

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43590
Docket No. MW-42468
19-3-NRAB-00003-180477
NRAB-00003-140076**

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman 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 assigned or otherwise allowed outside forces (Railroad Services) to perform Maintenance of Way and Structures Department work (removal and replacement of track and crossing materials and related work) near Mile Post 28.31 in Shakopee, Minnesota beginning on October 1, 2012 and continuing through October 5, 2012 (System File B-1201C-142/1578543 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice to contract out the aforesaid work and 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 1 and Appendix ‘15’.**
- (3) As a consequence of the violations referred to in Parts (1) and (2) above, Claimants R. Gordon, D. Witt, A. Steffen, and D. Isaacson shall now ‘...each be compensated for the lost opportunity to work, all hours reportedly, two hundred and fifty (250) man/hours, divided equally per Claimant at the appropriate rate,**

that the contractor's employees performed Maintenance of Way work.' (Emphasis in original)" "

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 instant matter arises from the Carrier's decision to utilize contractor forces to remove track and associated grade crossing material, and replace track and grade crossing material, and construct the track panel installed and dismantle the track panel removed, at about Milepost 28.31 along the Carrier's Mankato Subdivision. The Organization contends that the property where the work was performed belongs to the Carrier and the work was reserved to its members pursuant to Rule –Scope of the parties' Agreement.

The Carrier disputes the Organization's claim that it violated the Agreement, because, it contends, the work provided the Carrier no operational benefit, as it was performed at the expense of, and for the benefit of, a Carrier customer. The Carrier states that it had no responsibility for maintenance of the track at issue, as it led into the industry property. Because, the Carrier states, the work did not take place on Carrier property, it did not fall within the requirements of the parties' Agreement.

As the Carrier asserts, controlling authority holds that Rule 1(B) is clear and requires that before the protections of the Agreement come into play, the work must be performed ". . . on the operating property." See Third Division Awards 40281, 40370. As in those cases, this record presents a conflict as to the ownership and control of the

track where the work occurred. The Organization asserts that the track was on the Carrier's operating property, while the Carrier asserts that it was the property of a customer and the work was performed for the benefit of the industry. We agree with the reasoning in the cited Awards that the Organization bears the burden of establishing that the work was performed on Carrier operating property. This record, which presents a factual conflict as to the crucial factual elements of the claim, fails to provide a basis for the Organization to carry its burden of proof.

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 27th day of March 2019.