

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43775
Docket No. MW-42672
19-3-NRAB-00003-140376**

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 (Carreno Concrete Works) to perform Maintenance of Way and Structures Department work (pour concrete slab with rebar) in the Proviso Yard between Mile Posts 11.4 and 16.4 on the Geneva Subdivision on April 4, 2013 (System File J-1301C-508/1584516 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance notice of its intent to assign 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, Claimants S. Hugger, M. Schofield and S. Torres shall each be compensated for “***an appropriate share of all hours of straight time and overtime that the contractor’s employees spent performing Maintenance of Way work on district B-9, at the 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 Organization alleges that the Carrier violated Rule 1B of the parties' Agreement when an outside contractor, Carreno Concrete Works, performed routine Maintenance of Way Bridge and Building Department work (pouring a concrete slab with rebar) in the Proviso Yard between Mile Posts 11.4 and 16.4 on the Geneva Subdivision on April 4, 2013. According to the Organization, four contractor employees worked eight hours each on the project, using ordinary equipment, such as a skid loader, which is already owned by the Carrier.

According to the Carrier, the Organization has failed to establish that the work occurred as alleged. The Proviso Yard is several miles long, and it is not clear where the work is supposed to have been done. The Carrier has no record of "Carreno Concrete Works" performing any concrete work, and the manager's statement indicates that he did not order anyone to do the work alleged.

Where there are disputes in facts such as exist in this case, the Board has limited options. It can review the record to see if the facts can be reconciled and if they can, it can proceed to analyze and decide the claim. If it cannot reconcile the facts, it must dismiss or deny the claim. The Organization has the burden of proof in matters of contract interpretation. If it cannot establish sufficient facts to support a claim, the claim must be denied.

This case illustrates the difficulties faced by the Board in cases where the facts are in dispute between the parties. The Organization has submitted three employee statements attesting to the fact that a contractor poured a concrete slab in the Proviso Yard on April 4, 2013. Socorro Torres wrote that on "4-4-13" he witnessed "a contractor

working in Proviso Yard poring [sic] a slab... Contractor formed + poured a good size concrete slab + installed rebar...” Unfortunately, Mr. Socorro’s statements lacks the name of the contractor or the specific location where the work supposedly occurred. Michael Schofield submitted a statement saying “On 04/04/13 I witnesses Carreno Concrete Work prepping a concrete pad to be poured, in the Proviso parking lot....” Mr. Schofield’s statement identifies the contractor, but the location remains indefinite: if the Proviso Yard is several miles long—and the claim identifies a 5-mile stretch where the work occurred—it is likely that there is more than one parking lot. The statement from Claimant Hugger adds a contact telephone number for Carreno Concrete but added no details about the work, stating only “Contractor formed + poured a good size concrete slab + installed rebar....”

The Claimants’ statements are credible that *something* happened, but sometimes that is not enough. The Carrier must have sufficient information to be able to investigate the claim to determine if the work occurred as alleged and to be able to defend the allegation that it violated the Agreement. Here, there was insufficient information for the Carrier to be able to do that. The record includes results from a search the Carrier did of its contractor database, which showed no information that Carreno Concrete had performed any work for the Carrier anywhere at any time.¹ Manager Justin Perry’s statement succinctly summarized the problems with the claim as presented:

“I did not hire a contractor to do any such work. The Claimants did not provide enough detail for me to adequately investigate this. Proviso yard is several miles long. No specifics on where this work was performed.”
(Emphasis added.)

It may be that a contractor poured concrete somewhere in the Proviso Yard on April 4, 2013, but the claim as presented lacked sufficient information to establish that fact. The Board finds itself unable to reconcile the dispute in facts between the parties, and is required in cases of irreconcilable facts to dismiss the claim.

AWARD

Claim dismissed.

¹ That does not mean that Carreno Concrete did not perform any work; it could be a subcontractor to one of the Carrier’s contractors. But the Carrier’s ability to investigate was stymied nonetheless.

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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.