

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42493  
Docket No. MW-42056  
17-3-NRAB-00003-120424**

**The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.**

**PARTIES TO DISPUTE:** ( **Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
( 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 utilized outside forces (Gerke Excavating) to perform Maintenance of Way and Structures Department work (remove brush and make grade for turnout switches) at Mile Post 172 on the Wyeville Subdivision beginning on May 31, 2011 and continuing (System File B-1101C-117/1556441 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 above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1 and Appendix ‘15’.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants P. Wilson, J. Elstran, M. Kuberra, D. Clark and J. Shrock shall now ‘. . . each be compensated for the lost opportunity to work, all hours that the contractor’s employees performed Maintenance of Way work, at the applicable rates of pay. The Carrier has declined this claim.”**

**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.

The Organization's Claim of July 5, 2011 alleged that the Carrier violated the Agreement when it assigned Gerke Excavating to remove brush and make grade for turnout switches at Mile Post 172 on the Wyeville Subdivision beginning May 31, 2011. The Organization contended that the Gerke crew consisted of five employees working eight hours per day. The Organization contended that the Carrier's alleged actions were in violation of the Agreement and requested a remedy of compensation for the Claimants for the lost opportunity to work the hours that the contractor's employees performed scope-covered work.

By letter dated August 26, 2011, Engineering Supervisor Mitchell McClure denied the claim. Supervisor McClure indicated that the Organization failed to supply sufficient proof to support its claim. Supervisor McClure also provided a statement from Director of Track Maintenance, Mike Gilliam that indicated that the contractor was not working for the Carrier, but was working for an industry. The Organization was advised that the work alleged was not performed at the request of the Carrier or on the Carrier's property and therefore the work did not fall under the scope of the Agreement. The Carrier indicted that the Organization failed to meet its burden of proof and the Agreement was not violated. The Organization was advised that the Claimants were all fully employed and as this work was not scope-covered work, none of the Claimants suffered any loss.

By letter dated September 9, 2011, the Organization appealed the Carrier's decision, reiterating its previous arguments. While the Organization indicated that the contractor's forces performed work for the industry, they argued and presented evidence to show that the contractor also performed work on the Carrier's

property. Finally, the Organization alleged that the Claimants could have performed the work as overtime after their normally assigned tour.

In its November 21, 2011 denial of the Organization's appeal, the Carrier indicated that the relevant work did not fall within the scope of the Agreement as it did not occur upon the Carrier's property.

According to the Organization, the Carrier had customarily assigned work of this nature to BMW employees. It further claims that the relevant work is consistent with the Scope Rule and the Carrier's employees were fully qualified and capable of performing the designated work. The work performed by Gerke Excavating is within the jurisdiction of the Organization and, therefore, Claimants should have performed said work. According to the Organization, because the work was performed on Carrier property, as well as for the industry, Claimants should have performed the relevant work. Because the Claimants were denied the right to perform the work, the Organization argues that they should be compensated for the lost work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the work was contracted out by the industry and not by the Carrier, and therefore was not within the control of the Carrier. Thus, the Carrier is not responsible for the work and is not scope-covered under the Agreement. According to the Carrier, controlling precedent has upheld the Carrier's position.

We have carefully reviewed all evidence regarding whether the Organization has proven that the relevant work belongs to BMW forces. The Organization was unable to rebut the Carrier's evidence that the relevant work was assigned by the industry and not by the Carrier. Based on the record before the Board, the industry's use of Gerke Excavating did not violate the Agreement. See Third Division Award 37143.

Based on the evidence, as well as the above-cited precedent, we cannot find that the Carrier contracted Gerke Excavating; rather, it was the industry that utilized Gerke. Therefore, the Carrier did not violate the Agreement. The burden was on the Organization to prove that a violation occurred, but it failed to do so. See Third Division Award 16851. The instant claim is 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 11th day of January 2017.