

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19305
Docket Number MW-19211

Clement P. Cull, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Chicago and North Western Railway Company

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

(1) The Carrier violated the Agreement when, without prior notice to General Chairman P. J. McAndrews as required by Article IV of the May 17, 1968 National Agreement, it assigned outside forces to perform track maintenance work at East Clinton, Illinois and at various other locations. (System File 81-1-191)

(2) Each track laborer on the maintenance gang headquartered at Sterling, Illinois be allowed pay* at his respective rate of pay for an equal proportionate share of the total number of man hours consumed by outside forces in performing the track laborer's work referred to

*(The claim contemplates that all service performed by said outside forces during straight-time hours will be allocated to the claimants on the basis of the claimants' straight-time rates and that all service performed by said outside forces during the claimants' overtime hours should be allocated to the claimants on the basis of the claimants' overtime rates).

(3) The Carrier shall also pay the claimants six percent interest per annum on the monetary allowances accruing from the initial claim date until paid.

OPINION OF BOARD: The dispute herein involves the use of manpower supplied to Carrier by Temporary Help, Inc., St. Louis, Mo., to perform track maintenance work which included, among other things, raising the track structure of both main lines east of the Mississippi River Bridge, E. Clinton, Illinois. The work of the individuals supplied by Temporary Help, Inc. began on April 14, 1969.

Temporary Help, Inc. recruited, selected and hired the men. They were paid by that company an hourly rate lower than the rate provided in the herein agreement pursuant to a report of the hours worked made to it by one of the men involved. The men also received food and lodging at the expense of Temporary Help, Inc. The men, upon assignment to Carrier, worked with the regular track forces under the supervision of the Track Foreman and used Carrier's tools and equipment none of which was supplied by Temporary Help, Inc. The men

were not required to complete Carrier's application for employment or submit to Carrier's physical examination. No deductions for Railroad Retirement were made nor were premiums paid on their behalf to the group hospital and life insurance plans as is done for employees of Carrier. Moreover these men did not appear on Carrier's payroll. Carrier reimbursed Temporary Help, Inc. pursuant to a bill submitted by that Company.

Carrier contends, among other things, that there was no contracting out as contemplated by Article IV of the May 17, 1968 National Agreement. It asserts that no contracting out occurred as Carrier retained control of the manner and means of accomplishing the tasks involved.

As set out above, Temporary Help, Inc. retained to itself the right to determine substantial matters governing essential terms and conditions of employment of the men it supplied. This leads us to believe that the control exercised by Carrier over the men during their working hours is insufficient to create an employer-employee relationship between the men and Carrier, and we find them to be employees of Temporary Help, Inc. with whom Carrier contracted or agreed that they be furnished to Carrier under the above conditions. Thus we find that by engaging Temporary Help, Inc. to perform as it did it contracted out the work.

We find, from the record, that the work is covered by the Petitioner's Scope Rule. (Award 18305) It is not disputed that Carrier did not notify the General Chairman of its plans to contract out. Having failed to do so we find Carrier violated that agreement.

The question of reparations in Article IV cases have been before this Board frequently. The Awards, involving the same parties as well as others, hold that where there has been no pecuniary loss the claim for reparations is denied. Petitioner contends that the claim should be allowed in this instance as Carrier did not raise the matter of no loss on the property. However, we find that Carrier did raise the defense of no loss of earnings on the property when in its letter of July 17, 1969 to the General Chairman it stated "There were no section men laid off". This statement is not rebutted.

Accordingly, we shall adhere to those awards which hold that where claimants suffered no loss reparations will not be awarded. (Awards 18305, 19056, 19254, 18716 and others.)

Therefore we will sustain Claim 1 and deny Claims 2 and 3.

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FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 violated.

A W A R D

Claim sustained as indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Killen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1972.