

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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 remove ballast and sub-surface soil from beneath the tracks and to assist in the removal and realignment of tracks in the Hardy Street Yards beginning April 11, 1988 (System File MW-88-86/470-64-A).

(2) As a consequence of the aforesaid violation, furloughed Machine Operators C. Wyatt, L. R. Neal, M. Hernandez, J. Johnson, D. Scott and R. Sanchez shall each be allowed pay at their applicable straight time and over-time rates for an equal proportionate share of the total number of man-hours expended by the outside forces performing the work referred to in Part (1) above, beginning April 11, 1988 and continuing until the violation is corrected."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

On February 26, 1988, the Carrier wrote to the Organization as follows:

"NOTICE NO. 4

Please accept this as Carrier's Notice pursuant to Article 36 of the BMW Agreement of our intent to contract the following work:

In conjunction with the rehabilitation and up-
grading of a major portion of the Hardy Street Yard,
Houston, Texas, it will be necessary to remove most
of the diesel contaminated soil and replace with sand
and crushed limestone and to install a complicated
subsurface drainage system. It is also necessary to
remove and replace poor track areas and place fiber-
glass track containment pans where required. The
Carrier plans to use our forces to perform all track
work and the placement of diesel containment pans.
Due to the large scope of the dirt work, it is our
intent to utilize a contractor for this portion of
the project.

The City of Houston has agreed to close Hardy
Street across our yard if we rehabilitate Maury
Street through our right-of-way and the Opelousas
Street crossing. This work will consist of removing
trackage, upgrading other crossings by replacing rail
and cross-ties through the streets and by installing
over 100 tons of asphaltic concrete paving. The
Carrier plans to use our forces to perform all work
except the asphaltic concrete paving. It will be
necessary to contract out this portion of the pro-
ject, as it requires equipment and expertise that we
do not have available.

This work will begin on or after March 14, 1988."

Article 36 reads as follows:

"CONTRACTING OUT

In the event this carrier plans to contract out
work within the scope of the applicable schedule
agreement, the carrier shall notify the General
Chairman of the organization involved in writing
as far in advance of the date of the contracting
transaction as is practicable and in any event not
less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

The General Chairman promptly responded to the Carrier's notice, stating in part as follows:

"Please be advised we cannot agree to outside contractors performing this MofW work and we request a conference to discuss this notice.

It is our position that the Carrier now owns or leases the equipment to remove the diesel contaminated soil as the only equipment necessary for this work would be front-end loader, dump trucks, motor grader and gradall. This equipment could also be used to replace the sand and crushed limestone.

It is also our position that the Carrier has the employees either working or in a furloughed status that could perform this work if they are given an opportunity. . . ."

Thereafter, the Carrier proceeded with its plans to contract the work at issue. According to the Organization, such work by the contractor commenced on April 11, 1988.

The Organization contends that the Carrier did not proceed in good faith under Article 36, arguing that the Carrier had already entered into an Agreement without an outside concern prior to its conference with the Organization. The Carrier denies this, stating in its reply to the claims appeal that such Agreement was not signed until April 12, 1988.

Simply giving notice, even where such notice is timely, is not all that is required of the Carrier under Rule 36. Where work is "within the scope of the applicable schedule agreement," the parties are required to make "a good faith attempt to reach an understanding concerning said contracting."

In the Board's view, the record supports the Organization's contention that the work involved was of a nature regularly performed by the Claimants. There was no showing as to the unavailability of equipment to perform the work. In fact, employees represented by the Organization did perform some of the work involved in the "rehabilitation and upgrading" of the Hardy Street Yard. The Carrier fails to note any previous instance of contracting out this particular type and extent of work. In sum, the Carrier has failed to demonstrate why the work could not have been performed by its own forces in a manner satisfactory to the Carrier's requirements.

In sustaining the Claim, the Board directs the parties to meet promptly to determine the actual number of hours worked by individual employees of the contractor in order to fix the number of hours of pay to which the Claimants are entitled. In this instance, the Carrier's request to offset such payment by other earnings is found inappropriate. This is not an instance where an employee was improperly denied full-time reinstatement; rather, only a share of a limited number of hours is involved.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 16th day of November 1990.