PUBLIC LAW BOARD NO. 7099

BROTHERHOOD OFMAINTENANCE OF WAY EMPLOYES, DIVISION OF I.B.T. **CASE No. 05**

-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 204.0 in the vicinity of Ashton, Iowa on the Worthington Subdivision on November 19 and 20, 2003 instead of Seniority District T-7 employes 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-9512T/1388482 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,	32 hours straight time and 12 hours overtime
T. Hoffman,	32 hours straight time and 12 hours overtime
W. Otkin,	56 hours straight time and 16 hours overtime
D. Witt,	16 hours straight time and 8 hours overtime
T. Fogarty,	16 hours straight time and 8 hours overtime
D. Rohrbaugh,	56 hours straight time and 8 hours overtime
D. Anderson,	56 hours straight time and 16 hours overtime
G. Borgmeier,	40 hours straight time and 8 hours overtime
B. Rumler,	40 hours straight time and 8 hours overtime
B. Bass,	16 hours straight time and 8 hours overtime
T. Witt,	24 hours straight time and 8 hours overtime
S. Pettis,	24 hours straight time and 8 hours overtime
T. Flatau	16 hours straight time and 4 hours overtime
D. Ekenstedt	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 beginning in November 2003, a contractor (Railroad Salvage and Restoration) working at the new ethanol plant located in Brewster, MN, distributed material for two new switches between MP 204.0 and MP 204.5 near Ashton, IA on the Worthington Subdivision. In addition, on November 19 and 20, 2003, the Carrier had Hulcher Company assist in the installation of switches. 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 Otter Creek 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 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 employes 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 Employes.

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 27+63 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, D, and E (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 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 BMWE forces from performing work properly belonging to them. However, that does not end the matter for our review of the record discloses that while part of the work at issue was properly performed by outside forces not under the control of the Carrier or for the Carrier's benefit, the work performed by Hulcher Company on November 19 and 20, 2003 was work that should have properly been performed by Carrier/BMWE forces. Such work was performed over this stated two day period using two Hulcher employees who each worked approximately 8 hours each day. In assessing this liability on behalf of the Carrier, the Board is not persuaded by the Carrier's "full employment" assertion. In this regard, it is well established that the fact that a Claimant may have been fully employed at the time of the Agreement's violation does not remove the Carrier from the liability flowing from such breach due to the lost work opportunity suffered by any such Claimant. (See, e.g. Third Division Awards 29472, 29531, 29563 and 29577).

With respect to the remaining work at issue, 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, 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.

Finally, in addressing the Carrier's procedural objections, the Board notes that while the Carrier did in fact raise a timeliness objection during the initial processing of the instant claims, such objection was not carried forward as the matter progressed. Accordingly, the Board has no choice but to note that in this particular instance, the Carrier's procedural objections were abandoned.

AWARD

Claim sustained in accordance with the Findings noted herein.

Dennis J. Campagna, Neutral Member

D.A. Ring, Carrier Member

R. C. Robinson, Organization Member

Dated: August 29, 2008
Buffalo, New York