NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24173

THIRD DIVISION Docket Number MW-23859

Josef P. Sirefman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Chicago, Milwaukee, St. Paul and 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 a by-pass track in the 'Beecher Street Bridge area' at Milwaukee, Wisconsin to outside forces on May 23, 25, June 4, 5,6,7 and 8, 1979 (System Files C#75/D-2354 and C#80/D-2357).

(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 said work.

(3) As a consequence of the aforesaid violation, furloughed Track Sub-department employes A. Fails, D. Christian, Jr., G. Bond, G. Brumfield, D. Chambers and C. Beamon each be allowed pay at their respective rates for an equal proportionate share of the two hundred fourteen (214) man-hours expended by outside forces."

OPINION OF BOARD: In the course of widening a street the Wisconsin State Highway Department engaged a contractor to construct a temporary "shoo-fly" (by-pass track) over which Carrier operated its trains. Stripped to its essentials the issue is whether the Carrier was obligated under Article IV of the May 17,1968 National Agreement to give advance notification to the Organization of the work to be performed; and if Claimants, furloughed members of the Carrier's Track Sub-Department represented by the Organization, should have performed such work.

The first paragraph of Article IV reads:

> "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."

Carrier contends that notification under Article Iv was not required because the work was not exclusively reserved to or performed by the BMWE members, that the work was done solely at the discretion, within the control of and paid for by the Wisconsin State Highway Department, and that the Organization had not objected to similar arrangements in the past.

In Award 22783 Referee Scearce observed:

"We find that the Carrier's defense to this claim fails on a very important -- and decisive -- point; while it way well be that the end result of this project was the underpass, for which the City assumed all costs involved, the construction of the trackage in question was strictly and singularly for use of the Carrier. Moreover, the right-of-way was the property of the Carrier; it seems apparent that the Carrier had to agree to the grade separation as wall as the method by which such work, including the shoofly and that subsequent permanent track -- to be performed by others -- would be accomplished on its property. Consequently, we conclude that such decision was within the authority of the Carrier, as evidence by the contracts between Carrier and the municipality in the record. We also conslude that, based on the foregoing, the work as set out in the Claim was work normally and typically performed by the track forces and that prior notice should have been given under Article IV."

A review of the instant record establishes that there is no denial by the Carrier of the Organization's assertion that the bypass was Carrier's property. Wore importantly, Carrier controlled the bypass, whose sole purpose was to provide track over which Carrier operated its trains. The work involved has been work regularly performed by employes in Carrier's Track Sub-Department. Therefore, the Carrier was obligated to give the Organization advance notice of the project in accordance with Article IV, and the Organization is entitled to raise the issue when there is an absence of such notice. Claimants shall be wade whole by each receiving an equal proportionate share of 214 man-hours.

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 wet the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATICNAL RAILROAD ADJUSTMENT BOARD
By Order of Third Divisiat

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 15th day of February 1983.

CARRIER MEMBERS' DISSENT
TO
AWARD 24173 (DOCKET 23859)
(Referee Sireman)

The Majority erred in rendering their decision in Award 24173.

The issue in dispute framed by the Carrier was as follows:

'Carrier contends that notification under Article IV was not required because the work was not exclusively reserved to a performed by the BMWE members, that the work was done solely at the discretion, within the control of and paid for by the Wisconsin State Highway Department, and that the Organization had not objected to similar arrangements in the past."

The Majority's cornerstone was the decision in Award 22783 (Scearce) which was quoted with authority:

"We find that the Carrier's defense to this claim fails on a very important - and decisive -point; while it may well be that the end result of this project was the underpass, for which the City assumed all costs involved, the construction of the trackage in question was strictly and singularly for use of the Carrier. Moreover, the right-of-way was the property of the Carrier; It seems apparent that the Carrier had to agree to the grade separation as well as the method by which such work, including the shoofly and that subsequent permanent track - to be performed by others - would be accomplished on its property. Consequently, we conclude that such decision was within the authority of the Curler, as evidence by the contracts between Carrier and the municipality in the record. We also conclude that, based on the foregoing, the work as set out in the Claim was work normally and typically performed by the track forcer and that prior notice should have been given under Article IV."

In the instant award the facts of the case did not sup&t the conclusion that the Carrier had dominion and control over the construction project which was contracted out, and thus Carrier had no obligation to give notice. Award 23422 (LaRocco) supports the Carrier's argument:

"The issue is whether the Soope clause contained in the applicable collective bargaining agreement between the Organization and the Carrier specifically covers the work performed by the coutrrctor. 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 exclusivelyfor its benefit, the work may be contracted out without a violation of the Soope rule. Third Division Awud Nos. 20644 (Eischen); No. 20280 (Lieberman); No. 20156 (Lieberman) and No. 19957 (Haye)."

The Third Division recently followed the reasoning of Award 23922 when rendering Award 24078 (Marx). There, the Majority distinguished Award 22783 (Scearce) based on the facts of record. The Majority concluded:

". . ..If the Carrier is not contracting out work (an found in these awards), no Article IV notification is required."

Unfortunately, the Majority did nut recognize the thrust of the Carrier's argument; that they (Carrier) did not have the control and dominion over the project nor the scheduling thereof. Thus, the Carrier was effectively placed in a subordinate position unable either to give notice or assign MU forces to the project. Clearly, Carrier could not adhere to the mandate of Article IV which begins "In the event a carrier plans to contract outwork.... and should not now be penalized by this erroneous award. Far the foregoing reasons we dissent.

CARRIER MEMBERS' DISSENT TO
AWARD 24173 (DOCKET 23859)

D. M. Lefkow

W. F. Euker

J. E. Mason

J. R. O'Connell

P. V. Varga