

**Form 1**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40370  
Docket No. MW-40708  
10-3-NRAB-00003-080520**

**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 384.5 and 385.0 on the Trenton Subdivision beginning on May 1 through May 24, 2007 (System File R-0701C-308/1476446 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) and Appendix 15.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. Owen, E. Taff, B. Swank and V. Hutchinson shall now each be compensated at their respective and applicable rates of pay for an equal share of the one hundred and twenty (120) hours expended by the outside forces in the performance of the aforesaid work.”**

**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 case is similar to Third Division Award 40281. In that case, the Board denied the Organization's claim that the Carrier improperly subcontracted fencing work without prior notice to the Organization when it supplied materials to a farmer to rebuild a fence along the Carrier's right-of-way. In that case we found an irreconcilable conflict in the record concerning who owned the fence along the Carrier's right-of-way, i.e., the Carrier or the farmer:

“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 the 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 '[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 on to 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 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."

A similar conflict exists in the instant case record. The Organization again asserts in its August 3, 2007 letter that "[r]ight of way fencing is ON Carrier operating property." The Carrier's position does not concede that the Carrier owned the fence in dispute in this case. In its September 27, 2007 letter, reflecting a statement submitted by a Carrier officer, the Carrier states:

" . . . Farmers/land owners of property adjacent to Railroads are capable and entitled to build, reconstruct, or repair their fences. On or about May 14th, 2007, a UP employee using UP equipment cleared brush and trees along our right of way. After the brush and

fence were removed, the landowner constructed his fence at his expense. . . .” (Emphasis added)

As in Third Division Award 40281, given the conflict in the evidence, the Organization failed to meet its burden requiring that the claim be denied.

In light of the denial of the claim for the reasons set forth above, we do not reach the issue raised by the Carrier concerning its April 27, 2007 notice to the Organization, which provided:

“This letter is to advise, Union Pacific Railroad, intends to use an outside Contractor to construct and install new right of way fencing and material along Union Pacific Railroad tracks and right of way, on the Trenton Sub Division. Specifically right of way fencing will be built or reconstructed by private fence Contractors at several locations between Carlisle, Iowa, Mile Post 64.0 and Allerton, Iowa, Mile Post 0.00, and between Allerton, Iowa, MP 365.00 and Mosby, Missouri, Mile Post 473.30, beginning May 15, 2007 through December 30, 2007. This work will require removing and disposing of old fence wire and post, and installing new post and wire.”

The work in dispute began on May 1, 2007. The notice was dated April 27, 2007. If the Carrier desires to contract work, Rule 1(B) of the Agreement requires it to notify the Organization “. . . not less than fifteen (15) days prior thereto. . . .” The Carrier’s notice was not timely under Rule 1(B) for the commencement of the disputed work.

Finally, as in Award 40281:

“The Organization’s reliance upon Third Division Award 37022 does not change the result. In that case, ‘. . . contractor 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.’”

**Because the Organization has not carried its burden of proof, the instant 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 25th day of March 2010.**