

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32994
Docket No. MW-32371
98-3-95-3-185**

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

**(Brotherhood of Maintenance of Way Employees
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 or otherwise allowed outside forces to perform all Bridge and Building Subdepartment construction, maintenance and repair work at various Nebraska locations along 248.44 miles of track on the Nebraska Division including the Albion Branch from Mile Post 0.10 at Oconee to Mile Post 34.6 at Albion, the Cedar Rapids Branch from Mile Post 0.13 at Genoa to Mile Post 44.5 at Spalding, the Norfolk Branch from Mile Post 2.6 at Columbus to Mile Post 48.6 at Norfolk, the Ord Branch from Mile Post 0.48 at Grand Island to Mile Post 61.3 at Ord and the Stromsburg Branch from Mile Post 12.5 at Brainard to Mile Post 75.15 at Central City, beginning June 27, 1993 and continuing (System File N-6/930740).**
- (2) The Agreement was further violated when the Carrier assigned or otherwise allowed outside forces to perform welding repair and buildup work on damaged, battered, chipped and/or worn rails, frogs and switches at various Nebraska locations along 248.44 miles of track on the Nebraska Division including the Albion Branch from Mile Post 0.10 at Oconee to Mile Post 34.6 at Albion, the Cedar Rapids Branch from Mile Post 0.13 at Genoa to Mile Post 44.5 at Spalding, the Norfolk Branch from Mile Post 2.6 at Columbus to Mile Post 48.6 at Norfolk, the Ord Branch from Mile Post 0.48 at Grand Island to Mile Post 61.3 at Ord and the Stromsburg Branch**

from Mile Post 12.5 at Brainard to Mile Post 75.15 at Central City, beginning June 27, 1993 and continuing (System File N-17/940001).

- (3) The Agreement was further violated when the Carrier assigned or otherwise allowed outside forces to operate, maintain and service a truck with a gross vehicle weight of over 10,000 pounds in the transportation of track materials and other recognized Maintenance of Way Department supplies at various Nebraska locations along 248.44 miles of track on the Nebraska Division including the Albion Branch from Mile Post 0.10 at Oconee to Mile Post 34.6 at Albion, the Cedar Rapids Branch from Mile Post 0.13 at Genoa to Mile Post 44.5 at Spalding, the Norfolk Branch from Mile Post 2.6 at Columbus to Mile Post 48.6 at Norfolk, the Ord Branch from Mile Post 0.48 at Grand Island to Mile Post 61.3 at Ord and the Stromsburg Branch from Mile Post 12.5 at Brainard to Mile Post 75.15 at Central City, beginning August 7, 1993 and continuing (System File N-18/940005).**
- (4) The Agreement was further violated when the Carrier assigned or otherwise allowed outside forces to perform general inspection of the track structure, roadway and incidental work related thereto at various Nebraska locations along 248.44 miles of track on the Nebraska Division including the Albion Branch from Mile Post 0.10 at Oconee to Mile Post 34.6 at Albion, the Cedar Rapids Branch from Mile Post 0.13 at Genoa to Mile Post 44.5 at Spalding, the Norfolk Branch from Mile Post 2.6 at Columbus to Mile Post 48.6 at Norfolk, the Ord Branch from Mile Post 0.48 at Grand Island to Mile Post 61.3 at Ord and the Stromsburg Branch from Mile Post 12.5 at Brainard to Mile Post 75.15 at Central City, beginning June 27, 1993 and continuing (System File N-21/940002).**
- (5) The Agreement was further violated when the Carrier assigned or otherwise allowed outside forces to lay rail, renew ties, ballast, surface and line track, maintain and renew all track components such as frogs and switches, maintain the right of way, load, unload and handle track materials and other work incidental thereto at various Nebraska locations along 248.44 miles of track on the**

Nebraska Division including the Albion Branch from Mile Post 0.10 at Oconee to Mile Post 34.6 at Albion, the Cedar Rapids Branch from Mile Post 0.13 at Genoa to Mile Post 44.5 at Spalding, the Norfolk Branch from Mile Post 2.6 at Columbus to Mile Post 48.6 at Norfolk, the Ord Branch from Mile Post 0.48 at Grand Island to Mile Post 61.3 at Ord and the Stromsburg Branch from Mile Post 12.5 at Brainard to Mile Post 75.15 at Central City, beginning June 27, 1993 and continuing (System File N-20/940003).

- (6) The Agreement was further violated when the Carrier assigned or otherwise allowed outside forces to operate, maintain and service all recognized roadway equipment being utilized to maintain the track and associated structures and roadways at various Nebraska locations along 248.44 miles of track on the Nebraska Division including the Albion Branch from Mile Post 0.10 at Oconee to Mile Post 34.6 at Albion, the Cedar Rapids Branch from Mile Post 0.13 at Genoa to Mile Post 44.5 at Spalding, the Norfolk Branch from Mile Post 2.6 at Columbus to Mile Post 48.6 at Norfolk, the Ord Branch from Mile Post 0.48 at Grand Island to Mile Post 61.3 at Ord and the Stromsburg Branch from Mile Post 12.5 at Brainard to Mile Post 75.15 at Central City, beginning June 27, 1993 and continuing (System File N-19/940004).
- (7) 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 the work referred to in Parts (1) through (5) and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52(a) and the December 11, 1981 Letter of Understanding.
- (8) As a consequence of the violations referred to in Parts (1) and/or (7) above, Nebraska Division Bridge and Building Foreman L. A. Yager, Carpenters S. M. Foster and R. D. Cutsor shall each be allowed pay at their respective straight time and time and one-half rates for an equal proportionate share of the total number of

straight time and overtime hours expended by the outside forces in the performance of the work described in Part (1).

- (9) As a consequence of the violations referred to in Parts (2) and/or (7) above, Nebraska Division Track Welder R. Pensick and Track Welder Helper J. P. Sliva shall each be allowed pay at their respective straight time and time and one-half rates for an equal proportionate share of the total number of straight time and overtime hours expended by the outside forces in the performance of the work described in Part (2).
- (10) As a consequence of the violations referred to in Parts (3) and/or (7) above, Nebraska Division Track Subdepartment Group 15(d) District Truck Operator D. D. Olson shall be allowed pay at his respective straight time and time and one-half rates for the total number of straight time and overtime hours expended by the outside forces in the performance of the work described in Part (3).
- (11) As a consequence of the violations referred to in Parts (4) and/or (7) above, Nebraska Division Eastern District Group 7 Track Inspector C. J. Jasper shall be allowed pay at his respective straight time and time and one-half rates for the total number of straight time and overtime hours expended by the outside forces in the performance of the work described in Part (4) up until, but not including, August 9, 1993, and Nebraska Division Eastern District Group 7 Track Inspector M. W. Legler shall be allowed pay at his respective straight time and time and one-half rates for the total number of straight time and overtime hours expended by the outside forces in the performance of the work described in Part (4) beginning August 9, 1993 and thereafter.
- (12) As a consequence of the violations referred to in Parts (5) and/or (7) above, Nebraska Division Track Subdepartment Group 8 Class A Branch Line Section Foremen V. L. Stiles and D. D. Martin and Nebraska Division Track Subdepartment Group 17 Sectionman L. H. Hans shall each be allowed pay at their respective straight time and time and one-half rates for an equal proportionate share of the

total number of straight time and overtime hours expended by the outside forces in the performance of the work described in Part (5).

- (13) As a consequence of the violations referred to in Parts (6) and/or (7) above, Nebraska Division Eastern District Roadway Equipment Subdepartment Operator R. J. Pensick shall be allowed pay at his respective straight time and time and one-half rates for the total number of straight time and overtime hours expended by the outside forces in the performance of the work described in Part (6)."

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.

These claims arose when the Nebraska Central Railroad ("NCR") began railroad operations on five of Carrier's branch lines on June 27, 1993. As a general matter, the Organization's objection contends that Carrier improperly contracted out scope covered work. Carrier, on the other hand, maintained that the track in question was leased to NCR.

A procedural issue is present as a threshold matter. All but one of the claims was dated and received by Carrier on August 26, 1993. The remaining claim was dated October 1, 1993. Carrier contends all of the claims are untimely. Rule 49 requires that all claims must be presented in writing ". . . within 60 days from the date of the occurrence on which the claim is based." Because August 26, 1993 was the 60th day from the date of the occurrence, none of the claims was properly presented within the

allowable time frame. The Organization, to the contrary, maintains that the 60th day is properly within the filing window.

We do not find that the prior Awards cited by the parties have established precedent regarding this precise issue: Is the 60th day within or without the claim presentation period specified by Rule 49? In our view of customary parlance, Rule 49 establishes a period of 60 calendar days after the date of the occurrence in which claims may be presented. We find, therefore, that August 26, 1993 was properly included as being within that period. The claims filed that date are not untimely. The same is not true of the claim dated October 1, 1993. Hence, it must be denied.

According to the Organization's Submission, the remaining substantive issue "... boils down to one (1) question. That question is; Did Carrier prove its affirmative defense that it had leased the track in question to the NCR?"

The controversy arose because the Carrier refused to provide the Organization a complete copy of the lease despite several requests from the General Chairman. It maintained that other portions of the lease were proprietary. In addition, it noted that no Agreement provision required it to furnish complete copies of leases to the Organization. Accordingly, in addition to its many assertions that a valid lease existed, Carrier provided only an excerpt of the lease along with several other related documents. The excerpt dealt with the maintenance of the trackage in question. In its April 5, 1995 letter, the Organization acknowledged that the excerpt did support the Carrier's contention that Carrier had no control over the disputed work and that NCR was not receiving financial and/or barter allowances for services provided to Carrier.

The narrow evidentiary question, thus presented, is this: Is furnishing a complete copy of a lease the only possible way to prove the existence of a valid lease? Absent an Agreement provision requiring such action, we must find in the negative. On this record, we find the validity of the lease has been sufficiently proven. In addition to the excerpt previously noted, the Carrier also provided the Organization with the following:

1. A press release announcing the intended lease.
2. A notification letter to the various General Chairmen of affected organizations along with a map showing the limits of the leased branch lines.

3. An employee newspaper article describing NCR's operations under the lease.
4. Another letter to the affected General Chairmen regarding NCR's filing for a non-carrier exemption with the Interstate Commerce Commission ("ICC").
5. The ICC's Notice of Exemption on Finance Docket 32290. These papers specifically reference the fact that Carrier and NCR had executed a lease and operating agreement effective June 27, 1993. The summary of the transaction listed, by specific mile post numbers, the limits of the leased track on the five branches. The mile post numbers match identically with the limits specified in the claims.
6. The ICC Notice of Exemption on Finance Docket 32290 specifically states, in pertinent part, as follows:

"This exemption is proper under 49 CFR 1150.31 because it involves the operation by a new carrier [Nebraska] over an active (nonabandoned) line owned by and leased from an existing carrier [UP]."

A long line of prior Awards of the Board recognize that work performed by a lessee does not violate Scope or reservation of work Rules. Nor does such work conflict with restrictions on the contracting of work. See, for example, Third Division Awards 14641, 21045, 29515, 29568, 29581 and 29601. Accordingly, the claims that survived Carrier's procedural objection must be denied.

AWARD

Claim denied.

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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 23rd day of December 1998.