issuance of a

sustaining Award. In support of its assertion, it cited Third Division Awards 24399, 35735, 36854 and 37575, as well as Public Law Board No. 6205, Award 16.

The Carrier notes that Service Order No. 38753 states:

“Serving of this ‘notice’ is not to be construed as an indication that the work described above necessarily falls within the ‘scope’ of your agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employees represented by the BMW E.”

The Organization argues that Rule 1, the Scope language, supports its claim. The Agreement language reads:

“Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair, and dismantling of tracks, structures and other facilities. . . .” (Emphasis added)

The Organization maintains that the phrase “all work” extends to and subjects bridge repair and construction work to its jurisdiction. There may exist an overlap of work jurisdiction with the Ironworkers. However, such overlap does not preclude the Board from sustaining the claim. Furthermore, the tools used by the contractor’s employees are tools commonly used by BMW E-represented employees in the performance of their work.

The Carrier argues that the Scope Rule at 1 D. controls the outcome of this case. It provides:

“This Agreement shall not apply to the following:

\* \* \*

2. Employees governed by the provisions of existing Agreements between the Company and other labor Organizations, such as . . . Structural Iron Workers, etc.”

Furthermore, on the Chicago Northwestern territory, the Carrier asserts, BMW-represented employees have never performed the work in question on steel bridges. During the on-property handling of the claim, Manager McQuitty submitted the following un-rebutted statement:

“The bridge work mentioned in this claim was performed, but wasn’t properly the work of MOW employees. It is a steel structure that was in place to begin with and is steel structure that it was replaced with. The work was not in the class or nature of Bridge and Building employees, but rather Iron Workers.”

The Organization argued during the Referee Hearing that the Carrier waived its right to assert the work jurisdictional defense, because it was not raised in the Carrier’s first step response. The Carrier noted that its jurisdictional defense was raised during the on-property processing of the claim. The Board finds that this argument was not waived. Manager McQuitty’s statement indicates that the work jurisdiction issue was part of the Carrier response during the on-property processing of the claim.

There is no evidence in the record that contradicts Manager McQuitty’s statement. Consequently, the Board accepts it as fact. (See Third Division Awards 31529 and 37611.) The Organization acknowledged during the Referee Hearing that Ironworkers have performed this work on this territory. The Organization relies on the language of the Scope Rule as quoted above to support its claim.

The factual record establishes that the work at issue is customarily performed by Ironworkers. BMW-represented employees do not perform this type of work on the Chicago Northwestern territory. The language of the Scope Rule specifically provides that the terms of the BMW Agreement do not apply to employees covered under the Ironworkers’ Agreement. The receipt of an advisory notice from the Carrier involving the work in question does not confer work jurisdiction to BMW-represented employees. There is no overlap of work jurisdiction on this territory

shown on this record. The work performed on the steel bridge at M.P. 7.21 on the Fort Dodge Iowa Subdivision is Ironworkers' work. The affidavits in the Ironworkers' Submission from an Ironworker with 16 years of experience on this territory and from the Ironworkers Business Agent confirm the factual finding that on this territory the work at issue is Ironworkers' work. Because the work at issue is Ironworkers' work, the terms and conditions of the BMW Agreement do not govern this dispute.

**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 25th day of July 2012.