

NATIONAL RAILROAD ~~ADJUSTMENT~~ BOARD

THIRD DIVISION

Award Number **19623**  
Docket Number MW-19507

Alfred H. Brent, Referee

(Brotherhood of Maintenance of Way **Employees**

PARTIES TO DISPUTE: (

(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, without notice **to** or agreement with General Chairman Funk, it assigned or otherwise permitted outside parties to perform ditching work near Linnton, Oregon on May 28, 29, June 1, 2, 3, 8, 9, 10, 11 and 12, 1970. (System File **312F/MW-84-Contracting** Out-7-24-70)

(2) Machine Operators L. Schuh, O. Wells, Truck Drivers S. **Suckow** and F. Ibabao each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours expended by outside parties in performing the work referred to **in Part** (1) of this claim.

OPINION OF BOARD: The Organization contends that the Carrier violated the contracting out rule of the Agreement when it subcontracted the work of cleaning a drainage ditch between the Carrier's newly constructed passing track and a State of Oregon highway, near Linnton, Oregon.

When this track was **originally constructed** on Carrier operating property, fill material spilled over the embankment into the drainage ditch between the track and the highway. Construction work **was** performed by Carrier Maintenance of Way employees under the Agreement. The Organization contends that the Carrier had the necessary equipment and staff at the location during the time the job was contracted out to repair the spillage.

While the Carrier asserted on the property that the work performed by the sub-contractor was performed on land granted to the State of Oregon, no probative evidence to sustain that allegation was introduced. A copy of the actual easement to the State of Oregon would have sufficed. Absent such proof this Board must find that the passing track is on operating property and the shoulder of the track and the drainage ditch is an integral part of the track and therefore the cleaning of spill material was in fact a necessary operation to the completion of the passing track, which is work within the scope of the Agreement. The Carrier's desire to contract **out** must conform to Rule 40. This Board has on a number of occasions ruled on the contracting out rights of the Carrier. (Referee Carter in 7060 and Referee Hutchins in 13349)

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Finally, the question of damages was never raised by the Carrier when the case was handled on the property and it cannot be raised for the first time in the submission. It is well established principle of this Board that new evidence or arguments **not** presented on the property cannot be considered when the matter is reviewed by this **Board**. (See 11939, 11987, 12388, 13957, 16423, 16061)

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute **are** respectively Carrier and **Employees** within the meaning of the Railway Labor Act, **as** approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the **Agreement** was violated.

A W A R D

The **claim** is sustained.

NATIONAL RAILROAD **ADJUSTMENT** BOARD  
By Order of Third Division

ATTEST:

E. A. Killen  
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1973.