NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19813

THIRD DIVISION

Docket Number MU-19632

C. Robert Roadley, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Camas Prairie Railroad

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

(1) The Carrier violated the Agreement when it assigned the work of surfacing track from Mile Post #2 to Mile Post #24 to forces (Union Pacific Railroad employes) outside the scope of its agreement with its Maintenance of Way employes (System File (CP) - MW - 84(a) - 11/17/70).

(2) The claimants* each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours expended by outside forces subsequent to May 29, 1970 in the performance of the work referred to within Part (1) of this claim.

*Section Foremen

Section #1 - F. W. Cowger
section #2 - G. 0. Criswell

Machine Operators

D. L. Mitchell
J. E. Morefield
J. H. Wing
R. G. Shaul
Tom Robinson
H. R. Lewis
J. B. Trail
J. F. Byrd
T. S. Goodson
J. R. Flatt
T. L. Webb

Surfacing Crew Foreman

A. A. Steele

Assistant Foreman Surfacing Crew

P. E. Black

Ass't Section Foreman

Tony Greco

Sectionmen

N. E. Wilson
Louis Greco
E. M. Pinion
A. L. Fay
W. F. Harris
Julian Piraino
G. A. Dickinson
Garnett Wilson
C. E. Kunkle
M. T. Jenkins
Ross Nickel1
M. T. Huff
H. E. Huff
R. J. Harlow
F. E. DeForest
R. V. Starr
E. C. Kole
G. A. Ragland
E. P. DeVault
F. M. Halford
R. K. Denny
C. A. Puryear
C. N. Rice
J. L. Hull
F. D. Fister, Sr.
0. E. Norkoli
Joe E. Johnson
James E. Johnson
Don Hayes
T. L. Bohnsack
C. M. Cole

OPINION OF BOARD: This dispute arose when, as a part of the over-all project of constructing the Little Goose Lock and Dam and the Lower Granite Lock and Dam by the U.S. Army Corps of Engineers in the states of Washington and Idaho, it was necessary to relocate the Carrier's tracks over a distance of approximately 75 miles. In order to accomodate the work Involved an Agreement was entered into between the representatives of the Brotherhood of Maintenance of Way Employees, in behalf of certain employees of both the Camas Prairie Railroad and the Union Pacific Railroad, and representatives of these two Carriers which recognized the necessity of utilizing Union Pacific equipment and forces to handle certain work involved in the relocation of railroad facilities on the Camas Prairie Railroad. This Agreement is dated February 1, 1966, and states, in part:

> "In the interest of progression of the work it is agreed because the Camas Prairie Railroad does not have sufficient equipment, personnel, outfit cars, power tools, et cetera, that Union Pacific extra gang forces and equipment will be used for track construction work, relocation work and removal of retired portions, as may be determined necessary on the Camas Prairie Railroad."

Additionally, there is in effect an Agreement dated September 12, 1962 (effective December 1, 1962), which is an agreement on the former Northern Pacific Railway and adopted by Camas Prairie Railroad Company, and the Organization, for application on the Camas Prairie. This Agreement stipulates that work of the nature involved in the instant claim may be let to,

> "**** contractors and be performed by contractors' forces, provided that when special skills, special equipment or special material are required, or when work is such that the Railway Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the agreement beyond the capacity of the Carrier's forces, should the General Chairman not agree to contracting such work, the Railway Company may, nevertheless, let such work to contractors and the dispute may be processed as a grievance or claim."

Petitioner asserts that the Carrier violated this September 12, 1962 Agreement when it contracted to have Union Pacific Railroad employees perform crack surfacing work from Mile Post #2 to Mile Post #24, a portion of the Carrier's trackage involved in the referred to construction and relocation. The claim is on the grounds that "track surfacing" is maintenance work and, as such, is not part of the work contemplated as being covered by the Agreement "beyond the capacity of the Carrier's forces," but is work regularly performs by the employees within the Scope of the September 12, 1962 Agreement to which they were entitled by virtue of their seniority.

In its submission to this Board the Carrier entered a "Motion for Dismissal" on the grounds that the claim, as handled on the property, is not the same claim as was noticed to the National Railroad Adjustment Board.

The original claim as presented on the property by letter from the General Chairman under date of September 29, 1970 stated, in pertinent part:

> "***We are therefore, filing claim in behalf of these Track Department employee ***** beginning sixty days prior to the date of this letter....."
>
> "**** In addition to the period as set out in this claim, which is sixty days prior to the date of this letter, this claim is also to cover any subsequent dates which this crew may have worked after July 20....."

Part (2) of the claim, as noticed to this Board on September 21, 1971 stated:

> "The claimants each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours expended by outside forces in the performance of the work referred to within Part (1) of this claim."

Under date of February 8, 1972 the Resident of the Organization addressed a letter to the Executive Secretary of this Third Division, which stated, in part, as follows:

> "Within Part (2) of our Statement of Claim we inadvertently omitted the words 'subsequent to May 29, 1970' after the word 'forces'. Therefore we respectfully request that all concerned correct their copies accordingly.
>
> Copies of this notice of correction are being forwarded to all recipients of our letter dated September 21, 1971."

In support of its "Motion for Dismissal" the Carrier stated:

> "In contrast to the claim handled in the usual and customary manner on the property, the claim noticed to this Division is far reaching and all encompassing and until the Union had belated thoughts about the matter, was obviously intended to cover any and all time that a Union Pacific Railroad extra gang may have been used on trackage operated by the Camas Prairie Railroad Company at some unspecified point in time in the past. The claim *** is substantially different from the statement of claim presented to the Carrier on the property."

The Carrier in support of its position, cited Award No. 16607 which stated, in part:

> "We agree with the argument by and on behalf of the Carrier that the Statement of Claim presented to the Board is substantially different from the Statement of Claim presented to the Carrier on the property. We have consistently held that where there is a substantial variance between the claim handled on the property and that presented to the Board, we cannot resolve the dispute,"

In defense of its position on this question Petitioner asserted that the omission of the words "subsequent to May 29, 1970" was nothing more than a clerical error which they corrected by their letter of February 8, 1972 and which was received by the Carrier on February 10, 1972 - prior to the date that the Carrier was required to file its submission to this Board.

It is significant to note that the variance in the claim is related to Part (2) of the claim and treats with the matter of monetary damages. There appears to be no question that Part (1) of the claim before us is the same as was handled on the property and relates to the nature of the alleged violation and is the primary thrust of the dispute. We do not feel that the Carrier has been misled or its rights prejudiced as to the basic issues involved. In other words, we do not find that the principle described in Award 16607, cited by Carrier, is applicable in so far as Part (1) of the instant claim is concerned. However, the record is also clear that, in spite of the fact that a correction in the language of Part (2) was filed with this Board and copied to the Carrier, the correction was not timely filed, and, absent such correction, Part (2) of the claim does contain a "substantial variance" to that portion of the claim as was handled on the property. We will therefore dismiss Part (2) of the claim and proceed to consider the merits of the claim insofar as Part (1) is concerned.

See Award 10420 wherein we stated, in part:

> "The mere dismissal of part of a claim does not invalidate it entirely."

Also Awards 9343, 7030, 19573.

Two Letter Agreements have been cited as being controlling in this dispute, the first dated September 12, 1962 (effective December 1, 1962) and the second dated February 1, 1966. The opening paragraph of the September 12, 1962 Agreement states:

> "The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employees in the Maintenance of Way Department."

As previously referenced herein this Agreement sets forth the conditions under which the foregoing work may be contracted out by the Carrier and, if not agreed upon by the General Chairman, provides that the dispute may be processed as a grievance or claim.

The Agreement of February 1, 1966 is a special Agreement brought about by the need to relocate a portion of the Carrier's railroad facilities to accomodate construction of the Little Goose and Lower Granite Dams by the Army Corps of Engineers. It was agreed that the Carrier would utilize Union Pacific forces and equipment in the performance of the railroad work involved.

The basic issue is whether the "surfacing of track" was properly part of the "construction work" covered by the February 1, 1966 Agreement or whether it was solely "maintenance work" alleged to be not covered by such Agreement but, rather, work belonging to the Carrier's employees under the provisions of the September 12, 1962 Agreement.

Petitioner avers that the Agreement of February 1, 1966 does not cover maintenance work but only covers construction and relocation work; that said Agreement is not an extension of the September 12, 1962 Agreement (as asserted by the Carrier) but is an agreement made in compliance therewith; and that the maintenance work performed was undertaken several months after the construction work was completed thus proving that such maintenance was separate and apart from the work contemplated by the February 1, 1966 Agreement.

The Carrier, on the other hand, asserts that the very language of the September 12, 1962 Agreement (paragraph 3 thereof) covers structures and facilities located on the right of way and provides that, by agreement, particular work "in connection with the construction and maintenance or repair of, or in connection with the dismantling of structures or facilities located on the right of, way may be let to contractors and performed by contractors' forces."

Carrier further asserts, therefore, that the February 1, 1966 Agreement supplemented the 1962 Agreement; it represents the agreement between the parties as contemplated by the 1962 Agreement. We must agree with this Carrier contention for it is obvious that the need for the 1966 Agreement was the direct result of the construction of the Dams involved and the necessity of using other than the Carrier's employees to perform the railroad work incident thereto. Had there been no Little Goose and Lower Granite Dams project in the picture there would have been no need for the 1966 Agreement at all.

It is not logical to assume that one can assert that the 1966 Agreement was merely made in compliance with the 1962 Agreement and yet not recognize that the 1966 Agreement did, in fact, supplement the 1962 Agreement.

The thrust of Petitioner's position is that the construction of the trackage in question was completed and put in service and then, subsequently, was surfaced which then became maintenance work as contemplated by the 1962 Agreement. Petitioner stated that fourteen miles of the involved trackage had been in use for seventeen months and ten miles was used for over four months as illustrative of the fact that the construction contemplated by the 1966 Agreement had been completed. However, the Carrier, in its letter to the General Chairman dated December 22, 1970, stated as follows:

> "Due to difficulties on construction of the new line and timing schedules set by the Corps of Engineers it became necessary for the Camas Prairie Railroad to operate over the relocated line before track construction has been entirely completed. As an example, most of the relocated track had not received the second raise nor was the ballast section dressed to meet our standard before being placed in operation.
>
> It is your contention that actual construction has been completed.
>
> This is not a fact. Winter weather had necessitated a discontinuance of the work since the freezing temperatures made it impossible to dump ballast or raise the track. Extra gang forces had worked as long as possible until the frozen ballast structure made the work impractical and nonproductive and in March when temperature and weather conditions permitted the extra gang was returned to complete the second raise and dressing of the ballast section.
>
> Further, the Camas Prairie Railroad did not have the necessary equipment or manpower to do this deferred construction work."

To this statement, and others of similar nature made by the Carrier, Petitioner takes exception by reiterating that construction work on the segments of trackage involved had been completed and therefore the surfacing of the track was in the nature of routine maintenance which should have been performed by Camas Prairie employees. The record is replete with such assertions and counter assertions but we find no evidence in the record of probative value upon which we could make a determination favorable to the claimants.

This Board has, on numerous occasions in the past, ruled that when an allegation is made that an Agreement has been violated the burden of proof rest with the one who asserts the claim. Illustrative of this principle we stated in Award No. 13028:

"The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance."

In Award No. 11862 we stated:

"Under the circumstances of this case the Organization has not sustained its burden of proving that the Carrier violated the exception to the general rule *****."

The general rule referred to is set forth in Award No. 7805 and treats with the matter of a carrier's right to contract out certain work under specified circumstances.

Based upon a thorough review of the record before us and for the reasons stated herein we will therefore, deny Part (1) of the claim and dismiss Part (2) of the claim.

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 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.

A W A R D

Part (1) of claim denied;

Part (2) of claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD,
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1973.