

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37277
Docket No. MW-36399
04-3-00-3-639**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Burlington Northern and Santa Fe Railway Company
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it utilized outside forces (Mar-John Track Maintenance, Inc.) to perform Maintenance of Way work (build track, install turnout and bump post) at St. Cloud, Minnesota on the Stables Subdivision on November 20, 25, December 1, 2, 3, 8 and 9, 1997 (System File T-D-1488-B/MWB 98-04-09AE BNR).
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice of its plans to contract out said work as required by the Note to Rule 55 and Appendix Y.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman R. G. Baker and Sectionmen K. R. Koenig and D. R. Miller shall each be compensated for an equal and proportionate share of one hundred sixty-eight (168) hours' pay at their respective straight time rates of pay, Group 2 Machine Operator R. D. Breitzkreutz shall be compensated for fifty-six (56) hours' pay at his respective straight time rate of pay and Group 3 Machine Operator L. E. Zirbes shall be compensated for fifty-six (56) hours' pay at his respective

straight time rate of pay and Group 3 Machine Operator R. W. Ottman shall be compensated for sixteen (16) hours' pay at his respective straight time rate of pay."

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.

Although viewed differently, the basic facts are not in dispute. The Carrier entered into a lease of a portion of its property with Maier Transport & Warehousing, Inc. ("Maier") dated October 27, 1997. Maier, in turn, contracted with Mar-John Track Maintenance, Inc. to perform the work in question.

Throughout the handling on the property, the Carrier maintained that it played no part in the contracting of the work. It also provided a copy of its lease with Maier. The Carrier's assertion that the work was for the ultimate benefit of Maier was not effectively refuted on the property. Moreover, the plat diagram attached to the lease shows that the track in question brought industrial rail access to Maier's warehouse facility and terminated just beyond the west side of its building. Thus, the lease does not demonstrate any readily apparent benefit to the Carrier or, for that matter, any business entity other than Maier.

These parties have confronted similar claims in the past. Award 12 of Public Law Board No. 4768 addressed nearly identical issues that arose in 1988. The record in this case demonstrates that the disputed work was performed on property that was genuinely leased to Maier and that the work was for the exclusive benefit of

Maier and not the Carrier. While the Carrier retained title to the property and a degree of control of its use, the instant record does not establish the level of benefit or control necessary to bring the work within the scope of the Agreement. Accordingly, the Carrier was not required to provide notice in connection with the work. See Third Division Awards 37048 and 32319, and Awards cited therein.

Given the foregoing discussion, we do not find the record to be sufficient to prove that the Agreement was violated.

AWARD

Claim denied.

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 5th day of November 2004.