

****CORRECTED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40859
Docket No. MW-41308
11-3-NRAB-00003-100176**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Hodgeson and Son Contracting) to perform Maintenance of Way and Structures Department work (removing snow and cleaning right of way) between Mile Posts 238.0 and 259.0 on the LaGrande Subdivision of the Oregon Division on January 8, 9, 12, 13, 14 and 15, 2009 (System File C-0952U-153/1516029).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Dacus and W. Cleaver shall now each be compensated for fifty-nine and one-half (59.5) hours at their respective and applicable Group 19 rates of pay.”**

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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.

This case raises the same issues concerning the Carrier's contracting of non-emergency snow removal work with sustaining Awards issued by the Board in Third Division Awards 40857 and 40858. As in those Awards, the record in this case also does not demonstrate the existence of a "mixed practice" where the Carrier contracted non-emergency snow removal work. For the same reasons discussed in those Awards, this claim also has merit.

There was a dispute on the property concerning whether the work was performed by the outside forces on the days set forth in the claim. In its March 17, 2009 letter, the Carrier initially took the position that contracted forces were not used on the dates asserted by the Organization. However, in its April 30, 2009, letter, the Organization took the position that "[t]he dates and hours the contractor performed the work grieved herein were documented through eye witness accounts of BMWED M/W employees who recognized this work as a violation of our Collective Bargaining Agreement . . . [and w]e have no reason to doubt that the work took place as outlined in the claim correspondence." The Organization also produced a statement from an employee asserting that he was taken off equipment and the contractor performed the work and that he and another employee witnessed the contractor's forces plowing snow. The Carrier produced a statement from Manager of Track Maintenance Leake with its Submission asserting that on the dates in dispute a certain piece of equipment (a road grader) was not used. However, the Organization asserts that statement was not exchanged on the

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property and there is no evidence that it was. In any event, we are sufficiently satisfied that the Organization has demonstrated that the contractor performed the work on at least some (if not all) of the dates in dispute.

As in Awards 40857 and 40858, *supra*, the Claimants shall be made whole for the lost work opportunities. However, in the exercise of our remedial discretion to formulate remedies, because there was an initial dispute concerning the precise days on which the contractor performed the work, the extent of relief granted to the Claimants shall be limited to the number of hours actually worked by the contractor's forces during the period set forth in the claim. The matter is remanded to the parties for a check of the Carrier's records to determine that amount.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 7th day of February 2011.