

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43732
Docket No. MW-42787
19-3-NRAB-00003-140483**

The Third Division consisted of the regular members and in addition Referee Jeanne M. Vohnhof when award was rendered.

**(Brotherhood of Maintenance of Way Employes 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 to perform Maintenance of Way and Structures Department work (construct track and turnout switch) at Mile Post 39 at the mainline going into the industry at Jordan, Minnesota on the Mankato Subdivision beginning on July 16, 2013 through July 19, 2013 (System File B-1301C-152/1590239 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intent to contract out the above-referenced 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 1 and Appendix ‘15’.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Pettis, R. Melheim, C. Gronewold, E. Nelson, A. Hartman, B. Bass, D. Clough and D. Brooks shall each ‘...be compensated for the lost opportunity to work, all hours that the contractor’s employees performed Maintenance of**

Way work, reportedly two hundred and fifty six (256) at the appropriate 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.

As set forth above, this claim was initiated on behalf of the Claimants, employees in the Maintenance of Way and Structures Department. At the time of the dispute, the Claimants had established seniority in various classifications. The Organization states that the Carrier assigned or allowed a contractor to construct track and a turnout switch for installation in Union Pacific's main line going into an industry in Jordan MN. The parties agree that the switch was installed into the Carrier's main line track using Carrier forces.

The Organization contends that this work is reserved to Carrier forces under Rule 1(B).

“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 far 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."

The Organization argues that the work at issue here, the construction of track and turnout switches, is at the heart of the type of work performed by Maintenance of Way employees and encompassed under Rule 1. It asserts that the work is reserved to the Carrier's Maintenance of Way employees by clear language in the Rule, and also has historically been performed by these employees. According to the Organization the Carrier did not provide proper advance notice of the contracting out of this work.

The Carrier argues that the work is not covered by the Scope Rule. According to the Carrier, an Industry customer purchased the materials and hired contractors to build a switch on their property. The Carrier states that it did not own the property on which the work occurred; did not exclusively control the contract forces; and did not purchase the product/work that is involved in the claim. According to the Carrier,

the only scope-covered work was installation of the switch into the Carrier's mainline, and that work was performed by Carrier forces. Although the Carrier contends that it was not required to provide advance notice because the disputed work was not scope-covered work, it also contends that it did provide two notices in October, 2012 that encompass this work.

In response to the claim, Carrier Manager Layne Hable responded that the switch was purchased and built by Great Plains Sand, an Industry customer, on their property. He added that the Claimants were involved in surface and lining of track and held positions that would have had nothing to do with building a switch.

The Organization provided a statement from the Track Inspector for the area stating that Carrier forces have built all of the switches for new industries in the past, and that Carrier forces have built switches to be placed in the track maintained by them. The Organization argues that the track and turnout was installed on the Carrier's track and that it does not matter where the work was performed, because it is scope-covered work used in the performance of common carrier service on the operating property. In addition, the Organization contends that the Carrier retains strict control over the specifications of any track and switches that come onto its operating property, and therefore cannot contend that it had no control over the switch produced by the contractor.

The Carrier has cited awards of this Board holding that the Organization fails to demonstrate that work falls under the Scope Rule when the work performed is not at the Carrier's instigation, under its control, at its expense, or exclusively for its benefit. Third Division Awards 40236, 40088, 37143, 37144, 39964, all citing Third Division Award 31234. There is no evidence in the record that the Carrier instigated or sought the performance of the disputed work. Because the Industry customer assumed the responsibility for producing the switch and paid for it, we conclude that the Industry customer did so for its benefit. Therefore, the evidence does not substantiate that the work was performed exclusively, or even primarily for the benefit of the Carrier.

In addition, the Organization has not demonstrated by probative evidence that the Carrier exercised control over the production of the switch. The fact that the third party contracted for a product that complied with Carrier standards for components that are to be attached to Carrier tracks is not sufficient, without additional evidence, to demonstrate that the Carrier assumed significant control over

the production of this switch.

The Organization relies upon PLB 6493, Aw. 43, Delaware and Hudson Railway Co. and Brotherhood of Maintenance of Way Employees, in which Referee Dana Eischen concluded that a switch contracted by a third party fell under the applicable scope rule because once it was installed on the Carrier's tracks, it inured to the benefit of the Carrier. Award 43 does not address whether the Carrier initiated the construction of the switch, or exerted control over its production. In addition Award 43 does not address the holding of Third Division Awards examining whether the work "exclusively" benefits the Carrier.

The Organization argues that there is no evidence of a lease or other such agreement between the Carrier and the third party in this case. Several Third Division Awards relied upon by the Carrier cite a lease or other such agreement specifically permitting a third party to contract work on Carrier property, as a factor in their ruling that the work involved was not covered by the scope rule. Third Division Awards 37143, 37144, 39964. There is not sufficient evidence in the record of this claim, however, that the work was produced on Carrier property, and therefore the absence of such an agreement does not establish that the work is covered under the scope rule.

When the Organization is not able to establish that the work was performed under the Carrier's instigation or control, at its expense or for its exclusive benefit, the work is not covered under the Scope Rule. Third Division Awards 40236, 40088, 37143, 37144, 39964, all citing Third Division Award 31234. The Organization has not provided sufficient evidence to establish that this work is encompassed by the Scope Rule or that the Carrier violated the Agreement when it contracted out the disputed work. On this record, the claim must be denied.

AWARD

Claim denied.

Form 1
Page 6

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19-3-NRAB-00003-140483

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.