NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24078
THIRD DIVISION Docket Number MW-24053

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Chicago, Milwaukee, St. Paul & Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it assigned the work of constructing four hundred seventy (470) feet of track on and at the ends of Bridge D-30-281 in connection with a grade separation project at the intersection of Mill Road and North 60th Street at Milwaukee, Wisconsin to outside forces on September 10, 11, 12, 13, 14, 17, 18, 19, 20 and 21, 1979 (System Files C#113/D-2383 and C#114/D-2382).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract out said work.

(3) As a consequence of the aforesaid violation, Bridge and Building Sub-department employes E. W. Phillips, P. A. Schouten, R. L. Marrow, M. N. Machalk, D. D. Bowman, M. DeVries, R. Stankowsky, T. J. Rueda, A. C. Schulz, J. Love, V. T. Jones, P. Ziarkowski, B. Williams, J. W. Keller, G. A. Prell and K. W. Wein each be allowed pay at their respective straight time rates for an equal proportionate share of two hundred forty-two and two-thirds (242-2/3) man-hours; Track Sub-department employes L. Smith, A. M. Kloth, N. Evans, R. A. Martin, R. L. Jones, F. Harris, A. V. Davis, P. O. Quinn, W. Lierman, J. A. Sukopp, L. Wetzel, R. Vasquez, A. A. Hall, C. Smith, W. Neal, M. E. Adler, H. N. Horton, L. Morales, J. Bingmon, P. D. Zehel, C. Meeks, R. R. Lewitzke, L. Vaughan, J. Gaedtke, G. Jones, C. Beamon, E. Chambers, M. E. Lutz, J. L. Hern, J. Davis and M. Nehls each be allowed pay at their respective straight time rates for an equal proportionate share of sixty-two (62) man-hours; Roadway Equipment and Machine Sub-department Truck Drivers O. Gaedtke, R. Jaraczewski and D. Jensen each be allowed pay at their respective straight time rates for an equal proportionate share of forty-three and two-thirds (43-2/3) man-hours and Bulldozer Operator M. Seider be allowed forty-three and two-thirds (43-2/3) hours of pay at his straight time rate."

OPINION OF BOARD: In this dispute the Board once again considers the question of a Carrier's responsibility to the Organization and the employes it represents as a result of work performed by an outside contractor under such contractor's arrangement with a third party. Such responsibility, as argued by the Organization, goes both to notification to the Organization under the terms of Article IV of the May 17, 1968 National Agreement and to the assignment of the work itself to employes represented by the Organization.

In this instance, the work involved was the construction of 470 feet of track. Without contradiction, the Carrier stated throughout the claim handling

procedure that the track in question had been contracted for by the Wisconsin State Highway Department to prevent interference with railroad operations during installation of a state highway bridge. Connection of such "shoofly" track to the Carrier's operations was performed by regular Carrier employes.

Article IV, Contracting Out, reads as follows:

"ARTICLE IV - CONTRACTING OUT

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement the Carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto."

There is no need here to review whether or not this is the type of work normally and/or exclusively assigned to employes represented by the Organization. The basic and determinative issue is whether the work can be found to be contracting out under the control of the Carrier. Article IV is clearly predicated on its opening clause which reads, "In the event a carrier plans to contract out work...".

The Carrier makes a convincing case here that it did not control the work, that it was for purposes of the State Highway Department, and that it would have no basis to assign its own employes to the work even if it had so desired.

The circumstances make it clear, of course, that the Carrier was not without knowledge of the construction of the "shoofly" trackage and that it could have undertaken a discussion with the General Chairman as provided in Article IV. But the language of the provision does not require it, since it was not the Carrier which had "plans to contract out work". This is summarized in the Carrier's letter of July 2, 1980, sent to the Organization during the claim processing, reading in part as follows:

"The work in question was performed to avoid any interference with the railroad's train operations, so that the State Highway Department could continue with their project in installation of a state highway bridge. Such work was certainly not done at the Carrier's request or to enhance any of the Carrier's existing trackage. The State Highway Department contracted the work in question, it was not contracted by this Carrier. Carrier did not contract any of this work and was not liable for an expenses. This Carrier had no control over the State Highway Department's desire to perform the construction project."

A serious of previous awards have reviewed this question. The Board finds of particular pertinence in this instance Award No. 23422 (LaRocco), which

refers both to the scope issue and the notification issue and reads in pertinent part as follows:

> "The issue is whether the Scope clause contained in the applicable collective bargaining agreement between the Organization and the Carrier specifically covers the work performed by the contractor. Generally, we have adhered to the proposition that where the disputed work is not performed at the Carrier's instigation, not under its control, not performed at its expense and not exclusively for its benefit, the work may be contracted out without a violation of the Scope rule. Third Division Awards No. 20644 (Eischen); No. 20280 (Lieberman); No. 20156 (Lieberman) and No. 19957 (Hays).
>
> Recently, we have refined the general rule. In Third Division Awards No. 23034 and No. 23036, we correctly ruled that the Carrier retains sufficient control over the disputed work if the Carrier participates in the contracting out process when it knows the work is covered by an applicable collective bargaining agreement. In those cases, we were concerned with the Carrier's attempt to evade its collective bargaining obligations merely by inserting a clause in the Carrier's operating agreement with the state government authority which stated that an outside contractor would perform track rehabilitation work. In Award Nos. 23034 and 23036, the Carrier assisted the state in obtaining an outside contract and then sought to evade its labor agreement obligations by relying on the state operating agreement.
>
> The facts in this case are very different. The Carrier did not have any control over MBTA's determination of who should perform the work. The MBTA contracted directly with the outside contractor. The Carrier played no role (either as a principal or an agent) in selecting the outside contractor. Unlike the situation in Awards No. 23034 and 23036, the contracting out of the work was not instigated by the Carrier because there was no operating agreement between the state and the Carrier which covered this project. Here, the MBTA alone controlled when and how the work was to be performed. Since the Carrier had no control over the MBTA'd actions, the Carrier was not evading any of its responsibilities under the applicable labor agreement. Since we have found that the Carrier had no control over the disputed work, the Carrier had no duty to notify and confer with representatives of the Organization."

Other awards with similar holdings are Award Nos. 20644 (Eischen), 20639 (Twomey), 20156 (Lieberman), 19957 (Hays), and 15906 (McGovern). These awards do not deal directly with the Article IV notification requirement, but rather dismiss the Organizations' claims for the work. It follows, however,

that if the Carrier is not contracting out work (as found in these awards) no Article IV notification is required.

The Organization cites a number of awards holding that Article IV notification, as a minimum, was required, even where the work involved a governmental agency actually contracting for the work, notably Award No. 22783 (Scearce) and Award No. 19623 (Brent). It may be, from the facts of record in these instances, that a greater degree of Carrier control or benefit was involved. In any event, the Board finds Award No. 23422 and others cited more directly to the point at issue here.

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

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 5th day of January 1983.