

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40962
Docket No. MW-40850
11-3-NRAB-00003-090143**

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**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Braun Construction/Caylor-Gentz) to perform Maintenance of Way and Structures Department work (place forms/rebar and place/finish concrete on inlet/outlet structures for culvert) at Mile Post 45.5 on the Moffat Subdivision commencing on July 31, 2007 and continuing through August 27, 2007 (System File D-07-45C/1488454).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract the aforesaid work or make a good-faith effort to reduce the incidence of contracting out Scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 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 G. Wiese, J. Brainard, H. Deputy, D. Jones and R. Anderson shall ‘. . . now be compensated an equal and proportionate share of all straight time hours and**

overtime hours, at their respective rates of pay, for work performed by contractor's employees, ten (10) hours each day, commencing on July 31, 2007, continuing through August 27, 2007.'"

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.

On March 20, 2007, the Carrier provided the Organization with the following notice on Service Order 36744:

"Location: Tollard siding extension Moffat Tunnel subdivision, MP 45.80

Specific Work: Grading for track roadbed and construction of drainage structures."

The work associated with this project involved rebar fabrication, placement and setting of forms and concrete placement and finishing. The Organization requested a conference on this notice. The matter was not conferenced. The Carrier submits that it attempted to contact the designated General Chairman, but its calls were not returned. Braun Construction/Caylor-Gentz began work on July 31 with five employees who worked through August 27, 2007, on inlet and outlet structures of a culvert pipe. The Organization filed its claim on September 27, 2007.

The Organization bears the burden of proof. It must establish each element of its case by a preponderance of the evidence. The Organization charges that the notice is inadequate because it fails to disclose sufficient information under Rule 52 and the December 11, 1981, Berge/Hopkins Letter of Understanding. The Board concludes that the Carrier met its Rule 52 notice obligation. The Carrier provided the notice more than 15 days prior to the contracting. There is no showing by the Organization that the failure to conference was solely attributable to the Carrier. The information contained in the notice is sufficient.

The Organization claims concrete work is reserved under Rule 8. The Carrier asserts the existence of a mixed practice with regard to the performance of concrete work. At times the Carrier employs its forces and at times it uses outside forces to perform concrete work.

The Organization supports its claim by citing Third Division Awards regarding cleaning and maintaining the right-of-way under Rule 9 (28817 and 30528). The Carrier argues that it is well established that it may contract out concrete work.

The Board concludes that it is well established on this property that the Carrier contracts out concrete work. See Third Division Award 37363. The following Third Division Awards all support the conclusion that the Carrier may and does contract out concrete work: 28850, 31283, 31284, 31286, 31288, 31651, 31730 and 32433. The Organization has not presented a line of cases in which the Board held that concrete work is reserved to BMW-employees under Rule 8. In the absence of a conflicting line of cases, it is appropriate to require the Organization to establish a basis for distinguishing this case from the application of this well established point that the Carrier may contract out concrete work. The Organization has not done so. The Board follows this well established determination to afford stability and predictability to the application of the cited contract language.

The Board concludes that the Organization has not met its burden to establish that concrete work is reserved to BMW-employees under Rule 8, or that they customarily perform this work. The Carrier did not violate Rule 8 or Rule 52 when it contracted out the disputed concrete work.

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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 14th day of April 2011.