Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28045
THIRD DIVISION Docket No. MW-26879
89-3-86-3-16

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 construct and repair its tracks serving Rolling Rivers Enterprise, Inc. beginning January 1, 1985 (System File MW-85-47/426-38-A).

(2) The Carrier also violated Article 36 of the Agreement when it did not give the General Chairman advance notice of its intention to contract said work.

(3) As a consequence of the aforesaid violations, System Roadway Machine Operators M. A. Kucera, A. Simmons and Z. Smith shall each be allowed two hundred forty (240) hours of pay at their respective straight time rates."

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.

This is a subcontracting dispute initiated by the Organization on behalf of three Claimants who are Roadway Machine Operators. The Organization contends that Carrier violated the Agreement when, beginning January 1, 1985, employees of Coastal Railway Services, Inc., performed work in connection with a track repair and construction project on tracks serving Rolling River Enterprises, Inc., at Houston, Texas. Specifically, the Organization alleges that the contractor's employees removed old crossties, rail and ballast and added stabilization using a bulldozer, grove cherry picker and backhoe, all work which accrues or is reserved to members of the Organization. The Organization further claims that Carrier violated Article 36 of the controlling Agreement, which prohibits Carrier from contracting out work unless it gives notice to the Organization, holds a conference with the Organization, and endeavors to reach a mutually satisfactory Agreement concerning the disputed work.

Carrier contends that the work performed by the outside contractor was beyond the Carrier's dominion and control. It argues that the work complained of by the Organization in the instant Claim was not contracted by the Carrier; that the track in question no longer serves Carrier's customers and lies dormant; that Rolling River Enterprises leased the track for its own purposes and at its own expense.

Carrier also argues that even if the work had been in control of Carrier, the Organization has not established exclusivity and must do so in order to prevail because the Scope Rule is general in nature.

Our attention has been directed to several Awards of this Board dealing with the issue of whether work performed on a facility owned by a Carrier, but leased by it to another, is within the Scope of the Agreement. We take particular note of the thorough and comprehensive discussions of the parties' respective positions in Third Division Awards 23422 and 26212. As a general matter, this Board has adhered to the proposition that where the disputed work is not performed at the Carrier's instigation, is 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 20644, 20280, 20156. Award 23422 is illustrative of these general principles. In that case, an outside contractor performed a track improvement project on the Dorchester Branch right-of-way, which is owned by the Massachusetts Bay Transportation Authority (MBTA). The MBTA granted Carrier a license to operate trains on the Branch and Carrier performed ordinary maintenance work. The outside contractor was employed by the MBTA. Under those facts, the Board concluded that Carrier had no control over the disputed work, as it played no role, either as a principal or an agent, in selecting the contractor. The MBTA alone controlled when and how the work was to be performed, the Board concluded, and therefore Carrier had no duty to notify and confer with the Organization.

The instant case stands on a very different footing, however. Here, the terms of the lease agreement demonstrate that Carrier retained considerable control over the work performed. The relevant portions thereof provide as follows:

> "2. Industry desires to utilize said track in connection with the operation of its facilities in this vicinity, which track is in need of extensive rehabilitation.
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> Industry shall, at its expense and to the satisfaction of Railroad, arrange for the rehabilitation of said track. The cost to rehabilitate said track has been estimated by Railroad to be Two Hundred Twelve Thousand Seven Hundred Fifty and No/100 Dollars ($212,750.00).

Upon completion of said rehabilitation work, Industry shall submit to Railroad itemized statements covering the cost of rehabilitating said track, which shall be subject to the approval of Railroad; provided, however, that such cost shall not, without Railroad's prior written consent, exceed the estimated cost mentioned above. Upon review and approval of such statements by Railroad, the cost covered thereby shall then be considered to be Industry's approved cost. Industry will, at 'all reasonable times, give Railroad's representatives access to its books for the purpose of verifying such statements.'

Railroad shall refund to Industry such approved cost at the rate of Twenty Dollars ($20) for each carload of freight yielding roadhaul revenue of Three Hundred Dollars ($300) or more to Railroad and delivered on or shipped from said track. Such refunds shall be made by Railroad semi-annually for the term set forth in Section 9 but not to exceed ten (10) years from the date hereof.

3. Industry, at its own expense and to the satisfaction of Railroad, shall maintain said track.

6. Railroad shall serve Industry over said track, unless prevented due to labor dispute or any causes beyond the control of Railroad, subject to any lawful charges that may be made by Railroad for such service, at such times as such service will not interfere with the use of said track by Railroad." (emphasis added)

As the foregoing lease provisions demonstrate, Carrier retained the right of approval with regard to the rehabilitation of the trackage in question, and agreed to refund the cost of the contracting work involved here to Rolling River Enterprises, Inc. Moreover, it is apparent that Carrier benefitted from the performance of the work. Under these circumstances, Carrier was sufficiently in control of the disputed work, in our judgment, to require it to comply with the notice provisions of the Collective Bargaining Agreement. As the Board noted in Third Division Award 26212:

> "Had Carrier directly let the work in question to Byler clearly the Agreement and notice requirements would apply. It seems equally clear that by leasing the property for the express purpose of construction of the track an attempt is made to do by indirection that which cannot be directly done. We conclude the Agreement was violated when no advance notice of the lease was given."

As a final matter, we are not persuaded that the Organization's failure to establish historic exclusivity is fatal to its Claim. Such proof is not necessary where, as here, the work is within the scope of the Agreement.

With respect to the remedy requested in Part 3 of its Claim, it is not clear whether the Organization employees were on furlough or fully employed. Accordingly, it is the intent of this Award, based on the Carrier's records, to make Claimants whole, and they are to be compensated for any period that they were furloughed, if that is the case, during the relevant time frame. We do wish to add, however, that there is merit to the Organization's contention that flagrant and continued disregard of a Carrier's responsibility to provide proper notification could result in the sustaining of a monetary Claim. It is an argument that warrants attention and we will consider it in the future.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 10th day of August 1989.