

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43776  
Docket No. MW-42673  
19-3-NRAB-00003-140377**

**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 (Guzak Contractors) to perform Maintenance of Way and Structures Department work (replace tile, paint and install lockers) at Global I between Mile Posts 3 and 4 on the Rockwell Subdivision on March 27 and April 4, 2013 (System File J-1301C-509/1584517 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 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.’ (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.

The Organization alleges that the Carrier violated Rule 1B of the parties' Agreement when it assigned an outside contractor, Guzak Contractors, to perform routine Bridge and Building Subdepartment work on March 27 and April 4, 2013, at the Global 1 Yard Office between Mile Posts 3 and 4 on the Rockwell Subdivision. According to the Organization, two contractor employees worked eight hours each day painting, and installing lockers in the women's washroom, painting a storage room and replacing broken tiles in a hallway.<sup>1</sup> The contractor used various hand tools that are common in the Carrier's inventory, and the Carrier's B&B forces have historically performed this very same work as part of their regular maintenance. The Carrier failed to give adequate notice, and there was no basis under Rule 1B for this work to be contracted out.

The Carrier responds that the Organization has not met its burden of proof. The work of installing lockers is not protected work under the BMW Agreement; it is covered by the SMWIA agreement. The Carrier provided adequate notice by letter dated March 8, 2013. Finally, Carrier forces were assigned elsewhere on critical bridge construction projects. As a result, the Carrier was not adequately equipped to get the work done with its own forces and equipments, which is one of the recognized grounds under Rule 1B for contracting out.

In contracting claims, the Organization must first establish that the work occurred as alleged and that it is Scope-covered work under the Agreement. The next issue is whether the notice was sufficient under Rule 1(B). If it was, the Carrier must

---

<sup>1</sup> See statements in the record from S. Hugger and S. Torres.

establish that the proposed contracting falls under one of the exceptions established in Rule 1(B): special skills, equipment, or materials; the Carrier is not adequately equipped to handle the work; special time requirements “beyond the capabilities of the Company”; or emergency conditions.

The record includes a statement from Manager of Bridge Maintenance Justin Perry:

“Installing lockers is covrd [sic] by the SMWIA agreement and is not protected work under the BMWE agreement. A labor notice was served 3/8/13 and was mailed by Daryl Clark. My records indicate that employees of gang 3276 work [sic] working on critical bridge defects on the Rockwell subdivision (shimming a bridge, and replacing guard timbers). This gang was also working OT for Chicago Service Unit at Global 1 and 2 doing facility work on Fridays at this time. Claimants were not available for the amount of time it would have required to perform the scope of work.”

The Organization did not refute the Carrier’s contention that the work was covered by the SMWIA agreement and not protected by the BMWE Agreement. If the work is not scope-covered, Rule 1B does not apply. The Board is faced with a situation where the Organization contends that the work is scope-covered and the Carrier contends that it is not. This is an irreconcilable dispute regarding a material fact. In such cases, the Board must dismiss or deny the claim.

**AWARD**

Claim dismissed.

**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.