

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20895
Docket Number MW-20907

Irwin M. Lieberman, Referee

PANTIESTO DISPUTE: { Brotherhood of Maintenance of Way **Employees**
{ Chicago and North Western Transportation Company

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

(1) The Carrier violated the Agreement when it assigned to outside **forces** the work of extending the house track at Bigelow, Minnesota, i.e. **grading**, laying rails, ties, etc.

(2) The Carrier was also in violation of Article IV of the National Agreement of **May 17, 1968** when it failed to notify General Chairman Larson of its intention to contract said work.

(3) Foreman **W.E. Olson**, Laborer **E. D. Vande Poppe**, **Laborer** **R. T. Schwebach** and Machine Operator **Cort Grimm** 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 performing, the work described in Part (1). (System File **0-9/81-19-73**)

OPINION OF BOARD: Beginning on or about April 16, **1973** a **project** was undertaken at Bigelow, Minnesota which included relocating turnouts and extending existing-trackage which was used by one of Carrier's customers, Farmers Elevator Company. Section forces had done **all** track work on the old trackage involved in this dispute since at least **1949**. In this instance Carrier assigned its track forces to perform the work of relocating the turnouts and an outside contractor was given the work of track construction and necessary grading. As a consequence, Petitioner filed the claim herein **alleging** that Carrier had violated the Agreement as well as **Article** IV of the National Agreement of May 17, **1968** when Carrier permitted contractor's employees rather than track **forces** of its own to perform the track construction work.

Carrier contended that the Farmers Elevator Company had leased the old track and additional right-of-way from Carrier **in** order to extend the trackage and avail itself of certain advantageous new tariffs. Carrier argues that when the customer contracted with an independent contractor to build the tracks in question for its exclusive use, the work was not **Carrier's** responsibility and the fact that the new trackage was located on Carrier's right-of-way is immaterial. Carrier cites rulings of the Interstate Commerce Commission which held that a track constructed by an industry at its expense is **in** no sense a part of the property of the Carrier. Carrier asserts that since this trackage was a "**private siding**",

construction or maintenance of such track at the Carrier's expense would constitute preferential treatment for the customer and be violative of the law. The Carrier concludes that since the right-of-way and old trackage had been leased to the customer the Carrier was not **in violation** of any agreement.

The Organization stated throughout the handling of this **Claim**, without **denial**, that the type of work involved in this dispute was embraced within its Agreement and had historically been performed by Track Department forces. Since **Carrier's** defense was based largely on the assertion that the right-of-way was leased to the Elevator Company, Petitioner requested that Carrier submit a copy of the **lease to clarify** the issue in dispute. The Organization argues that **Carrier** did not furnish a copy of the lease and by letter dated **November 15, 1973** told the Organization that the lease had not been consummated as of the date of the **conference**. In addition, Carrier informed the Petitioner that it would not be agreeable to furnishing a copy of the contract. Petitioner argues that **Carrier's** omission of the lease was fatal to its defense,, and **since** a **prima facie** case had been established, the Claim **must** be sustained.

It is noted that Carrier with its rebuttal **argument** before this Board submitted a copy of a lease agreement with the **Elevator Company** dated April **13, 1973**. Such evidence cannot be considered **since** it is well established doctrine that new evidence which was not presented during the **handling** of the dispute on **the property** may not be considered by this **Board**.

Under **all** the circumstances, this dispute is **analogous** to that which this **Board considered** in Award **19623**. In that Award we said:

"While the Carrier asserted **on the** property that the work performed by the sub-contractor was performed on land granted to the State of Oregon no probative evidence to sustain that **allegation** was introduced. A copy of the actual easement to the State of Oregon would have sufficed. Absent such proof this **Board** must find that the passing track is on operating **property.....and** therefore the cleaning of spill material was in fact a necessary operation to the completion of the passing track, which is **work** within the scope of the Agreement."

Similarly herein, we **must** find that the work of extending the trackage was work which should have been assigned to track forces since it occurred on Carrier's right-of-way and was work within the Agreement. **Furthermore**, Carrier did not give the notice required under the National Agreement. **The** question of damages was not raised by Carrier.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Pauls*
Executive Secretary

Dated **at** Chicago; Illinois, **this 12th** day of December 1975.