# Award No. 12845
# Docket No. MW-12825

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

## (Supplemental)

Robert J. Ables, Referee

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

## ST. JOHNS RIVER TERMINAL COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when it assigned the work of relocating Industrial Lead Track No. 3 at Jacksonville, Florida, to Bailes-Sey, Contractors, Inc.

(2) The decisions by the Division Engineer, by the Chief Engineer, MW&S, and by the Assistant Chief Engineer were not in compliance with the requirements of Sections 1 (a) and 1 (c) of Article V of the August 21, 1954 Agreement because of failure to give reasons for disallowance of the above-mentioned claim.

(3) Because of the violations referred to above, the Carrier now be required to allow the claim as was presented to Division Engineer Perkins under date of June 10, 1960 (Carrier's file MW-15401) which reads:

"Valdosta, Georgia, June 10, 1960

Mr. P. A. Perkins, Division Engineer,
Southern Railway System
G.S. & F. Division, Atlanta, Georgia

Dear Sir:

I have been requested to make time claim for work done by employes of Bales & Siles Contractors, in shifting over lining and surfacing A&B Distributing and Hood Chemical tracks in Simpson Yards, between 259-260-G Mile Post.

I understand that they used forty or fifty laborers and two foremen April 23 and 24th, ten hours each day, and one foreman and 6 laborers April 25, 8 hours and one foreman and 7 laborers two hours, April 26, 1960.

Will you please accept this as a time claim for the following named employes for the time made by these employes of these Contractors in doing this work as they should have been called and allowed to do this work as this is work that has always been done by the Maintenance of Way Employes.

L. W. Touchton, Foreman—20 hours at overtime rate 10 hours straight time rate, H. F. Mullis, Foreman — 20 hours at the overtime rate. (Jessie Harris) 6 laborers George, Lockett, Tommie, Jackson, Rufus Felder, B. J. Roberson, Mack Bryant, 20 hours each at the overtime rate and 10 hours each at the straight time rate. This laborers rate.

J. B. Brinkley, Laborer, 20 hours at the overtime rate one hour at the straight time rate, Willie Coney, Morris Williams, H. J. Williams, J. Billingslea, J. Clark, John Oliver, Jr., J. W. Troy, D. Young, Julius Oliver, J. W. Savage, J. Hicks, S. Morris, W. W. Daugherty, F. Sutton, R. J. Amerson, E. C. Sutton, A. G. Nelson, J. J. Spivey, Cornelius Scott, Jr., Earnest Scott, Jr., Charlie Scott, Eddie Harris, Sam Lee, Oddie Yow, M. Miller, J. Griffin, Bulah Williams, Adam Roe, Allen Gray, Seebern Brannen, 20 hours each at the overtime rate. Please advise.

Very truly yours,

/s/ J. W. Simpson
General Chairman,

New Address 203-W-Moore Street,
Valdosta, Ga. Phone No. CH 2-7880"

**EMPLOYES' STATEMENT OF FACTS:** Industrial Lead Track No. 3 at Jacksonville, Florida, is also referred to as the "A&B Distributing and Hood Chemical track" and is located in Simpson Yards between Mile Posts 259 and 260G.

The work of relocating this track was contracted to Bailes-Sey, Contractors, Incorporated; the work consisting of constructing a new subgrade, lining track over to new location, applying ballast, as well as surfacing, finish lining, dressing and other similar track work.

On April 23 and 24, 1960, the contractor employed two (2) foremen and fifty (50) laborers, each of whom worked ten (10) hours on each of those dates.

On April 25, 1960, the contractor employed one (1) foreman and six (6) laborers, each of whom worked eight (8) hours on this work.

On April 26, 1960, the contractor employed one foreman and seven (7) laborers, each of whom worked two (2) hours on this work.

Consequently, claim was presented as set forth in the letter quoted in the Statement of Claim and it was denied in a letter reading:

**OPINION OF BOARD:** The question in this case is whether Maintenance of Way Employes are entitled to time claims for track relocation work on certain industrial track located mainly on private property, where the work was done by an outside contractor employed by the railroad.

In 1954, the contractor had constructed an industrial lead track to serve a patron of the railroad. Although this industrial track connected with the main line of the railroad, most of it was located on private property.

In April of 1960, to provide for the plant expansion of a patron, it was necessary to relocate approximately 890 feet of this industrial track. As before, the greater portion of the relocated track was on private property. The necessary grading and drainage prior to track relocation was done by one contractor. The actual track relocation was done by the same contractor who laid the track in 1954.

On the merits of the dispute, the Employes contend their Agreement was violated "since work of the character here involved has customarily and traditionally been assigned to and performed by track foremen and by Maintenance of Way Laborers." In the oral argument before the Board, the Employes reiterated this view: "Work of the character involved in this dispute was traditionally and customarily performed by track forces prior to and at the time of the negotiation of the current Agreement and subsequent thereto." In addition, to counter the Carrier's attempt to defeat their claim by contending that only a small portion of the track was located on the Carrier's property, the Employes argued that:

> "Regardless of where this track was located, this track all belonged to the Carrier, and it was the Carrier's sole responsibility to have the work performed. The Carrier assigned the contract and the Carrier paid for the material, labor and the contractor's profit."

Finally, the Employes conclude that there is no practice of performing work of this character with outside forces.

The principal thrust of the Carrier's position is that this was new construction, not maintenance or repair work, and therefore not covered under the Agreement. Carrier asserts that Maintenance of Way Employes are "Maintenance" employes, and "do not constitute a construction force. They are employed primarily to maintain and repair existing facilities. They are not employed to construct additional facilities or to move industrial tracks from one location to another."

This Board is hardly surfeited by an abundance of facts. In effect, the argument boils down to the employes saying they have always done this work, and the Carrier saying that they never have done this work. How more profitable it would have been if only a small fraction of the more than 90 pages in this record were devoted to a few illuminating facts as to the actual practice on this property.

Carrier's repeated references to the need for expeditious action, its rationalization about the unavailability of regular work force, and its laborious efforts to show that the use of an outside contractor was justified as an exception to the general rule that a Carrier may not contract out work covered by its collective bargaining Agreements, are quite unpersuasive and suggest that the work involved in this dispute was indeed covered by the Agreement. But, this Board cannot make the Employes' case. That is their job.

The only probative fact in this proceeding is that the contractor who relocated the track in 1960 was the same contractor who laid the track in 1954. If all of this work did belong to the Maintenance of Way Employes, they have surrendered it by their acquiescence to the earlier work — at least, under the facts available here.

The Employes and the Carrier discussed at length in the record before the Board the procedural question whether the claims should be sustained because of the Carrier's admitted failure to give reasons for denying the claims, as required by Article V of the August 21, 1954 Agreement. The Employes' contention that the claims should be so sustained was not advanced in the latter stages of this proceeding in recognition of recent awards (relied on here) which hold that rights under Article V are procedural and not jurisdictional in character and if not asserted on the property (as they were not asserted here) such rights are waived. Awards 10684 and 11178 and Second Division Award No. 3858. Accordingly, Employes' position that the claim should be sustained by reason of Carrier's failure to observe the requirements of Article V of the 1954 Agreement should be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of September 1964.