

PUBLIC LAW BOARD NO. 7099

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES, DIVISION OF I.B.T.**

CASE No. 03

-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 (Railroad Salvage and Restoration, Basic MYL and Randall Transit, Dulas Excavating and Hulcher Company) to perform Maintenance of Way and Structures Department work (distribute material, construct and haul switches, install switches and related work) at Mile Posts 12.7 and 13.85 in the vicinity of Hanlontown, Iowa on the Fairmont Subdivision on October 1, 20, 21, 22, 24 and 28, 2003 instead of Seniority District T-2 employees J. E. Dirks, J. J. Reister, J. M. Berding, J. A. Everett, B. C. Hagen, M. H. Birkett, L. K. Patterson, R. L. Buol, M. C. Kath, D. L. Bohl, L. F. King, G. L. Balch and K. E. Betts (System File 2RM-9498T/1384784CNW)
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper 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 referenced to in Parts (1) and/or (2) above, the Claimants shall now each be compensated at their applicable and respective rates of pay as follows:

J. E. Dirks,	16 hours straight time and 4 hours overtime
J. J. Reister,	24 hours straight time and 4 hours overtime
J. M. Berding	32 hours straight time and 6 hours overtime
J. A. Everett	16 hours straight time and 4 hours overtime
B. C. Hagen	40 hours straight time and 6 hours overtime
M. H. Birkett	24 hours straight time and 4 hours overtime
L. K. Patterson	16 hours straight time and 4 hours overtime
R. L. Buol	48 hours straight time and 8 hours overtime
M. C. Kath	32 hours straight time and 6 hours overtime
D. L. Bohl	56 hours straight time and 8 hours overtime
L. F. King	16 hours straight time and 4 hours overtime

G. L. Balch	16 hours straight time and 4 hours overtime
K. E. Betts	16 hours straight time and 4 hours overtime

The Carrier has declined this claim.”

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the record of this case together with the parties’ presentation, the Board finds that the claim should be disposed of as follows:

In their claim, the Organization maintains that the Carrier had various contractors perform track work, build and install switches between MP 12.7 and MP 13.85 on the Fairmont Subdivision, and alleges that as a direct result of the Carrier’s action, the Claimants have each incurred a loss of work opportunity as well as the compensation that flows from that lost work thereby violating the November 1, 2001 Agreement. In its response, the Carrier noted that the work at issue was performed, but not by or for the Carrier. Moreover, the Carrier notes that such work was not performed on Carrier controlled property but rather on property leased by the Iowa Ethanol, LLC, referred to as the “Industry”. In response, the Organization asserted that the lease agreement provided to the Organization by the Carrier for its perusal was not a lease agreement but rather a document that provided that the Industry would absorb the cost of materials and the construction of switches to connect its track to the Carrier’s track with the understanding that it would be the Carrier’s responsibility to construct the connecting track and switches, all of which would be funded by the Industry. Accordingly, it is the Organization’s stated position that the work at issue properly belongs to the Brotherhood of Maintenance of Way Employees.

Given the non-disciplinary nature of this case, the Organization carries the burden of proof required to establish a prima facie violation of the Agreement.

The “Industry Track Contract Articles of Agreement” as contained in the record before us provides the following relevant provisions:

Article 8 – Ownership of the Track, provides:

- A. The Railroad shall own the portion of Track A from the initial point of switch to the 13-foot clearance point at Engineering Station 1 +74 and from the 13-foot clearance point at Engineering Station 55+24 to the end of the track (hereinafter “railroad-owned Track”).
- B. The Industry shall own the portion of Track A between the 13-foot clearance points and all of Tracks B, C and D (hereinafter “Industry-owned Track”).

Article 2 – Industry-Supplied Turnouts provides:

The Industry, at its expense, will furnish and assemble one No. 11 136-lb. right-hand standard wood turnout and one No. 11 136-lb. left-handed standard wood turnout, including connecting rods and switch stands, obtained from an approved Railroad vendor for installation by Railroad forces.

Article 4 – Portions of Track to be Constructed by Railroad provides:

The Railroad, in consideration of payment by industry of the amount stated in Article 3 of this Agreement, will perform the following work:

- A. Construct 164 track feet of Track A, including one No. 11 136-lb. left-hand turnout supplied by industry beginning at Engineering Station 0+00.
- B. Construct 164 track feet of Track A, including one No. 11 136-lb. right-hand turnout supplied by industry beginning at Engineering Station 55+24.

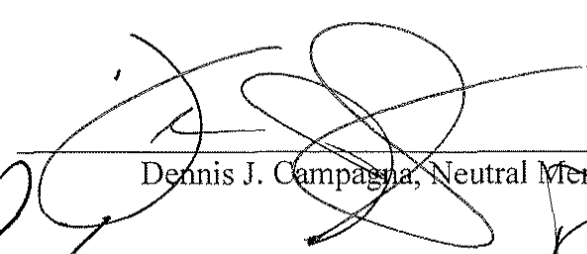
It is the Organization’s stated position that the foregoing provides a mechanism whereby the Industry is granted access to the Carrier’s rail line, and that that portion of track leased by the

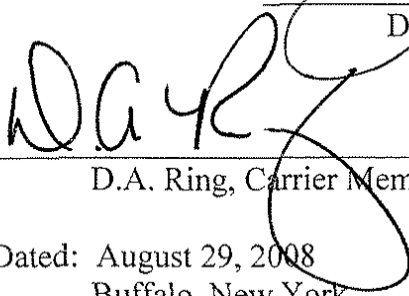
Industry that connects to the Carrier's rail line must be connected using Carrier (BMWE) forces. The Organization further posits that instead of using Carrier (BMWE) forces, to build switches to the Industry's property and then permitting the Industry to connect its track to the switches, the Carrier used outside forces to construct and install the switches thereby depriving the Claimant's of the at issue work.

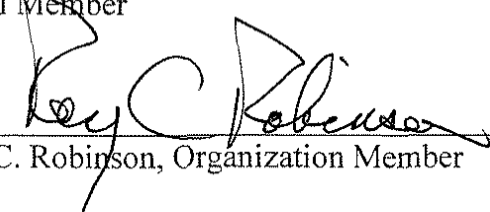
Following our review of the record, including those relevant portions of the Industry Track Contract Articles of Agreement ("Agreement") noted above, the Board finds that this Agreement is a lease Agreement, that it provides for Carrier as well as Industry rights and obligations, and that the Organization has not demonstrated that this Agreement is a subterfuge designed to prevent BMWE forces from performing work properly belonging to them. In addition, the Organization has not proven that the Carrier hired outside forces to perform work that should have been performed by BMWE forces. In this regard, the Board sees this as a legitimate lease Agreement, and there is nothing in the record that conclusively establishes that outside forces hired by the Carrier performed work that the Agreement specifically provided for BMWE forces to perform. As such, it is well established that work performed pursuant to a valid lease agreement, particularly where work is performed by and at the expense of others and is not for the benefit of the Carrier, falls outside of the Scope of the Agreement. (See Third Division Awards 29601, 29439 and 28819). Respectfully, as noted above, the Organization has the burden to prove otherwise and on the record before us, the Organization has failed to do so.

AWARD

Claim denied.



Dennis J. Campagna, Neutral Member

D.A. Ring, Carrier Member

R. C. Robinson, Organization Member

Dated: August 29, 2008
Buffalo, New York