

**PUBLIC LAW BOARD NO. 7101
CASE NO. 3**

PARTIES TO THE DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(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 (Mark Blong) to perform Maintenance of Way and Structures Department work (align, ballast, surface, align and related track work) off the side track at Mile Post 181.2 near Hurley, Iowa on the Mason City Subdivision beginning on March 22, 2003 and continuing through March 27, 2003 instead of Messrs. L. Hughes, R. Sanders, R. Pond and J. Kepler (System File 2RM-9434T/1363382 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, Claimants L. Hughes, R. Sanders, R. Pond and J. Kepler shall now each be compensated for thirty-two (32) hours at their respective straight time rates of pay and sixteen (16) hours at their respective time and one-half 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.

Claimant L. L. Hughes has established and holds seniority as a Foreman. Claimant R. D. Sanders has established and holds seniority as an Assistant Foreman. Claimant R. E. Pond has established and holds seniority as a Truck Driver Common. Claimant J. G. Kepler has established and holds seniority as a Trackman. On the relevant dates, Claimants were regularly assigned to their respective positions on Seniority District T-2.

On March 22, 2003 through March 27, 2003, Mark Blong allegedly performed routine Maintenance of Way track work on the side track at Mile Post 181.2 on the Mason City Subdivision, near Hurley, Iowa. The Carrier contends that this section of track was leased to Interstate Power and Light. Employees of Mark Blong, consisting of 1 foreman, 2 skid loader operators, 2 truck drivers and 1 laborer, used machinery to unload ballast, surface, align and dress off the track at Mile Post 181.2. According to the Organization, each of Mark Blong's 6 employees worked a total of 48 hours performing the relevant work.

The Organization contends that the Agreement was violated when the Carrier assigned Mark Blong the work of aligning ballast, surfacing, aligning and other related track work. 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 performed by Mark Blong 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 because the track in question had been leased to Interstate Power and Light, the relevant work was within the sole control of Interstate. Interstate had the right to contract out said work to Mark Blong. Specifically, the language of the lease agreement specifies:

The Industry, at its sole expense, shall maintain and repair the track structure consisting of the rail, ties, ballast and other Track material including any paving or planking work that may be needed.

Further, the Carrier contends that because the work was within the control of Interstate, the Carrier had no obligation to issue to the Organization a Notice of its intent to contract out the work. The Carrier also argues that there is a dispute in facts that cannot be resolved by this Referee.

After a complete and thorough review of the evidence in this matter, we find that the work in question was subject to a lease by Interstate. As such, the work does not belong to the Organization. When a legitimate lease dictates that the matter in question is not within the jurisdiction of the Carrier, it is not inappropriate for the lessee to contract out work that would otherwise belong to the Organization had the Carrier been in control of the work. Referee Marx dealt with a similar issue in Third Division Award No. 29439:

This Claim concerns work performed on terminal elevator tracks in the East Kansas City Yard by other than Maintenance of Way employees. The record demonstrates that work on these tracks is the responsibility of the lessee Rules as to the reservation of work to Maintenance of Way employees are clearly not applicable where the Carrier has no control over the work. Since the Organization cannot defeat this basic principle in this instance, there is no basis for the Claim.

In addition, because the property in question was leased to a third party, there was no need for a Notice to the Organization.

Based on the evidence in this matter as well as the above-cited precedent, we cannot find that the relevant work should have been assigned to the Organization. The work in question was within the control and authority of the lessee. Thus, having determined that the work was not within the scope of the Organization, we find that the Organization has not met its burden of proof and the Claim is therefore denied.

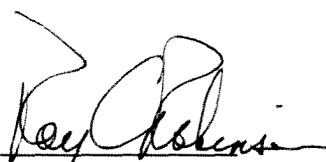
The Claim is denied.

AWARD

Claim denied.


Steven M. Bierig
Chairperson and Neutral Member


Dominic Ring
Carrier Member


Roy Robinson
Organization Member

Dated at Chicago, Illinois this 2nd day of FEB 2009.