

The Third Division consisted of the regular members and in addition Referee Irwin M. Lieberman when award was rendered.

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way Employes  
(Burlington Northern Railroad Company  
(Former St. Louis-San Francisco Railway Company)

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

(1) The Agreement was violated when the Carrier assigned and/or permitted outside forces to replace track ties at Mile Post 405 plus five (5) poles on the Williams Spur Lead on February 13 and 15, 1986 (System File F-7040/EMWC 86-3-25D).

(2) The Carrier also violated Rule 99 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 violations, Messrs. L. L. Davis, H. N. Simpson, T. E. Rhodes, J. E. Keils, R. D. Davis and B. L. Heiney shall each be allowed pay at their respective straight time rates for an equal proportionate share of ninety-six (96) man-hours and Special Equipment Operator D. Sconyers shall be allowed sixteen (16) hours of pay at his straight time rate."

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 dispute involves the alleged contracting of tie replacement work on a piece of trackage between the main line and a privately owned spur. The Organization contends that Carrier violated several provisions of the Agreement dealing with the contracting of work, including notification of the General Chairman of the intent to contract the work. Carrier insists, factually, that it did not contract the work in question and had no control over it. While insisting that the work was done at the behest of the owner of the spur, Carrier acknowledges that the contractor did come on its property and replaced approximately 20 ties.

There have been a host of Awards dealing with problems relating to contracting out of work over the years. This dispute differs from the past cases in several respects. Most significantly, in this instance, the work on Carrier's property (which was admitted) was solely for its benefit, even though paid for by the owner of the spur. In addition, from the record it seems unlikely that Carrier was unaware of the activity of the contractor, even though it had no direct control over the contracting. Thus, it is apparent that the work in question would surely have accrued to the Claimants herein, had it not been performed by the contractor.


The long established principle in this area of conflict is that work which is not for the exclusive benefit of Carrier and not under its control or at its expense, may be contracted without violation of the Scope Rule. In this instance the criteria indicated are applicable and the facts indicate that the work complained of was for the exclusive benefit of Carrier and it was on its property and not on the private trackage. This is sufficient, as we examine the record and authorities, to find a violation of the Agreement.

The remaining problem is the nature of the remedy to be invoked, in view of the mixed activity of the contractor. The record is unclear as to the extent of the work which is attributable to Carrier. The Organization alleges that 52 ties (and ancillary work) was performed by the contractor, consuming 16 hours of work by six employees of the contractor. The Carrier maintains that there were only approximately 20 ties replaced on its property. This Board is unable to make any determination with respect to the extent of the work performed by the contractor on this piece of Carrier's property. That fact can obviously easily be checked and determined. Both parties are enjoined to make a joint check of the trackage in order to quantify the extent of Carrier's liability. However, there is no question but that a violation of the Agreement occurred and Claimants are entitled to an appropriate remedy for the lost work.

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 25th day of May 1990.