

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Southern Pacific Transportation Company  
(Western Lines)

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

(1) The Carrier violated the Agreement when it assigned outside forces to perform paving work on crossing at Cornfield Yard on November 14, 15, 16 and 17, 1983 and when it assigned outside forces to perform paving work between Track Nos. 318 and 319 at Taylor Yard on December 14, 15 and 16, 1983 (System Files MofW 152-987 and MofW 152-995).

(2) As a consequence of the aforesaid violations, Messrs. E. T. Puente, F. V. Martinez, M. S. Quezada, G. Z. Heredia and C. C. Castaneda shall each be allowed sixty-eight (68) hours of pay at the applicable rates of their respective regularly assigned positions."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The instant claim involves two interrelated cases involving Carrier's contracting out of paving work. Such work was performed by outside forces for four days in November, 1983, at Cornfield Yard and for three days in December, 1983, at Taylor Yard.

The Claim of the Organization is that Carrier failed to assign paving work to Paving Gang No. 33. As said work was "identical in nature to that performed by Claimants on a daily basis," Carrier's violation of numerous provisions of the Agreement denied Claimants their seniority rights and loss of work opportunity.

The Carrier denies any violation in that it properly notified the Organization of its intent to contract out the disputed work. It further argues that the contested work was not reserved to the employees and could not have been performed by Paving Gang No. 33. It denies it violated any of the provisions of the Agreement.

A review of the on-property record finds that Carrier did comply with the provisions of Article IV of the May 17, 1968 Agreement on Contracting Out. In each case the Carrier gave advance notice of its intent to contract out. The Organization requested a conference and was provided a meeting for the purpose of discussion. While the Organization met with the Carrier it did not discuss the planned contracting out of paving work. Carrier thereafter proceeded with the use of outside contractors. There is no evidence of record that the Organization ever disputed the Carrier's contracting out at any conference held on the property.

Although the Scope Rule and Rule 26 lists paving as a category of work covered by Agreement, it does not delineate the exact nature of the work performed. As this is a general Scope Rule, the Organization must demonstrate that the work performed by the contractor is of the type performed by the classification of paver. The Organization must also provide substantial probative evidence of exclusivity. The record indicates that with the exception of this location, the disputed work has been done by contractors at all other points on the Carrier's property. This Board cannot presume exclusivity based upon appearances or assertions. It fails to find proof.

The Organization maintains that Track Subdepartment employees of Paving Gang No. 33 were willing and qualified to do the contested work. The evidence of record on the December work indicates it was a fairly large paving project, approximately two thousand feet long, seven feet wide and three inches thick. The Organization does not refute Carrier's position that the Paving Gang did only "patch work and minor road crossings." There is no probative evidence that the Paving Gang had ever performed work of a similar magnitude to the paving work involved here.

In order to prevail the Organization must provide substantial probative evidence of exclusivity or of Carrier violation of the provisions of Article IV. As this record is devoid of such evidence, the instant claim must be denied (see Third Division Awards 23303, 23423).

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Award No. 27040  
Docket No. MW-26665  
88-3-85-3-406

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of April 1988.