

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43774
Docket No. MW-42671
19-3-NRAB-00003-140374**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Wisconsin and Southern railroad supervisor) to perform Maintenance of Way Track Department work (inspecting track and removing track from service) near Janesville, Wisconsin on Seniority District T-8 on May 3, 2013 (System File B-1301C-131/1586634 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance notice of its intent to assign or otherwise allow outside forces to perform 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/or (2) above, Claimant D. Kopp shall be compensated two (2) hours and forty (40) minutes at his applicable 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.

The Carrier's tracks are sometimes used jointly with other carriers. The Wisconsin and Southern Railroad possesses joint trackage rights with the Carrier in the territory at issue here. On May 3, 2013, the crew on a Wisconsin and Southern Railroad train passing through the territory spotted a possible rail defect and alerted a W&SR manager. The manager traveled to the location, determined that there was a legitimate hazard and took the track out of service to protect W&SR's forces and equipment and the general public. W&SR notified the Carrier of the defect, and the Carrier then sent its own forces to make the necessary repairs.

The Organization filed a claim on behalf of D. Kopp, who is a senior track supervisor within the Carrier's Maintenance of Way and Structures Department on Seniority District 8, where the defect occurred. As a track supervisor, Kopp is regularly assigned to perform track inspections and related duties within the District, including the Janesville, Wisconsin, terminal and surrounding Subdivisions. The record includes a statement from the Claimant:

“... On May 3, 2013, a Wisconsin Southern Railroad train running on U.P. track reported a broken rail to their yardmaster. The yardmaster then called the Wisconsin Southern roadmaster to go and look at the rail. Then the track the Janesville Industrial Lead was taken out of service.

I am the Track Inspector headquartered at Janesville, WI. I have over 35 years of service with the railroad. I have been called many times to look at

many problems on the track. I was available at this time for the call instead of somebody from a foreign railroad look at U.P. track.

I talked to the Wisconsin Southern roadmaster and he said it took him 3 hours to find and protect the track.”

The Organization contends that the Carrier violated the Agreement when it permitted the W&SR supervisor to perform track inspection work that falls within the scope of the Agreement and that should have been assigned to the Claimant. The Carrier failed to comply with the advance notice and conferencing requirements of Rule 1B, and it failed to establish that the assignment fell within any of the allowable reasons for contracting out set forth in the Rule.

The Carrier points out that it has a joint trackage agreement with Wisconsin and Southern Railroad over the track in dispute, and it did not violate the Agreement when the Wisconsin and Southern roadmaster followed up on a report from one of its train crews of a possible rail defect. The record includes a statement from the Manager of Track Maintenance, Chase Nichols:

“This territory has joint trackage rights. Their train reported a possible broken rail and their employee when to look at it. He reported the broken rail to UP dispatcher when found. No scope covered work was performed. UP forces did the rail repairs per the agreement.”

First, the Carrier did not assign or request the manager from Wisconsin & Southern Railroad to look at the track. Second, the action of looking at track and reporting an issue is not scope covered work. Managers or non-agreement employees will regularly traverse their assigned territories and in the course of doing so may find an issue or hazard in the track and take remedial action.

Certainly track inspection is work that has historically, customarily and traditionally been assigned to the Carrier’s Maintenance of Way employees. But that is beside the point here. The Carrier did not “assign” an employee of an outside force to perform work that is reserved to Maintenance of Way employees. The Carrier did not even have knowledge of the defect until *after* the Wisconsin & Southern roadmaster had discovered and reported it to the UP dispatcher. Wisconsin & Southern has a joint trackage agreement with the Carrier in the area. Accordingly, it was appropriate for the W&SR train crew to report the possible defect to a W&SR yardmaster. There is

nothing in the record to indicate that the W&SR yardmaster should have contacted the Carrier to report the possible problem instead of sending a roadmaster from W&SR to see if there actually *was* a problem. It was also entirely appropriate for W&SR to use its employee to determine if there was a defect in an area where it had a joint trackage agreement with the Carrier. A broken rail poses a significant hazard, and W&SR surely has safety concerns for its employees and equipment in the same way that the Carrier does. Finally, this was *not* routine track inspection; it was more akin to an emergency response to an immediate safety hazard. The Carrier can hardly be held responsible for violating the Agreement when it had no knowledge of what the W&SR roadmaster was doing until after his work was done.

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 16th day of July 2019.