

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39964
Docket No. MW-39225
09-3-NRAB-00003-050662
(05-3-662)**

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division
(
(Union Pacific Railroad Company (former Chicago
(North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Belger) to perform Maintenance of Way and Structures Department work (install culverts, headwalls, wing walls and related work) at Mile Post 67.71 in the vicinity of Avon, Iowa on the Trenton Subdivision beginning on September 14, 2004 and continuing through October 29, 2004 instead of Seniority District B-2 employees J. Short, S. Bishop, R. Eller, D. Murphy, E. Lindloff, D. Austin and T. Poland (System File 2RM-9615B/1412230 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants J. Short, S. Bishop, R. Eller, D. Murphy, E. Lindloff, D. Austin and T. Poland shall now “*** each be compensated for an appropriate share of all hours of straight**

time and overtime (reportedly 50 hours per week, 40 straight time and 10 overtime) that the Contractor's employees spent performing Maintenance of Way work on district B-2, at the applicable rates 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.

The facts of this case are not in dispute. On April 30, 2004, the Carrier entered into an Industry Track Agreement with Heartland Co-Op (Industry). The contract provided that the Industry desired the construction of a 700 foot spur track and a 3,058 foot extension to Track 102 between Mile Post 66.4 and Mile Post 68.6 on the Trenton Subdivision near Avon, Iowa, and would perform that work at its own expense. The contract further required the Carrier to replace an existing timber bridge with three-plate pipes as a culvert, for which the Industry would reimburse the Carrier. The contract also included a provision that the Carrier reserved the right to change construction costs and track design if the Carrier was unable to begin construction within six months due to delay by the Industry.

On July 13, 2004, the Carrier served notice upon the Organization of its intent to contract for the following work at Bridge 67.70 Trenton Subdivision at Avon, Iowa: "Providing labor, materials, supplies, and equipment necessary to install 3-108"x52' Structural Plate Pipe with a headwall under the existing TST

bridge.” The matter was discussed in conference on July 20, 2004. The contractor commenced work on the project in September 2004.

The Organization contends that the work in question has historically been performed by Carrier forces, is clearly encompassed within the scope of the Agreement, and was thus reserved to the Claimants. The Organization first states that the Carrier violated the contractual advance notice requirement applicable to scope-covered work, because the notice was not provided until after the Carrier entered into the Industry Agreement. Moreover, the Organization asserts that there was no loss of Carrier control over the work at issue and the Carrier was not free to contract with outside parties to constructively circumvent the parties’ Agreement.

The Carrier notes that it substantiated that the work in question was performed pursuant to the Industry Track Agreement, for the benefit of the Industry and at its cost. Although the Carrier states that advance notice was not required in such circumstances, it points out that it did provide a precautionary notice, and discussed the matter in conference, months before the work commenced. Board precedent is clear, the Carrier concludes, that under circumstances such as those present herein, the work is not scope-covered and, accordingly, the claim should be denied.

Well-established precedent establishes that work performed pursuant to an agreement like the Industry Track Agreement herein, at the expense of others and not for the Carrier’s benefit, falls outside the scope of the Agreement. See, for example, Third Division Award 37144 and cases cited therein, as well as 29601. The Organization asserts that the Carrier maintained complete control over the work, but the record does not prove that such is the case. On the contrary, it shows only that the Carrier agreed to perform the work at the Industry’s expense, and that the Carrier retained the right to change overall construction costs and design should the Industry unduly delay the project’s commencement. This is not sufficient to meet the Organization’s burden of proof.

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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 30th day of September 2009.