

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42495
Docket No. MW-42092
17-3-NRAB-00003-130008**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 utilized outside forces (Volkman Rail Services) to perform Maintenance of Way and Structures Department work (construct switches and track, dump and spread ballast) at Mile Post 172 on Wyeville Subdivision beginning on June 7, 2011 and continuing (System File B-1101C-124/1557715 CNW).**
- (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 the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1 and the December 11, 1981 National Letter of Understanding.**
- (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, reportedly three hundred and sixty (360) man hours at the applicable 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.

The Organization filed its Claim on July 25, 2011. The Organization alleged that the Carrier violated the Agreement when it utilized Volkman Rail Services to construct turnout switches and track, and dump and spread ballast at MP 172 on the Wyeville Subdivision from June 7, 2011 through June 13, 2011. The work was alleged to have been performed by 6 contract employees for a total of 360 hours. The Organization argued that the Carrier has not provided Claimants with the opportunity for this work. As such, the Organization requested that Claimants be compensated.

Engineering Supervisor Mitchell McClure denied the Claim on September 4, 2011. Supervisor McClure took the position that the Organization had not satisfied its burden of proof in this matter. Supervisor McClure provided information from Director of Track Maintenance Mike J. Gilliam in which Gilliam indicated that the switch panels were constructed off Carrier property and were not for the benefit of the Carrier, but rather for a new industry. On October 19, 2011, the Organization appealed the Carrier's decision, arguing that the Carrier had failed to act in good faith and that it had violated the Agreement.

On December 16, 2011, the Carrier denied the Organization's appeal. The Carrier's response explained that the work did not fall within the scope of the Agreement and did not occur on Carrier property, nor was it for the Carrier's benefit. Because the work had not occurred on Carrier property, nor for the Carrier's benefit, the Carrier was not required to provide notice to the Organization as they did not have a claim to such work.

According to the Organization, the Carrier had customarily assigned work of this nature to BMW employees. It further argues 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 Volkman Rail Services is within the jurisdiction of the Organization and, therefore, Claimants should have performed said work. Because 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 industry and not by the Carrier. Under the language of the Scope Rule, the Carrier had no control over this work and said work was not performed at the behest of the Carrier. As such, the work in question does not belong to BMW employees under either the express language of the Scope Rule or any binding past practice. According to the Carrier, controlling precedent has upheld the Carrier's position.

We have carefully reviewed all evidence regarding whether the Organization proved that the relevant work belongs to BMW forces. The Organization was unable to rebut that the work in question was contracted by the industry and not the Carrier, and therefore is not within the jurisdiction of the Carrier. Based on the record before the Board, the outside industry's use of a contractor does 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 utilized outside forces; rather, the industry's use of outside forces did not violate the Agreement. The burden was on the Organization to prove that a violation occurred, and it failed to do so. See Third Division Award 16851. The instant claim is denied.

AWARD

Claim denied.

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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.