PUBLIC LAW BOARD NO. 7101
CASE NO. 9

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 utilized outside forces to perform Maintenance of Way and Structures Department work (construct track, unload ballast, surface track and related work) near Mile Posts 204.0 and 204.3 at Ashton, Iowa on the Worthington Subdivision on February 18, 21 and 26, 2004, instead of Seniority District T-7 employes R. Melheim, P. Slater, T. Witt and M. Miles (System File 7RM-9550T/1397777 CNW).

(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, the Claimants R. Melheim, P. Slater, T. Witt and M. Miles shall now ' *** each be compensated for an equal and proportionate share of 120 hours of straight time and 12 hours of overtime that the contractor's forces spent performing their work, at the applicable 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.

All Claimants in the instant case have established and hold seniority in the Maintenance of Way and Structures Department on Seniority District T-7 as follows:

R. J. Melheim	Foreman
P. M. Slater	Assistant Foreman
T. R. Witt	Welder
M. C. Miles	Machine Operator (Common)

Sometime prior to the dates in question, the Carrier entered into an agreement to provide rail service from its Worthington Subdivision rail line to the Otter Creek Ethanol Plant at Ashton, Iowa.

On January 4, 2004, the Carrier assigned the Worthington, Minnesota section crew (Gang 3394) to construct approximately 68 feet of track between the new switch near Mile Post 204.3 and the new Industry track entering the Otter Creek Ethanol Plant. On Wednesday, February 18, 2004, instead of assigning the Worthington Section crew or any of its other Maintenance of Way employees to continue to work on this section of track, outside forces (Railroad Salvage and Restoration of Joplin, Missouri) unloaded and distributed ballast on this section of new track. Six employees of the contractor expended 4 hours each in the performance of the work. On Saturday, February 21, 2004, the Carrier utilized the same contractor to build 72 feet of track connecting the track at the north end of the Ethanol Plant to the Carrier's main line track near Mile Post 204.0. Six employees of the contractor expended 10 hours each to complete the basic track maintenance work. On Thursday, February 26, 2004, the contractor performed routine track work. Six employees of the contractor unloaded ballast on the track at Mile Post 204.3 and surfaced and dressed the track on both ends of the way at Mile Posts 204.0 and 204.3

The Organization contends that the Agreement was violated when the Carrier assigned Railroad Salvage and Restoration of Joplin, Missouri the work of constructing track, unloading ballast, surfacing track and related work near Mile Posts 204.0 and 204.3 at Ashton, Iowa on the Worthington Subdivision on February 18, 21 and 26, 2004. 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.

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 Railroad Salvage and Restoration of Joplin, Missouri 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 the work performed was done by and for the benefit of the third party industry (Otter Creek Ethanol Plant) and without the knowledge of the Carrier. According to the Carrier, the Industry's contractor took the initiative to perform the work without the consent or knowledge of the Carrier. As the work was done without the Carrier's knowledge or intent, there was no opportunity or reason to provide any Notice to the Organization. Further, the Carrier claims that the work of February 26, 2004, was acquiesced by the Carriers' employees. Finally, even if the Organization were to prevail, the remedy requested is excessive as the Claimants were not on furlough status and did not suffer any loss of wages.

We initially note that the Carrier has agreed that "The alleged work in question, per the lease agreement, was to have been done by the Carrier's forces but constructed at Otter Creek's expense. During the initial correspondence, the Organization was made aware that alleged work was performed without the Carrier's knowledge or authorization."

Thus, it is clear that the Organization should have performed the work in question. However, it also appears that the Industry took it upon itself to complete the work in question without notifying the Carrier. The Carrier contends that there is nothing that it could have done in this case to prevent the situation. The Organization contends that the work in question is their work and as such, should have been assigned to Claimants.

A review of the materials in question yields that the work in question should have been performed by the Organization. It is clear and in fact it has been admitted by the Carrier that the work in question belonged to the Organization. However, the work in question was done by the Industry without the Carrier's permission. A review of the record in this case indicates that the work was improperly performed by the Industry. The Industry Track Agreement required that "Prior to entering Railroad's right-of-way ... the Industry ... are required to notify the Railroad ... at least ten (10) working days in advance of such work ...". In the instant case, there is no evidence of any advance notice.

It does appear that the work should have been performed by the Organization, which leads to the conclusions that Notice not provided and that Claimants were improperly denied the right to perform the work. Therefore, this Board rules that Claimants were denied the opportunity to engage in the relevant work on February 18, 21 and 26, 2004.

Having made that determination, the next matter to be considered is the appropriate remedy. The Carrier contends that because Claimants were fully employed, there is no need for any additional remedy. Nonetheless, the Organization contends that Claimants were unfairly denied the opportunity for the relevant work; therefore, they should be compensated appropriately.

After a review of the all the relevant precedent cited by both parties, this Board rules that Claimants shall be compensated for the work that was performed by the Industry on February 18, 21 and26, 2004. As indicated by Referee Kohn in PLB 7097 Award No. 4:

> The remaining issue is the proper remedy for that violation. The Carrier asserts that a monetary payment to Claimant would be improper because he was "fully employed" and therefore suffered no employment loss. That argument has been rejected in Third Division Awards 35735, 37536 and 37022 ... The Organization asserts that Claimant was available and willing to perform the work had he been assigned. Once the Carrier assigned contractors' employees to perform the work, Claimant lost the opportunity to perform that work, whether on overtime or otherwise. While the Carrier may contend that the work would have gone to an employee on furlough, the Organization is entitled to select its Claimant. Given that the Carrier was the party in possession of the work records and contractor invoices to establish the work schedules of the outside contractors' employees, and failed to provide any documentation to refute the Organization's claim of lost work opportunity, the appropriate remedy is that Claimant be compensated for that loss.
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> *Id.* at 4.

Thus, after a review of all the facts in this case, we have determined that Claimants shall be made whole for the work in question on February 18, 21 and 26, 2004.

Claim sustained.

AWARD

Claim sustained.

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.