

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40281
Docket No. MW-40444
10-3-NRAB-00003-080291**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 to perform Maintenance of Way and Structures Department work (rebuild right of way fence) between Mile Posts 392.5 and 392.75 on the Trenton Subdivision beginning on December 20, 2006 and continuing through January 10, 2007 (System File R-0701C-302/1468180 CNW).**
- (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 or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. Owen, N. Barker and G. Chaney shall now “*** each be compensated for an equal amount, at their respective and applicable overtime rates of pay, for the 60 hours that the contractor/farmer expended to build this fence.”**

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.

In pertinent part, Rule 1(B) provides that “[e]mployees 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 used in the operation of the Company in the performance of common Carrier service on the operating property.” (Emphasis added) Rule 1(B) further provides the requirement for 15 days prior notice by the Carrier to the Organization in the event the Carrier desires to contract out work, meeting (if requested) and the further requirement of a good faith attempt to reach an understanding concerning the contracting.

There is no dispute in this case that the Carrier provided materials to a farmer to rebuild a fence; the materials were provided at the Carrier’s expense; the Carrier’s forces were not used to perform the work; and the Carrier did not give prior notice to the Organization of its actions.

There is a dispute in this record concerning where that fence was located and who owned the fence. According to the Organization’s April 5, 2007 letter “[r]ight of way fencing is ON Carrier operating property.” According to the Carrier, the farmer’s land was adjacent to the Carrier’s right-of-way; the fence belonged to the farmer; and the fence was on the farmer’s property. The Carrier’s June 5, 2007 letter states that “[t]he fact is the farmer rebuild[t] his fence . . . [i]t was their

fence . . . [t]he carrier cannot take it upon itself to enter onto people[']s land and rebuild their property . . . [t]he Carrier does not own these fences.”

But Rule 1(B) is clear and requires that before the protections of the Agreement come into play, the work must be performed “. . . on the operating property.” This record is in conflict with respect to the location and ownership of the fence. The Organization asserts that the fence was on the Carrier’s operating property while the Carrier asserts that the fence belonged to the farmer and was on the farmer’s property. But the burden is on the Organization to show that the fence was “. . . on the operating property.” A record in such factual conflict with dueling crucial factual assertions does not provide a basis for the Organization to carry its burden of proof.

The Organization’s reliance upon Third Division Award 37022 does not change the result. In that case, “. . . contactor employees expended 16 hours performing right-of-way fence work on the Carrier’s property. . . .” The evidence in this record does not show, as it did in Award 37022, that the fence upon which the work was performed was “. . . on the Carrier’s property.”

This claim shall therefore 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 1st day of March 2010.