

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **19724**
Docket Number NW-19597

Irwin M. Lieberman, Referee

(Brotherhood of Maintenance of Way Employee
PARTIES TO DISPUTE: (
(Southern Pacific **Transportation** Company (Pacific Lines)

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

(1) The Agreement was violated when, without prior notice to the General Chairman, outside forces were **used** June 4, 5, 8, 9 **and 10**, 1970 to clean **debris from** track and right-of-way between Plan-port and Newman, New Mexico (System File **MofW** 152-733).

(2) Extra Gang Foreman **J. W. Conyers** and Laborers **Ricardo Jimenez**, Francisco **Aguirre** and Abraham **Jimenez** each be allowed **forty (40)** hours' pay at their respective straight time rates **because** of the aforesaid violation.

OPINION OF BOARD: Claimants are Extra Gang Foreman and three laborers. The Petitioner contends that Carrier violated the Agreement when without prior notice to the General **Chairman, as required** by Article IV of the May 17, **1968** National Agreement, it contracted the work of **cleaning** debris **from** the track right-of-way between Planeport and Newman, New Mexico. Contractors' forces were used to **accomplish** the work on June 4, 5, 8, 9, and 10, 1973.

The Carrier, while conceding that it did not give the notice required by Article IV, denies any liability to Claimants. On the property, Carrier initially raised the argument that the work in question was performed by contract "**due** to an emergency", but failed to support this contention with **any** evidence. Carrier further argues that the Scope Rule of this **Agreement** has repeatedly been found to be general in nature, and does not reserve the work in question exclusively to **the** employees covered by the Agreement. Carrier persuasively **argues** that Carrier's right to contract **out** work was carefully preserved by Article IV;

"Nothing in this Article IV shall affect the existing rights of either party in connection with contracting **out....**"

In a series of Awards, starting **with** 18305, we **have** held that the phrase in Article IV "work within the scope of the applicable schedule agreement" **does** not require that the work be exclusively reserved to employees covered by the Agreement. We reaffirm this **reasoning**. We have found in an earlier **case** (Award 7583) that the work in question has been performed by employees covered by this **Agreement**: (but not necessarily exclusively).

Carrier contends that no monetary **damages have** been proven by Petitioner. No mention **of** this issue on **the** property is evidenced by the record. In a related **case**, we dealt with this issue (Award 13349):

"The **burden** is upon **employee** to show ~~what~~ his loss **has been**. But upon showing ~~that~~ he **has** sustained a Loss of certain work **and** what that work was he has **overcome** this burden. If the Carrier wishes to show in mitigation that the employee received **other** income, the **burden** of proof is **upon the** Carrier. Further, in a case such as this **where** the employee could have done the work at **more** than one time the Carrier must show that the employee **was** employed at all times when he could reasonably have done the work. "

Since Carrier has presented no evidence on the property **that Claimants** were employed during the contractor's activities, we must reject Carrier's contention with respect to Part 2 of the Claim (See Awards 18030, 19028 and 19578).

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

That **tha** parties waived **oral** hearing;

That **the** Carrier and the **Employees** involved in **this** dispute are respectively Carrier **and** **Employees** within the meaning of **tha** 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**.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. G. Killen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1973.