PUBLIC LAW BOARD NO. 2960

AWARD NO. [redacted] 164
CASE NO. 259

**PARTIES TO DISPUTE:**

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when outside forces were used to prepare a new site for the relocation of the Car Department's tool house near Rapid City, South Dakota (Organization File 6LF-2225 T; Carrier File 81-88-33).

(2) The Agreement was further violated when the Carrier did not give the General Chairman prior to written notification of its plans to assigned said work to outside forces.

(3) Claimants R. D. Hanson and C. Bossert shall be compensated eight and one-half hours each at the applicable time and one-half rate of pay for 902 and 903 machine operators rate of pay respectively."

**OPINION OF THE BOARD:**

This Board, upon the whole record and all of the evidence, finds and holds that the Employe and Carrier involved in this dispute are respectively Employe and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

Claimant Hanson held seniority as a 902 Machine Operator and Claimant Bossert held seniority as a 903 Machine Operator but both employes were working as Trackmen on the date of the alleged violation, October 1, 1987. There is no dispute that on this day the Carrier utilized Berg, Inc., to prepare a new site for the relocation of the Car Department's tool house. Two employes of Berg, Inc., operated one dozer, one motor grader, and one dump truck to load and transport dirt, grade the area, and spread and level fines.

The only factual dispute has to do with the source of the equipment used by Berg, Inc. In the initial claim, the Vice Chairman asserted that Berg rented the equipment in question from "Rapid Rental." In his denial of the claim, the Assistant Vice President contested this factual assertion, maintaining that Rapid Rental only had one of the three pieces of equipment, that being the dump truck. Thus, he asserted, this was the only piece of equipment which had been rented.

The General Chairman on appeal made a counter assertion that Berg did not own a motor grader; therefore, it had to have been rented from another source. There was no rebuttal to this assertion by the Carrier.

It is well established that the Carrier is obligated to make a good-faith effort to rent equipment for use by its forces in order to accomplish their scope-covered work. In this case the unrebutted assertions of the Organization--which must stand as fact--establish that Berg had to rent two of the three pieces of equipment used. This raises the obvious question if Berg could rent these two pieces of equipment, why couldn't the Carrier? As for the third piece of equipment, there is no evidence that they made any effort to rent it. Moreover,

there was no emergency which would have prevented the Carrier from attempting and/or making rental arrangements. In short, the Board, under these circumstances, is not convinced that the Carrier made the requisite good-faith effort.

The Carrier's other defense is that the Claimants were fully employed. However, it is noted that they were employed as Trackmen and it is noted the claim is for the Machine Operator rate of pay. In this regard they did lose an opportunity to enhance their compensation. Additionally, there is no evidence that the Carrier couldn't have rearranged forces and/or work in such a way so the Claimants could have been available.

While the Claimants were damaged, the claim is purely excessive. They are entitled only to the difference between the straight-time Trackman rate and the applicable straight-time Machine Operator rate for the number of hours expended by the two contractor employes which was 8.5 hours each.

**AWARD:**

The claim is sustained to the extent indicated above.

Gil Vernon, Chairman

D. D. Bartholomay
Employe Member

Joan M. Harvieux
Carrier Member

Dated: 7-25-91