

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42194
Docket No. MW-41986
15-3-NRAB-00003-120354**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Ameritrax) to perform Maintenance of Way work (transport, install and surface track panels and related work) in the vicinity of the 8th Street Yard in Omaha, Nebraska on March 2, 3, 4, 7 and 9, 2011 (System File D-1152U-213/1553177).**
- (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 out said work and when it failed to 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 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. Brinkman, J. Mumm, B. Sock, D. Woods, J. Adams, B. Lippert and J. Schneider shall now each be compensated for thirty-six (36) hours at their respective straight time rates of pay.”**

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 arises out of service improvements that were done in and around the 8th Street Yard in Omaha, Nebraska, pursuant to an "Industry Track Agreement" (ITA) that provided for, among other things, track construction and modifications that would connect the facilities of a private rail loading enterprise – Omaha Transloading Corporation – across land and tracks owned by the Burlington Northern Santa Fe Railway (BNSF) and connect them to tracks owned and maintained by the Carrier. The ITA, which was entered into on September 1, 2010, set forth very specific undertakings regarding which of the signatory parties had responsibility for specific parts of the project. The Carrier was responsible for construction and maintenance on its tracks; Omaha Transloading Corporation was responsible for construction and maintenance of the tracks to be constructed on land that it had leased from BNSF. Specifically, Sections 2 and 3 of the ITA identified a line of demarcation regarding the portions of track to be installed by the respective Parties. Section 2 states that the "Railroad, at its expense, will install 293 track feet of Track A including one No. 9 136-lb right-hand turnout as shown on Exhibit A", while Section 3 (parts 3.1, 3.2, and 3.3) states, in part, that the "Industry [Omaha Transloading Corporation], at its own expense and subject to the prior approval of Railroad, will perform all grading and install all necessary drainage facilities required in connection with the construction of the Track" and that the "Industry, at its expense, will also install Track B as shown on Exhibit A, and install walkways along both sides of the Track beyond the Clearance Point." Section 4 (Ownership of the Track) dictates that the Parties retain ownership in their respective sections of track, with the Industry specifically owning the remainder portion of Track A and all of Track B. The ITA also specified that the Parties would each have maintenance responsibilities over portions of the track, as well as use and lease

rights. The ITA made clear that, as part of its responsibility, Omaha Transloading Corporation “. . . at its expense, shall adequately police and supervise all work to be performed by Industry and shall ensure that such work is performed in a safe manner.”

According to the record, Carrier forces performed the work that the Carrier was obligated to complete per the ITA. This claim covers work that the Organization contends that Carrier forces should also have performed, but which the Carrier contends occurred in the area reserved to construction and maintenance by Omaha Transloading Corporation. The record includes a statement from Manager of Industry and Special Projects, Michael Blackley, which reads, in relevant part, as follows:

“The Exhibit “A” [attached to the ITA] states the railroad installs [up] to the 13’ clearance point. Union employees installed the switch to the 13’ clearance point per the ITA. UPRR industrial paid for the project. To complete the project, a contractor was hired to install the remaining per the industry track agreement.”

The location of the work is critical: BMW-represented forces have rights only to scope-covered work; work that occurs on property owned and/or leased by another entity (i.e., BNSF or Omaha Transloading Corporation) and for which that entity is contractually obligated to develop and maintain is not scope-covered work to which the notice and limitations on subcontracting set forth in Rule 52 apply.

The claim as filed stated that the contractor, Ameritrax, performed Maintenance of Way work “in the vicinity of the 8th Street Yard.” The diagram, Exhibit A, attached to the ITA is very precise in delineating the demarcation between UP territory and BNSF territory. The description of the location in the claim lacks the specificity that would be required to determine whether the work occurred in the area under the control of the Carrier or in the area under the control of Omaha Transloading Corporation. Nor does the record as developed by the Parties on the property further define the exact location of the work disputed in the claim.

The burden of proof in a matter of contract interpretation such as this is on the Organization. In this case specifically, that would necessarily include the exact location of the disputed work. The Organization failed to establish that the work definitively occurred in the area under the control of the Carrier per the ITA. This

leaves two other possibilities: at worst, the work occurred in the area of the Yard under the control of Omaha Transloading Corporation; at best, there is an irreconcilable dispute in the material facts regarding where the work took place. In either case, the Organization failed to meet its burden of proof. Accordingly, the 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 28th day of October 2015.