Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28590
THIRD DIVISION Docket No. MW-27887
90-3-87-3-411

The Third Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Union Pacific Railroad Company

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

(1) The Agreement was violated when the Carrier used on outside concern to unload crossties on the right-of-way between M.P. 3.9. and M.P. 28 on March 10, 11, 12, 13 and 14, 1986, between M.P. 42 and M.P. 88.50 on March 17, 18, 19, 20, 21, 24, 25 and 26, 1986, between M.P. 547 and M.P. 580 on March 31 and April 7, 8, 9, 10, 11, 14 and 15, 1986 (System File M-340/013/210-52).

(2) Because of the aforesaid violation, Roadway Equipment Operator D. Morgan shall be allowed one hundred sixty-eight (168) 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.

The basic facts in this case are set forth as follows: On November 25, 1985, Carrier served notice on the former General Chairman of its intention to contract out the unloading of approximately 700,000 crossties. Said notice comported with the requirements of the December 11, 1981 Letter of Understanding.

The subcontracting proposal was later discussed on February 5, 1986, at which time, Carrier pointedly maintained that the equipment needed for the venture was not in its inventory and could not be leased.

Carrier implemented its subcontracting proposal by utilizing Mid-South Railroad Service on the dates cited and a Claim was filed on April 26, 1986, contesting such action.

In defense of its position the Organization contends that work of the character involved herein was encompassed within the scope of the Agreement and consequently was protected work. It also argues that it was indeed possible for Carrier to use other machinery or methods since said equipment was owned by Carrier and previously used to perform crosstie unloading work.

It observes that none of the exception factors detailed in Rule 52 (contracting) was present here and, as such, Carrier was effectively precluded from contracting out the work.

Specifically, it points out that Agreement covered employees possessed the special skills needed to perform the work. Carrier had the basic operational equipment. Special materials were not required to accomplish the task and the work involved was not of such magnitude or of such nature as to be termed an emergency. It further maintains that Carrier failed to make a good faith effort to procure said equipment consistent with the clear requirements of the December 11, 1981 Letter of Understanding, wherein to the extent possible, it was agreed that maintenance of way forces be used. In other words, by renting equipment, covered employees could perform the work.

In response, Carrier disputes the Organization contention that it had the needed equipment to perform said work, arguing instead that it did not have the Koehring 6611 Tie Unloader in its inventory. It maintains the Koehring 6611 was the only machine capable of meeting its tie distribution requirements, since the machine self-loaded and unloaded ties and moved from one gondola car to another during the unloading process.

Furthermore, since Mid-South Railroad Service did not lease equipment, and required its own employees to operate equipment, it was not possible to use Agreement covered employees.

Thus, according to the December 11, 1981, Letter of Understanding and Rule 52 of the Controlling Agreement, it was operationally permissable to use the Koehring 6611. It recognized that there was a "Jimbo Crane" at the Grand Island Shop, but noted that the crane was inoperable and awaiting repairs.

In considering this case the Board concurs with the Organization's position. The central defining issue herein is whether Carrier could have used alternate equipment to unload crossties or was compelled by the lack of such machines to utilize the Koehring 6611. There is no question that said work accrued to Maintenance of Way forces and hence was protected, subject to the contracting exceptions delineated in Rule 52 and further implicitly protected by the December 11, 1981 Letter of Understanding. Since we find that it was plausible indeed to use the Jimbo Crane or some of the other equipment identified by the Organization, though it might have been less efficient, we must conclude that Rule 52 was violated. None of the Rule 52 exceptions was present to justify subcontracting.

On the other hand, we agree with Carrier that the monetary portion of the Claim is excessive and accordingly, Claimant is to be compensated at the straight time rate only for the time he was on furloughed status.

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 16th day of October 1990.