

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 39387  
Docket No. MW-37419  
08-3-NRAB-00003-020476  
(02-3-476)

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
( Union Pacific Railroad Company (former Southern  
( Pacific Transportation Company [Western Lines])

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Moore Rail Company) to perform Maintenance of Way work (install ties, change out rail, install plates, spikes, anchors and rehabilitate a switch) at the siding track at Mile Post 726.40 on the Oregon Division commencing on March 7 through April 13, 2001 (Carrier's File 1275035 SPW).
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work referenced in Part (1) above or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Robinson, W. McDaniel, J. Royer, G. Muscutt, R. Gonzales and P. Burger shall ‘. . . each be compensated an equal and proportionate share of all man hours worked by the Moore Rail Company employees, which shall be no less than the one thousand three hundred forty-four (1,344) straight time hours and one hundred forty-four (144) overtime hours already identified herein.

The above compensation will be in addition to any compensation they may have already received.’’

**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.

The actual nature of the work performed is not in dispute. It consisted of installing more than 400 ties, changing out rail, installing plates, spikes and anchors, and “rehabilitating” a switch on a siding track at Mile Post 726.40 on the Oregon division. Nor is it disputed that the work was performed by an outside contractor (Moore Rail Company).

The Organization’s claim specifies that such work is by rights and by Agreement (Rule 1 – Scope) the prerogative of BMWE-represented employees. Further, the Organization points out that the Carrier did not issue proper notice of the work to be done in accordance with Article IV of the Agreement. In addition, the Organization notes that the Carrier failed to provide any proof to support its assertion that it leased the property and that the repairs were commissioned by the lessee.

The Carrier insists that the Organization has not shown at any point during handling on the property that it was the Carrier and not the lessee who contracted for performance of the work in question. It contends that while the Organization may dispute the veracity of the Carrier’s assertion that it did, indeed, lease the property, it has not shown at any point that the Carrier was responsible for contracting the work.

It also disputes the Organization's claim that the Carrier derived direct benefit from the improvements made to the track.

The Board's review of the record and does not find support for the Organization's claim that the Carrier had control over the work performed. No documentation has been presented that suggests that the Carrier hired the contractor to perform the work. Nor has the Organization adequately countered the Carrier's assertion that it leased the siding at issue and had no control over who performed the work in question, because that became the prerogative – and the responsibility – of the lessee.

We note that the Carrier raised the objection that the Organization had not shown that the work in question was reserved exclusively to BMW-employees. Under the circumstances of this case that issue is moot and need not be addressed here. The Organization failed to prove that the Carrier 1) contracted the work out and/or 2) that it had any control over who performed the work. Accordingly the instant claim must be denied.

**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 8th day of December 2008.