

PUBLIC LAW BOARD NO. 7099

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

CASE No. 04

-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 to perform Maintenance of Way and Structures Department work (remove existing track, install new switch and related work) on the main line at Mile Post 168.15 in the vicinity of Brewster, Minnesota on the Worthington Subdivision on November 12, 2003 instead of Seniority District T-7 employees K. Reed, T. Hoffman, W. Otkin, D. Witt, T. Fogarty, D. Rohrbaugh, D. Anderson, G. Borgmeier, B. Rumler, B. Bass, T. Witt, S. Pettis, T. Flatau and D. Ekenstedt (System File 7RM-9511T/1388481 CNW).
- (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:

K. Reed,	16 hours straight time and 6 hours overtime
T. Hoffman,	16 hours straight time and 6 hours overtime
W. Otkin,	28 hours straight time and 8 hours overtime
D. Witt,	8 hours straight time and 4 hours overtime
T. Fogarty,	8 hours straight time and 4 hours overtime
D. Rohrbaugh,	28 hours straight time and 8 hours overtime
D. Anderson,	28 hours straight time and 8 hours overtime
G. Borgmeier,	20 hours straight time and 4 hours overtime
B. Rumler,	20 hours straight time and 4 hours overtime
B. Bass,	8 hours straight time and 4 hours overtime
T. Witt,	12 hours straight time and 4 hours overtime
S. Pettis,	12 hours straight time and 4 hours overtime
T. Flatau	8 hours straight time and 2 hours overtime
D. Ekenstedt	8 hours straight time and 2 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 beginning in November 2003, a contractor working at the new ethanol plant located in Brewster, MN, distributed material for a new switch at MP 168.15 near Brewster on the Worthington Subdivision. The contractor, identified by the Organization as Railroad Salvage and Restoration from Joplin, MO, hired up to 14 employees working to build the switch and weld the joints. The Organization alleges that the Carrier also had Hulcher Company assist in the installation of the switch on Wednesday, November 12, 2003. The crews consisted of several foremen, several assistant foremen, laborers, machine operators and welders. As a result of the Carrier’s use of these outside forces, the Organization maintains that 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 South Dakota Soybean Processors, referred to as the “Industry”. In response, the Organization asserted that the lease agreement provided to the Organization by the Carrier for its perusal made clear that the Carrier entered into this “agreement” with the Industry which required the switches to be built by outside forces rather than assigning said work to its own fully qualified and available employees with whom an agreement was already in place. Accordingly, the Organization asserts that this was not a lease agreement since there is no evidence that the Carrier ever relinquished control over any portion of its property in connection

with this dispute. 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 +62 and from the 13-foot clearance point at Engineering Station 30+20 to the end of Track A (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, D, E, F and G (hereinafter "Industry-owned Track").

Article 2 – Industry-Supplied Turnouts provides:

The Industry, at its expense, will furnish and assemble one No. 10 133-lb. left-hand turnout and one No. 10 133-lb. right-handed standard wood turnout, assembled for installation by Railroad forces.

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

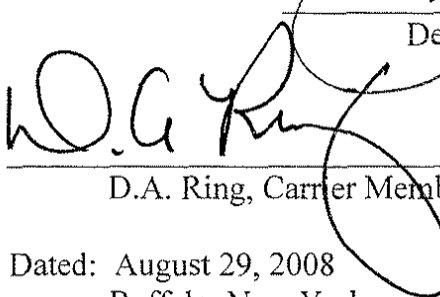
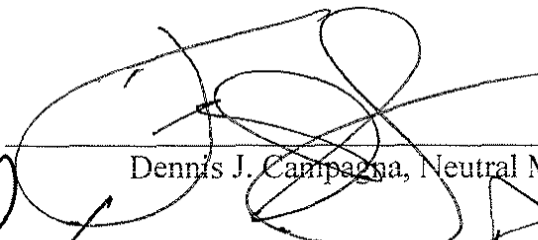
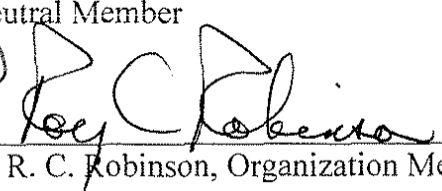
The Railroad, in consideration of payment by industry of the amount stated in Article 3 of this Agreement, will construct 318 track feet of Track A, including two No. 10 133-lb. turnouts to be supplied by Industry.

It is the Organization's stated position that the foregoing Agreement provides a mechanism whereby the Industry agrees to absorb the cost of materials and the construction of switches to connect its track to the Carrier's track and that the Carrier is obligated to construct the connecting track and the switches which are to be paid for by the Industry.

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 BMW 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 BMW 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 BMW forces to perform. As such, it is well established that work performed pursuant to a valid lease agreement, 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.

 _____ D.A. Ring, Carrier Member	 _____ Dennis J. Campagna, Neutral Member	 _____ R. C. Robinson, Organization Member
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Dated: August 29, 2008
Buffalo, New York