

**SPECIAL BOARD OF ADJUSTMENT
BMWED-UP FLAGGING ARBITRATION BOARD**

(Union Pacific Agreement and former Chicago and
Northwestern Transportation Agreement)

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION/IBT)

and)

UNION PACIFIC RAILROAD COMPANY)

) Case No. 1

) Award No. 1

Martin H. Malin, Chairman & Neutral Member
Robert Shanahan Jr., Employee Member
Derek E. Hinds, Carrier Member

Hearing Date: September 16, 2020

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned or otherwise allowed outside forces (RailPros, Inc.) to perform Maintenance of Way Department work (provide on track safety flagging protection) on the right of way at Mile Post B2.55 on the Belt Line of the Moffat Tunnel Subdivision on November 7, 2016 through November 11, 2016 and continuing (System File B-1652U-256/1676208 UPS).

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 52 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. Habenicht shall now ' be allowed compensation for **all hours** at their respective rates of pay as compensation for the hours worked on the dates cited by the outside contracting force of RailPros. This is compensation that Claimant would have received absent the violations of our Collective Bargaining Agreement.' (Emphasis in original).

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 November 28, 2016, the Organization submitted a claim alleging that commencing on November 7 to 11, 2016, and continuing, an employee of RailPros was flagging for a special project at milepost B 2.55 on the Belt Line of the Moffat Tunnel Subdivision. A corrected claim was submitted by letter dated December 14, 2016. Carrier responded by letter dated December 28, 2016, that “the RailPros employee in this case provided protection for an independent project adjacent to Carrier tracks. This project provides no cost or benefit incurred or gained by Union Pacific Railroad. The services provided by the Rail Pros employee were done so on an independent project for non-railroad personnel, vehicles and equipment. The service was not performed at the direction of the Carrier and does not benefit the Carrier. Further, the RailPros employee was not employed, directed, or paid by the Carrier. This work has nothing to do with BMWED projects or Carrier operations.”

By letter dated February 9, 2017, the Organization appealed the denial. Carrier denied the appeal by letter dated March 27, 2017. The denial related:

The facts of the matter are - the work cited in this claim had nothing to do with any BMWED work. According to Manager of Track Projects Manny Arambulo, this was simply a third party (RTD - Regional Transportation District) who hired a contractor (Rail Pros) to provide flag protection while they were performing their own tasks (construction of their track structure for a passenger transit line). The project had nothing to do with Carrier operations, was not directed by, funded by, or for the benefit of the Carrier. . . .

Accompanying the denial was the following statement of Manager Arambulo:

We believe RTD Company hired Rail Pro’s to ensure they were protected from trains while they performed work for the construction of their track structure that is in the vicinity of our tracks. It was near mile post 2.55 on the Belt Line. This work did not involve any BMWED scope covered work and it did not disturb the track structure. Union Pacific did not instigate, hire or pay for Rail Pro’s to perform the alleged work.

It is unclear from the record developed on the property whether RailPros provided any flagging protection involving Carrier’s track or whether its flagging was confined to RTD’s own track that just happened to be located near Carrier’s track. Of course, if all RailPros did was provide flagging protection for work performed on RTD’s tracks, there would be no basis for the claim. The Agreement does not apply where another party employs a contractor to perform work for that party that is confined to that party’s property. As the moving party, the Organization has the burden of proof and, because the record does not enable us to say that it is more likely than not that the work at issue concerned Carrier’s track, we are compelled to deny the claim.

AWARD

Claim denied.

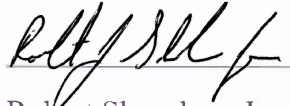
A handwritten signature in dark ink, appearing to read "MR Malin", written over a horizontal line.

Martin H. Malin, Chairman

A handwritten signature in dark ink, appearing to read "Derek E. Hinds", written over a horizontal line.

Derek E. Hinds

Carrier Member

A handwritten signature in dark ink, appearing to read "Robert Shanahan, Jr.", written over a horizontal line.

Robert Shanahan, Jr.

Employee Member

Dated at Chicago, Illinois, October 1, 2020