PUBLIC LAW BOARD NO. 7101
CASE NO. 7

PARTIES TO THE DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(and
(
(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 (Railworks) to perform Maintenance of Way and Structures Department work (unload ballast, surface, align and dress off the track) from the mainline switch and going into side track at Mile Post 162.1 on the Mason City Subdivision beginning on September 11, 2003 instead of Messrs. A. Winship, C. Sorensen, S. Seible and D. Haugen (System File 2RM-9478T/1378998 CMW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written 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 violations referred to in Parts (1) and/or (2) above, Claimants A. Winship, C. Sorensen, S. Seible and D. Haugen shall now each be compensated for eight (8) hours at their respective straight time rates of pay.

The Carrier has declined this claim."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this

Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

Claimant A. W. Winship has established and holds seniority as a foreman. Claimant C. J. Sorensen has established and holds seniority as a Class A Machine Operator. Claimants S. L. Seible and D. H. Haugen have established and hold seniority as Class B Machine Operators. On the dates pertinent hereto, they were each regularly assigned to their respective positions on Surfacing Gang 2901 on Seniority District D-2.

On Thursday, September 11, 2003, the Carrier allegedly assigned outside forces (Railworks) to perform alleged Maintenance of Way track work on a mainline switch located at mile Post 162.1 on the Mason City Subdivision near Hampton, Iowa. According to the Organization, 4 employees of the contractor consisting of 1 foreman, 1 tamper operator, 1 ballast regulator and 1 truck driver unloaded ballast, surfaced, aligned and dressed off the track at Mile Post 162.1. The contractor's employees each worked eight hours to accomplish the track surfacing work.

The Organization contends that the Agreement was violated when the Carrier assigned Roadworks the work of unloading ballast, surfacing, aligning and dressing off the track from the mainline switch and going into side track at Mile Post 162.1 on the Mason City Subdivision beginning on September 11, 2003. The Organization claims that it was improper for the Carrier to contract out the above-mentioned work, which is work that is properly reserved to the Organization. In addition, the Organization claims that it was never properly notified of the work.

According to the Organization, the Carrier had customarily assigned work of this nature to the Carrier's Maintenance of Way Employees. The Organization further claims that the work in question is consistent with the Scope Rule. According to the Organization, the Carrier's Maintenance of Way Employees were fully qualified and capable of performing the designated work. The work done by Railworks is within the jurisdiction of the Organization and therefore Claimants should have performed said work. The Organization argues that because Claimants were denied the opportunity to perform the relevant work, Claimants should be compensated for the lost work opportunities.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that because the track in question had been subject to an Industry Track Agreement with the Franklin County Development Association, the relevant work was within the sole control of the Industry which had the right to contract out said work to Railworks. Specifically, the language of the Industry Track Agreement specifies:

Article 8. Ownership of the Track.

A. The Railroad shall own the portion of the Track from the point of switch to the 13-foot clearance point ...

B. The Industry shall own the portion of the Track from the 13-foot clearance point to the end of the Track ...

* * * *

Article 10. Maintenance of Right-of-way and Track Appurtenances.

A. The Railroad, at its expense, shall maintain the right-of-way and track appurtenances for the portion of Railroad-owned Track.

B. The Industry, at its expense, shall perform the following maintenance of the right-of-way and track appurtenances for the portion of Industry-owned Track:

* * * *

2. Maintain all appurtenances to the Track ...

Further, the Carrier contends that because the work was within the control of Franklin County, the Carrier had no obligation to issue to the Organization a Notice of its intent to contract out the work. The Carrier also argues that there is a dispute in facts that cannot be resolved by this Referee. Finally, it argues that the Claim is procedurally defective.

After a complete and thorough review of the evidence in this matter, we find that the work in question was subject to the Industry Track Agreement with Franklin County. As such, the work does not belong to the Organization. When a legitimate agreement dictates that the matter in question is not within the jurisdiction of the Carrier, it is not inappropriate for the Industry to contract out work that would otherwise belong to the Organization had the Carrier been in control of the work. Referee Marx dealt with a similar issue in Third Division Award No. 29439:

> **This Claim concerns work performed on terminal elevator tracks in the East Kansas City Yard by other than Maintenance of Way employees. The record demonstrates that work on these tracks is the responsibility of the lessee ... . Rules as to the reservation of work to Maintenance of Way employees are clearly not applicable where the Carrier has no control over the work. Since the Organization cannot**

defeat this basic principle in this instance, there is no basis for the Claim.

In addition, because the property in question was subject to an Industry Track Agreement, there was no need for a Notice to the Organization.

Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the relevant work should have been assigned to the Organization. The work in question was within the control and authority of Franklin County. Thus, having determined that the work was not within the scope of the Organization, we find that the Organization has not met its burden of proof and the Claim is therefore denied.

The Claim is denied.

AWARD

Claim denied.

Steven Bierig Digitally signed by Steven Bierig

Steven M. Bierig
Chairperson and Neutral Member

Dominic Ring
Carrier Member
5-7-09

Roy Robinson
Organization Member

Dated at Chicago, Illinois this 6th day of May 2009.