

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43725
Docket No. MW-42762
19-3-NRAB-00003-140456**

The Third Division consisted of the regular members and in addition Referee Jeanne M. Vohnhof 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 employee D. Batey to perform Maintenance of Way and Structures Department work (mechanical bridge inspection work) on the Mississippi River Bridge located at Mile Post 136.67 on the Geneva Subdivision on July 20, 2013 instead of calling and assigning B&B Foreman J. Santos thereto (System File J-1301C-515/1590931 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Santos shall be ‘*** compensated for the man hours expended by the Electrician that he spent performing Maintenance of Way work on district B-3, at the applicable overtime rate 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.

On July 20, 2013 the Carrier assigned D. Batey, an electrician employed by the Carrier, to perform work on a bridge which was malfunctioning. The Organization argues that the Agreement was violated when this work was assigned to Mr. Batey instead of to Claimant J. Santos, who holds seniority as a Foreman in the Bridge and Building (B&B) Department, represented by the BMWE.

The Organization asserted that the Claimant was the regularly assigned B&B employee on this territory, and that he was available, willing and able to perform this work. The Organization claims that bridge inspection work is reserved to BMWE-represented employees under their Agreement with the Carrier. In addition, the Organization contends that this work has customarily and historically been performed by BMWE employees.

The Carrier argues that the work performed was electrical work, and that the Organization is improperly attempting to claim work which was rightly performed by an IBEW-represented employee. According to the Carrier, the Organization has not proven its claim that the work was BMWE work or that the Agreement was violated when the Carrier used an electrician to perform the work.

In support of its position, the Carrier provided a statement from the Manager of Bridge Maintenance Justin Perry, who stated that the call-in was for an issue with the instrumentation on the bridge, and that the repair involved a slight adjustment to the electronic timing mechanism, which is electrical work. The Carrier also relies upon a statement by Manager of Signal Maintenance Raymond Easley, who stated that that the electrician was called because the east end of the bridge did not operate and that the problem was electrical, not mechanical.

In order to establish a claim that there has been an improper contracting out of work, the Organization must first demonstrate that the work in question is work

under the jurisdiction of the Maintenance of Way Employees' Agreement. In Third Division Award No. 32646, (Referee Gerald E. Wallin) this Board ruled that "[I]n work jurisdiction matters of this kind, the moving party bears a heavy burden of proof to establish the merits of its claim."

The Organization relies upon the scope rule in its Agreement with the Carrier, which states as follows,

"RULE 1 – SCOPE

...

- B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property...**

By agreement between the Company and the General Chairman, work as described in the preceding paragraph, which is customarily performed by employees described here, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or time requirement must be met which are beyond the capabilities of Company forces to meet.

In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as fair in advance of the date of the contracting transaction as is practicable "and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him

for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith.”

In its response to the Carrier’s evidence the Organization stated that the work in question was mechanical inspection work, falling under its scope rule, and repeated its assertion that the Claimant “is experienced and qualified to perform this work.” In support of its claim the Organization provided a statement from the electrician who performed the work, and a policy requiring employees to report bridge operation failures immediately to B&B personnel.

The evidence demonstrates that the issue with the bridge was reported to B&B personnel, which includes B&B management, in compliance with the policy. The electrician’s statement confirms that he conducted an inspection of the bridge’s electrical controls. There is no evidence that he conducted a mechanical inspection of the bridge. Nor is there evidence to support the Organizations’ assertion that the Claimant has performed this work in the past.

In Third Division Award 31930, this Board stated,

“The substantive portions of the claim lack evidentiary support. Once the allegations of the claim, including their accuracy... were placed in controversy... it was incumbent upon the organization to prove each such allegation by submission of probative evidence. The on-property record is devoid of such evidence.”

Once the Carrier provided evidence that the disputed work was electrical work, the Organization was required to prove that the work performed was not electrical work, or that the Claimant was qualified to perform electrical work. The Organization has not provided probative evidence to establish either fact.

In Third Division Award 41168, (Referee Sherwood Malamud) this Board ruled, “The Organization bears the burden of proof to establish each element of its claim. (Third Division Award 31930).” Further, in Third Division Award 26257, (Referee Suntrup) this Board has ruled,

“As moving party in the instant dispute the burden of proof lies with the Organization to provide substantial evidence that the claim be sustained... Assertions by the Organization are no substitute for proof according to substantial evidence criteria. (Third Division Award 25575). Substantial evidence has been defined as such ‘relevant evidence as a reasonable mind might accept as supporting a conclusion.’”

Although the Organization asserted that the disputed work was reserved to BMW employees, and the Claimant was qualified to perform it, there is not substantial evidence in this record to prove that assertion. Therefore, the Organization has not proven that this work falls under its scope rule and has not proven its claim that the Carrier violated its Agreement by assigning the work to an electrician. On this record, 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 18th day of June 2019.