

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40863
Docket No. MW-41345
11-3-NRAB-00003-100125**

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 (R C Welding) to perform Maintenance of Way work (operate crane to remove/replace in track frog) on the South Morrill Subdivision at Mile Post 149 on November 6, 2008 and at Mile Post 139 on November 18, 2008 (System File D-0852U-230/1513701).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52 and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant D. Roelle shall now be compensated for sixteen (16) hours 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.

By letter dated April 21, 2008, the Carrier advised the Organization's General Chairman as follows:

**"THIS IS TO ADVISE OF THE CARRIER'S INTENT TO
CONTRACT THE FOLLOWING WORK:**

PLACE: At various locations on the North Platte Service Unit.

SPECIFIC WORK: Providing any and all fully operated, fueled and maintained and or non operated equipment necessary to assist with program work, emergency work, and routine maintenance commencing May 5, 2008 to December 31, 2008."

A conference on the notice was held on May 13, 2008, without reaching an understanding.

On November 6, 2008, a contractor's employee utilized a truck crane to lift a frog from a track and set in a new frog on the South Morrill Subdivision. On November 18, 2008, the same contractor's employee performed similar duties at a different location on the South Morrill Subdivision. This claim followed.

The notice in this matter was the same notice found sufficient for purposes of Rule 52 in Third Division Award 40861.

For reasons set forth in Third Division Award 40857, and Awards cited therein and contrary to the Carrier's argument, ". . . in contracting disputes, the Organization does not have to demonstrate performance of work by scope-covered employees on an exclusive basis."

With respect to the Carrier's "mixed practice" assertions and its argument that in those cases it can contract out scope-covered work, see Award 40861, *supra*:

"With respect to the type of work performed in this case, prior awards have upheld the Carrier's ability to contract out similar work. See Third Division Awards 33645 and 37644."

In this case (and contrary to the facts in Award 40861, *supra*) the contractor did not utilize the Carrier's equipment with its employee which caused the Board to sustain that claim as being inconsistent with the notice. In this case, the contractor provided the equipment and the operator. The statement of Manager of Track Maintenance B. Mumm, which was attached to the Carrier's May 8, 2009, letter stated:

"Used RC Crane to set frog in because did not have my own equipment to safely set in frog. The frog weighs 12,000 pounds. Did not have a piece of equipment that could make that lift on its own."

Based on the above, the claim lacks merit and shall be denied.

AWARD

Claim denied.

Form 1
Page 4

Award No. 40863
Docket No. MW-41345
11-3-NRAB-00003-100125

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 7th day of February 2011.