

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42546
Docket No. MW-42182
17-3-NRAB-00003-130132**

The Third Division consisted of the regular members and in addition Referee Roger K. MacDougall when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (R. J. Corman) to perform Maintenance of Way Department work (remove ballast retainers on bridges) between Mile Posts 250 and 277 at Sedalia, Missouri on September 16, 17, 19, 20, 21, 22 and 23, 2011 (System File UP742SN11/1563005 MPR).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out said work or make a good-faith effort to reach an understanding and reduce the amount of contracting as required by Rule 9 and the December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. Robinson, R. Edwards, C. Caton, K. Embry, B. Bungart and J. Johnson shall now each be compensated at their respective and applicable rates of pay for a proportionate share of the total straight time and overtime man-hours worked by the outside forces in the performance of the aforesaid work.”**

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 is a case involving contracting out of work. The Organization says the contracting out was improperly done.

The Rules in question are as follows:

“RULE 1 - SCOPE

* * *

B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property

RULE 2- SUBDEPARTMENTS

The following Subdepartments are within the Maintenance of Way and Structures Department.

- A. Bridge and Building Subdepartment**
- B. Track Subdepartment**
- C. Roadway Equipment Repair Subdepartment**
- A. B&B Subdepartment**

1. B&B & Painter Foreman
2. B&B & Painter Assistant Foreman
3. Scale Inspectors
4. Truck Drivers
5. B&B Carpenters
6. Masons
7. B&B Helpers
8. Bridge Tenders
9. Bridge Flagmen
10. Cooks
11. Machine Operators
12. Assistant Machine Operators

* * *

RULE 3 - CLASSIFICATION OF WORK

* * *

B. An employee directing the work of employees and reporting to officials of the Company shall be classified as a Foreman.

* * *

E. An employee assigned to construction, repair, maintenance or dismantling of buildings, bridges or other structures including the building of concrete forms, etc., shall be classified as a B&B Carpenter.

* * *

I. An employee qualified and assigned to the operation and servicing of machines used in the performance of Maintenance of Way and Structures Department work shall be classified as a Machine Operator.

* * *

K. An employee assigned to operate a truck used in the performance of Maintenance of Way and Structures Department work shall be classified as a Truck Driver.

* * *

D. Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company.

* * *

RULE 5 - SENIORITY DISTRICTS

Seniority Districts are identified as follows: B&B Track

**B-2 T-2
B-3 T-3
B-4 T-4
B-7 T-7
B-8 T-8
B-9 T-9**

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RULE 7 - SENIORITY LIMITS

A. Separate seniority in the B&B and Track Subdepartments shall be established in the following classes: B&B Subdepartment

- 1. B&B Foreman (including Classes 2&3)**
- 2. Assistant B&B Foremen (including Assistant Foremen - Truck Drivers)**
- 3. Truck Drivers***
- 4. B&B Carpenters (including Masons and Lead Carpenters)***
- 5. B&B Helpers, Bridge Tenders and Cooks**

* * *

TRACK - B&B MACHINES

H. The following machines, not listed as Class A, B, or C machines, are used in common in the B&B and Track Subdepartments, i.e., at times on Track work, at other times on B&B work. In order to permit the assigned operator to stay with the machine, regardless of the Subdepartment in which working, a separate seniority roster shall be established for operators of such machines. Where there are no qualified bidders holding seniority on such roster for such machine operator positions, vacancies shall be bulletined to both B&B and Track Subdepartment employees who shall be eligible to bid for such positions. Assignment to the vacancy will be based upon the oldest retained seniority date.

**Cranes of less than 20-ton maximum lifting capacity Pettibone
Speed Swing
Earth Drill Blacktop Roller Car Top Unloader Crawler Crane
Crawler Loaders and Dozers Boom Truck
Motor Grader
Tie Cranes
Rubber Tired Tractor Trencher
Portable Air Compressor (Rail-Mounted) W-64 Derrick Car
Lo-Boy Backhoe
Idaho Norland Snow Blower Articulated Front End Loader
Hydro-Scopic Excavator Unimog
Fuel Service Truck
Truck With Plows and Salt Spreaders Skid Loaders with
Attachments Sheep's Foot"**

In addition, the Organization says that the "Berge" letter continues to apply to this day. The Carrier disagrees.

The Organization says that when the Carrier plans to contract out work contained within the Scope of the Agreement, i.e., work which is customarily performed by Carrier forces, it is required to give the General Chairman written notice of its plans to contract out the work as far in advance of the date of the contracting transaction as practicable and in any event not less than 15 days prior thereto and if the General Chairman or his representative requests a meeting to

discuss matters relating to the intended contracting transaction, a representative of the Carrier shall promptly meet with him for that purpose, as required by Rule 1 (b), Paragraph 3 and the interpretation and amendments thereto embodied in the December 11, 1981 Letter of Agreement. Rule 1 (b), Paragraph 3 and the December 11, 1981 Letter of Agreement, in pertinent part, read:

“In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith.”

*** * ***

“Dear Mr. Berge:

December 11, 1981

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications

between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor”

There is a dispute over whether this work would normally fall under the Scope rule in the CBA in question. More specifically, is this work exclusive to the Organization, as they claim.

This issue, in very similar cases, has recently been decided by Referee Sinclair Kosoff, in Awards 42251 and 42253. He has exhaustively covered the rationale and reasoning for finding that the Carrier has a past practice of contracting out precisely this type of work. This Board elects to follow the rationale laid out by Referee Kosoff.

The Organization bears the burden of proving the contrary in any contracting out case. In this particular circumstance, this Board finds that it has failed to meet this hurdle.

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 6th day of March 2017.