

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 (Pat Baker Construction Company) to perform grade stabilization and dirt work at Harlingen, Texas from December 7, 1987 through January 15, 1988 (System File MW-88-33/468-57-A).

(2) The Carrier also violated Article 36 when it failed to give the General Chairman timely and proper advance written notice of its intention to contract said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Machine Operators G. M. Lambert, J. D. Mosby, A. R. Barak, O. Gillum and R. L. Dlabaj shall each be allowed two hundred forty (240) hours of pay at their respective straight time rates and sixty (60) hours of pay at their respective time and one-half overtime 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 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 November 2, 1987, the Carrier wrote to the General Chairman as follows:

"Please accept this as Carrier's Notice pursuant to Article 36 of the BMWE Agreement of our intent to contract for labor, equipment and material to perform grading, stabilization and dirt work to accommodate construction of two yard tracks at Harlingen, Texas.

The Carrier's forces will perform all track work."

On November 5, 1987, the General Chairman replied in pertinent part as follows:

"Please be advised we cannot agree to contractors performing this Maintenance of Way work and request a conference to discuss this notice.

Please be advised that it is our position that the Carrier has no intent to engage in serious good faith discussions with the Organization concerning this notice.

It is our position that the Carrier has committed itself to an outside contractor prior to serving this notice, therefore this is not a timely notice.

Please be advised that during the conference we will request a copy of the contract between the Southern Pacific Transportation Company and the outside contractor.

It is our position that Carrier employees have the experience to perform this work and the equipment is owned by the Carrier or can be leased in the Harlingen area with little effort"

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."

As required, the parties met to discuss the proposed contracting out of work. According to the Organization and not otherwise disputed, the Organization alleged "bad faith" on the part of the Carrier, claiming that an arrangement had already been completed for the services of the outside contractor. The Carrier failed to provide evidence that such was not the case.

As stated in Third Division Award 28611, "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 such 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. The Carrier argues that the Organization cannot show that it has performed such work exclusive of all others. Whether or not such may be the case, the test of exclusivity, appropriate in claims for work as among different crafts and classes, is not appropriate here. Rule 36 required no such test.

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 compensation 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. Bevel*
Nancy J. Bevel - Executive Secretary

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