

**PUBLIC LAW BOARD NO. 7101
CASE NO. 8**

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 utilized outside forces (Mark Blong) to perform Maintenance of Way and Structures Department work (change out rail, build/install derail panels, install ties, unload ballast, surface and related track work) at main line switches near Mile Post 125.0 and Mile Post 125.9 at Garden City, Iowa on the Mason City Subdivision on November 13 and 14, 2003 instead of Seniority District T-2 employees A. Lange, R. Sanders, P. King, D. Juhl, B. Hackbarth and R. Pond (System File 2RM-9514T/1388484 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 A. Lange, R. Sanders, P. King, D. Juhl, B. Hackbarth and R. Pond shall now “*** each be compensated for and equal proportion, 21.3 hours each, of the 128 hours of work that was performed by the employees of the contractor, at their applicable 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.

Claimants A. Lange, R. Sanders and P. King have established and hold seniority as Foremen. Claimants D. Juhl and B. Hackbarth have established and hold seniority as Trackmen. Claimant R. Pond has established and holds seniority as a Machine Operator common. On the dates pertinent hereto, Claimants Sanders, Juhl and Hackbarth had been assigned positions on Crossing Gang 2933 which was abolished effective at the end of the work shift on Wednesday, November 12, 2003. Claimant Lange was assigned and working as Section Foreman on Gang 2964 with headquarters in Iowa Falls, Iowa. Claimant King was assigned and working as a Flagging Foreman. Claimant Pond was assigned and working as a Boom Truck Operator on Gang 29555. All Claimants retain seniority on Seniority District T-2.

On Thursday and Friday, November 13 and 14, 2003, the Carrier allegedly assigned outside forces (Mark Blong) to perform alleged Maintenance of Way track work (change out rail, build/install derail panels, install ties, unload ballast, surface and related track work) at main line switches near Mile Post 125.0 and Mile Post 125.9 at Garden City, Iowa on the Mason City Subdivision. According to the Organization, the contractor utilized 8 employees (Foreman, Assistant Foreman, Laborers and Machine Operators) who worked from 7:30 a.m. to 4:00 p.m. on each Claim date in the performance of the alleged work.

The Organization contends that the Agreement was violated when the Carrier assigned Mark Blong the work of changing out rail, building and installing derail panels, installing ties, unloading ballast, surfacing and related track work at main line switches near Mile Post 125.0 and Mile Post 125.9 at Garden City, Iowa on the Mason City Subdivision on November 13 and 14, 2003. 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. In addition, the Organization claims that it was never properly notified of the contracting out of the work.

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 done 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 Prairie Land Cooperative, the relevant work was within the sole control of Prairie Land. Prairie Land had the right to contract out said work to Mark Blong. Specifically, the language of the lease agreement specifies:

Section 5. PORTIONS OF TRACK TO BE CONSTRUCTED BY INDUSTRY.

A. The Industry, at its own expense and subject to the prior approval of the Railroad, will perform all grading and install all necessary drainage facilities required in connection with the construction of the Track to the standards and satisfaction of the Railroad, and arrange to modify any overhead and/or underground utilities to meet Railroad specifications.

B. The Industry, at its own expense, will also perform the following work:

1. Construct 3,624 track feet of Track 132 and install a double-point split switch (DPSS) derail at or near Engineering Station 81+70 (actual location of derail to be determined by Railroad representative).
2. Shift 234 track feet and retire 198 track feet of Track 420.
3. Shift 806 track feet of Track 734 and install a double-point split switch (DPSS) derail at or near Engineering Station 2+43 (actual location of derail to be determined by Railroad representative).
4. Install a 30-foot-wide timber crossing surface in Track 734 for Hardin County Road S27.
5. Install illuminated "No Clearance Signs" on either side of the bulk loader as shown on Exhibit A.

* * * *

Further, the Carrier contends that because the work was within the control of Prairie Land, 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 Prairie Land. 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.

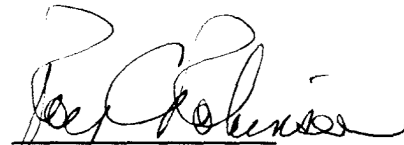
**Steven
Bierig**

Digitally signed by Steven
Bierig

**Steven M. Bierig
Chairperson and Neutral Member**


**Dominic Ring
Carrier Member**

5-7-09


**Roy Robinson
Organization Member**

Dated at Chicago, Illinois this 6th day of May 2009.