

NATIONAL ~~RAILROAD~~ ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19625
Docket Number MW-19520

Alfred H. Brent, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employes**
(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 the work of relocating main line tracks on operating property at or near Alderdale, Washington beginning on or about February 1, 1970 and ending on or about March 23, 1970 (System File **309F/MW-84** Contracting Out **7/31/70**)

(2) Machine Operators L. Schuh, F. Williamson, R. Archuleta, R. Roberts, E. Aguirte, W. Kent, D. **Legore**, J. Whitney, L. Hoot, Truck Drivers S. **Suckow**, H. Godfrey, F. Ibabao, and R. **Frater** 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: In this case the Carrier's mainline tracks were previously relocated on account of the construction of the John Day Lock and Dam on the Columbia River. The Carrier **commenced** operating trains on the relocated track in May 1967. In 1969 the Carrier encountered severe track movement due to unstable terrain in the area of the relocation of tracks at Alderdale, Washington. The Carrier was able to maintain track and line surface until such time as the horizontal and vertical movements of the track became quite severe, thus restricting train movement through the area to five miles per hour. At this point it was the consensus of the officials of the Carrier and the Corps of Army Engineers to relocate the Carrier's main track around the troublesome area. A contract was let to an independent company to perform excavating, grading and construction of a new roadbed.

The Organization **immediately** filed a claim of Agreement violation, alleging that the Carrier sub-contracted work embraced within the Scope of the Parties' Agreement without notice or mutual consent of the Organization's representative. Rule 40 of the controlling Agreement reads in part as follows:

"All work on Operating property, as classified in this Agreement, shall be performed by employees covered by this Agreement, unless by mutual agreement between **the** General Chairman and designated Representative of Management, it is agreed that certain jobs may be contracted to outside parties account inability of the railroad due to lack of equipment, qualified forces or other reasons to perform such work with its own forces. It is recognized **that where train service is** made inoperative due to conditions such as, but not limited to, washouts or fires, individuals or contractors may be employed pending discussion with respect to such mutual agreement."

The Organization contends that the work here involved was performed on operating property; that the Carrier had qualified personnel and equipment to have performed the work and that no discussions were undertaken with the General Chairman. The Carrier defends its action, asserting that an emergency existed, **necessitating** immediate **action** to forestall complete disruption of train movement and that the United States Government still retained title to the land on which the mainline tracks were located and on which the relocated tracks were to be constructed.

The nub of **this** dispute is not whether an emergency existed, for under the controlling rule the Carrier's mainline track was operating property under the Agreement, notwithstanding the fact that the Government retained title to the property. Even though an emergency may arise, the Agreement still requires discussion and agreement. The heart of the question goes to the area on which the new track was to be constructed. There are conflicting versions on the material facts of this case. The Organization **asserts** that the track was relocated between the Columbia River and the mainline. The length of line change was about 1,320 feet long; with fill about 13,000 yards of fill material used. The Carrier, on the other hand, asserts the track was constructed on Government owned land, with the **length of** relocated trackage being 4,588 feet and that the contractor placed 68,647 cubic yards of embankment material plus 2,400 cubic yards of gravel **sub-ballast**.

After thorough consideration of the record, it is clear to this Board that neither party offered conclusive evidence to support their assertions on the crucial issue of whether the work was actually performed on operating **property**. This Board cannot decide a dispute based on speculation and assumption. Accordingly, the claim will be dismissed.

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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 claim be dismissed.

A W A I T D

Claim dismissed.

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.