

SPECIAL BOARD OF ADJUSTMENT

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION/IBT)) Case No. 1
and))
UNION PACIFIC RAILROAD COMPANY)) Award No. 3
_____))

Martin H. Malin, Chairman & Neutral Member
Andrew M. Mulford, Employee Member
Katherine N. Novak, Carrier Member

Hearing Date: June 1, 2018

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way Department work (crossing watchman/flagging duties) on the Navasota Subdivision on May 29, 2015 through June 11, 2015 (System File UP629BT15/1629624 MPR).
2. The Agreement was further violated when the Carrier failed to notify the General Chairman 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 regarding the aforesaid work and when it failed to assert good-faith efforts to reach an understanding and reduce the amount of contracting as required by Rule 9 and the December 11, 1981 National Letter of Agreement
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Fillyaw shall now be compensated for an equal share of all straight time and overtime hours worked by outside forces performing the claimed work.

FINDINGS:

This Special Board of Adjustment upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

By letter dated June 12, 2015, the Organization submitted a claim alleging that on May 29 - June 11, 2015, Carrier assigned an outside contractor, Rail Pro Construction (Rail Pro), "to perform the Maintenance of Way work of crossing watchman/flagman on the Navasota Subdivision" at MP 3.8-5.0. Carrier responded by letter dated July 7, 2015, that "the contract work performed is for an independent party contractor working off track." Carrier denied that the work was covered by the Scope of the Agreement or that it was performed at the direction of Carrier or for Carrier's benefit or was paid for by Carrier. Specifically, Carrier's Engineering Supervisor wrote:

To the best of my knowledge, the work the Organization is claiming in this area involves a contractor closing a crossing so oil field vehicles and equipment do not cross train tracks when a train approaches. The crossing watchman/flagman work you are grieving time for is not at the direction of, nor for the benefit of the Carrier. The Carrier has not hired the contractor who is closing these crossings. A third party is responsible for the contracts, and they pay for the contractors to close the crossings. Instead of running the risk of getting a truck, large piece of equipment, or vehicle stuck at a crossing, the third party has hired a contractor to barricade or block the crossing to protect vehicles and equipment. . . .

Throughout handling on the property, Carrier maintained the position that the work in question was flagging for oil rigs and controlled by Lewis Energy, as was the case in the claim that eventually became PLB 7705, Award No. 1. In support of its position, Carrier submitted the statement from its Senior Trial Counsel Rome discussed in Case No. 2, Award No. 1, and an email from Director Alex Fischer dated June 23, 2015, asserting, "The work referenced did not disturb the track. The work performed by 3rd party flagmen was for flagging protection of another 3rd party."


Before this Board, Carrier concedes that the factual representations it made on the property were not accurate. Carrier advises that the flagging was performed on a project of the State of Texas performing work on public crossings. The Organization maintains that in light of its inaccurate factual representations during handling on the property, Carrier failed to establish what the Organization maintains is its affirmative defense and the claim must be sustained. Although we find Carrier's inaccurate representations on the property concerning, we are compelled to observe that the Organization never challenged them. And there is evidence that the Organization knew that the work at issue did not involve flagging for oil rigs but rather involved flagging for contractors on an overpass and may have known that the project was for the State of Texas. In any event, unlike Case No. 2, Award No. 1, and Case No. 3, Award No. 2, the Organization did not request Carrier to provide documentation of third party control of the work. In its submissions in Cases 2, 3 and 4, the Organization emphasizes that in those cases, the Organization requested documentation and Carrier failed to provide it, and maintains that the Organization's request and Carrier's failure to respond as requested distinguished those cases from PLB 7705, Award No. 1. With no such request in the instant case and no factual challenge to Carrier's assertion that it did not control the work at issue, we find the instant case is governed by PLB 7705, Award No. 1.


AWARD

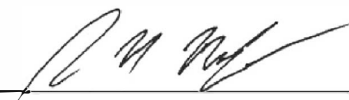
Claim denied.

ORDER

The Board, having determined that an award favorable to Claimant not be made.



Martin H. Malin, Chairman

Katherine N. Novak
Carrier Member

Andrew M. Mulford
Employee Member

Dated at Chicago, Illinois, July 23, 2018