

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Southern Pacific Transportation Company
(Eastern 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 Maintenance of Way and Structures Department work (repairing subgrade failures) on the Kerrville Branch beginning December 19, 1983 (System File MW-84-34/411-35-A).

(2) Regional Manager L. V. Hoehne failed to disallow the claim presented to him by Vice Chairman F. D. Lewis on January 30, 1984 as contractually stipulated within Section 1(a) of Article 15.

(3) As a consequence of either or both (1) and/or (2) above,

'System Machine Operator R. C. Green for 256 hours at Gradall Operator straight time rate of pay and System Machine Operator J. E. Nichols for 256 hours at Heavy Duty Truck Operator straight time rate of pay on a continuing basis.'

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.

By letter dated November 21, 1983, the Carrier advised the Organization that it intended to contract out work to "...subgrade failures in San Antonio (Texas) on the Kerrville Branch." According to this notice the anticipated work would begin around December 5, 1983, and continue on daily basis until approximately January 13, 1984.

On November 28 and December 28, 1983, the Organization advised the Carrier that it thought it improper to use outside contractors to perform the work in question because it was work "...historically performed" by the craft. The Organization also took exception with the Carrier when it stated, in its November 21 notice, that it had no operators who could operate a crawler backhoe or no furloughed Division machine operators to drive ten wheel trucks. It was the intention of the Carrier to rent one crawler backhoe and two trucks to do the subgrade work. Prior to the Organization's December letter cited above to the Carrier, the Carrier notified the Organization on December 20, 1983, that it was proceeding with the sub-contracting "...to repair chronic mud spots on (the) Kerrville branch between Yokum Bend and Mile Post 242.4." In this letter the Carrier officer stated that the contractor would furnish "one hi-hoe excavator and two dump trucks with operators" and that the equipment "was being rented with operators because of lack of qualified operators and equipment."

When a claim was filed on January 30, 1984, it was done so first of all on the basis of an alleged procedural violation by the Carrier for having failed to notify the Organization of sub-contracting as provided for (by Article 36) of the Agreement. The Board has studied both the language of that Article and the facts of record. It concludes that the Organization was notified of the Carrier's intent to subcontract "not less than 15 days prior thereto," and this objection must be dismissed.

Secondly, the Organization alleges that the Carrier violated the Agreement by not giving the work in question to the Claimants who were furloughed at the time the work was done and who were "fully qualified and available to perform (the) work." In response to that part of the Claim, the Carrier states that it had only one gradall which was used on State of Texas crossing jobs. In view of that the Carrier asserts that it was necessary for it to rent a hi-hoe excavator to repair chronic "subgrade spots ahead of System Rail Gang" at the location in question. The Organization alleges, on the contrary, that there was more than one gradall owned and operated by the Carrier and that at the time of the disputed work the one which the Carrier claims it had was not being used where the Carrier said it was. The Carrier does not respond to this assertion by the Organization. The Carrier then states that it could not rent the gradall (or the trucks, for that matter) without operators because it was expensive equipment. The Organization answers that such is not factually the case because such equipment was available throughout Texas for "rent or lease" without operators. The Carrier also does not respond to this assertion by the Organization. Lastly, the Carrier states that in either case there were no machine operators on furlough on the San Antonio Division seniority roster who could have operated the machinery at the time the work was being done. The Organization responds that the Carrier had system machine operators assigned to heavy duty trucks, that it has had such positions for several years, and the Claimants were furloughed, available, and covered by the system roster when the subcontracting work occurred.

The evidence of record supports the conclusion that system machine operator Green was on furlough and available to operate a gradall and the claim for 256 hours on his behalf is sustained.


The case of Claimant Nichols is more complex. According to the Carrier, Claimant Nichols was not eligible, as a system machine operator, to operate the ten wheel trucks at the location in question when the subcontracting took place because all truck drivers in the San Antonio "Division" were employed. The issue here is whether Claimant Nichols' rights extended to this Division, and to the ten wheel trucks in view of his system seniority as a machine operator. The Organization argues that such rights belonged to Claimant Nichols since a ten wheel truck, as a heavy duty truck, is equipment of the type falling within the purview of a system machine operator. In its Statement of Claim before the Board the Organization refers to operators of such trucks as "heavy duty truck operators." In view of the record as a whole, and the language of the Agreement at Articles 1 and 21, it appears that the reasoning by the Organization with respect to Claimant Nichols is plausible. As a system operator, Claimant Nichols had seniority rights to drive the trucks of the type in the San Antonio Division where the work was done. The Board believes that the Organization has sufficiently responded to the Carrier regarding Claimant Nichols' status. His claim for 256 hours must also be sustained.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1989.