

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40803
Docket No. MW-39218
10-3-NRAB-00003-050486
(05-3-486)**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(& 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 (Railworks, Thomas & Thomas, Premier, BelAir Construction and others) to perform Maintenance of Way and Structures Department work (remove existing track structure, clear cutting, fencing, grading and unload new track material) at the Roseport Industrial Lead beginning on April 26, 2004 and continuing, instead of Messrs. K. Sullivan, A. Spaulding, R. White, B. Helgeson, B. Elmberg, M. Walerius, C. Reiswig, J. Morgan, J. McCormick, I. Determan, A. Steffen, R. Bushinski, S. Anger and S. Biermaier (System File 7WJ-7409T/1406606 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper 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(B).**

- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants K. Sullivan, A. Spaulding, R. White, B. Helgeson, B. Elmberg, M. Walerius, C. Reiswig, J. Morgan, J. McCormick, I. Determan, A. Steffen, R. Bushinski, S. Anger and S. Biermaier shall now each be compensated at their applicable rates of pay for an equal proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning April 26, 2004 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.

It is undisputed that the work described in the Statement of Claim falls under an appendix of the parties' Agreement that governs "System New Construction Gang Work." The appendix effectively removed such work from the various Maintenance of Way Agreements pertaining to the territories of the former Carriers that have been merged into the current Carrier. Instead, the appendix consolidates the work under the main Union Pacific - Maintenance of Way Agreement for performance by the several system production gangs contemplated by the appendix. Indeed, the record before the Board establishes that the General Chairman for the UP-BMWE Agreement received notice and participated in a conference regarding the notice. The record further suggests that a parallel claim

was being advanced through the dispute resolution process under that Collective Bargaining Agreement. That claim is not before us.

Although the Organization does not dispute that its Agreement does not cover the work when performed by system production gangs, the Organization contends that any project work that is performed by outside contractors instead of system production gangs essentially reverts from the jurisdiction of the appendix and falls back within the scope of its Agreement.

Two observations about the claim warrant discussion at the outset. First, the Carrier asserted in its August 13, 2004, reply to the claim that the track material removal work was pursuant to an "As Is, Where Is" sale. That assertion was never effectively refuted by the Organization. Thus, the portion of the claim seeking compensation for the removal work must be denied. Second, the second paragraph of the Statement of Claim alleges a lack of proper notice and a failure of the Carrier to make a good faith attempt to reach an understanding about the disputed work. The record establishes that the Carrier served notice on February 25 and a conference was held on March 9, 2004. We also carefully reviewed the on-property record with regard to the good-faith portion of the allegation. Our review revealed that such assertion was not made on the property. Accordingly, these portions of the claim must also be denied.

Turning to the remainder of the claim, the Organization's overall theory of reversionary scope coverage is not one of first impression. It has been addressed by Award 131 of Public Law Board No. 6302 (Malin) and Award 8 of Public Law Board No. 7097 (Kohn). Both Awards rejected the Organization's theory of scope coverage. Upon our review of those Awards, we did not find them to be palpably erroneous. The instant record before the Board does not contain any evidence that persuades us to depart from the rationale of the prior Awards. Accordingly, for the reasons expressed in the prior Awards, we must deny the instant claim.

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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 15th day of December 2010.