

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43762
Docket No. MW-42523
19-3-NRAB-00003-140157**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 outside forces (Rossi) to perform Maintenance of Way and Structures Department work (perform asphalt repairs) in various parking lots within the Proviso Yard on November 29, 2012 (System File B-1301C-101/1578421 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written 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 1B and Appendix '15.'**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Womack, S. Torres and B. Pelzman shall each be compensated ‘*** for an equal share of all hours reportedly *thirty-two* (32) man/hours at the appropriate rate, that the contractor’s forces spent performing their work, at the applicable rate of pay.’ (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.

This Claim arose on or about November 29, 2012, when the Carrier allegedly assigned an outside contractor, Rossi Construction, to perform asphalt repair patch work to the parking lots of the Global II Administration building in the Proviso Yard, near Chicago, Illinois. According to the Organization, four contractor employees used air hammers and shovels to remove damaged asphalt and shovels to replace it. Pre-mixed asphalt compound was brought in from a nearby asphalt plant using a one-ton dumpbox pickup truck owned by Rossi, similar to trucks owned by the Carrier. The Organization contends that the work that was performed is common repair and maintenance work on roads and yard facilities that is contractually reserved to MoW and Structures Department employees. In addition, the Carrier failed to comply with its advance notice and meeting requirements and failed to make a good faith effort to reduce contracting out. The Notice provided by the Carrier on December 27, 2011, failed to mention the work in dispute here. Moreover, the Carrier failed to put forth any contractually valid reasons for assigning the work to an outside contractor. Evidence in the record, in the form of an eyewitness statement and photographs, establishes that the work occurred as alleged. Contracting the work was not contractually justified: there was no emergency, MoW forces had the Skills to perform the work, the Carrier had the same equipment as that used to perform the work, and the work was not such that the Carrier was not adequately equipped to handle it.

According to the Carrier, the Organization has not met its burden of proof. By letter dated December 27, 2011, the Carrier provided appropriate notice of its intent to contract out asphalt work in the Proviso Yard and the parties met in conference on it. Moreover, the contracting out was appropriate because the Carrier does not own a dump truck capable of hauling hot asphalt. Finally, the Carrier checked with Rossi

Construction about what work they had done. Rossi sent an e-mail, which the Carrier shared with the Organization, indicating that it had “no record of performing anything other than ‘patch columns and beams at the Global II Admin building’ on the date cited in this claim” At a minimum, there is a dispute in the facts, and the claim should be denied.

The threshold issue for the Board to consider is whether the work occurred as alleged. The Organization submitted a written statement from one of the Claimants, along with copies of three photographs that he stated he took on the date of the work. The statement is not dated, so it is impossible to determine if it was written at the time of the alleged incident or some time later, when the author’s memory could have faded. The quality of the photographs in the record is too poor to be able to tell exactly what is happening in them. They are also undated. In contrast, the record also includes a copy of the e-mail correspondence between the Carrier and Rossi Construction, which includes a Daily Work Report (DWR) from Rossi for November 29, 2012. The “Description of Work” reads: “Patched columns & beams at Global II Admin. Building per Justin Perry.” (Perry is the Carrier’s Manager of Bridge Maintenance.) The DWR also indicates that one supervisor and two laborers performed the work. Clearly, the work described in the DWR does not meet the description of the work alleged in the Claim.

The record here presents the Board with a classic “irreconcilable dispute in facts” with respect to a “determinative issue” – to wit, did the work occur as alleged by the Organization or not? On the basis of the record before it, the Board is not in a position to make factual determinations as between the two versions presented by the parties. In such cases, prior Boards have ruled, the Board’s only recourse is to dismiss the claim. This Board will follow those precedents.

AWARD

Claim dismissed.

**Form 1
Page 4**

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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 16th day of July 2019.