

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

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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 clean the engine pits at Miller Yards on August 13, 14 and 15, 1985 (System File MW-85-122/435-63-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, B&B Foreman W. I. Wheeler, Assistant Foreman D. J. Zhanel, Carpenters A. R. Brown, Jr., B. B. Brown, J. E. Trantham, K. R. Ballard and Helpers B. F. Swearengin and G. G. Gilmore shall each be allowed twenty-four (24) 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.

The Organization alleges that on August 13, 14, and 15, 1985, an outside concern, Gentry Holmes, cleaned the engine pits at Miller Yards in Dallas, Texas. According to the Organization, employees of Gentry Holmes expended 192 man-hours performing the engine pit cleaning work, which has traditionally and historically been performed by Bridge and Building Department employees.

The Organization contends in its Submission that Carrier violated Articles 1 (Scope), 2 (Seniority) and 21 (Rates of Pay), which read in pertinent part as follows:

"ARTICLE 1

SCOPE

SECTION 1. These rules govern rates of pay, hours of service and working conditions of all employees in the Maintenance of Way and Structures Department (not including supervisory forces above the rank of foreman) represented by the Brotherhood of Maintenance of Way Employees as follows:

Roadway Track Department:

Foremen, Assistant Foremen, Apprentice Foremen, Laborers, Highway Crossing Watchmen and/or Flagmen, Watchmen at Non-interlocking Crossings, and Lamp Tenders, Laborer Driver.

Bridge and Building Department:

Foremen, Assistant Foremen, Mechanics, Carpenters, Painters, Bridge Watchmen, Helpers, Laborers and Pumpers.

Welding Department:

Foremen, Welders, Welder Helpers, Grinder Operators, Grinder Helpers, Assistant Foremen and Lead Welders.

Roadway Machine Department:

Machine Operators and Helpers, Machine and Tool Watchmen.

Wood Preserving Department:

Foremen, Machinists, Machinist Helper, Welders, Machine Operators, Laborers and Tie Inspectors.

ARTICLE 2

SENIORITY RULES

SECTION 1. (a) Except as otherwise provided, seniority begins at the time the employee's pay starts on the position to which assigned following bulletining of the vacancy.

Employees temporarily employed or promoted to a position of higher rank than laborer, shall not establish a seniority date unless assigned thereto following bulletining of vacancy as provided in Article 8.

(b) Seniority of laborers will begin on the date their pay starts after they have been in continuous service for a period of sixty (60) consecutive calendar days from the date employed.

(c) Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service as hereinafter provided.

* * *

ARTICLE 21

RATE OF PAY

SECTION 1. The carrier will compile a new rate sheet each time the rates of pay change on the individual positions listed, including the basic rate and the rate including the cost-of-living allowance. A copy of the rate sheets will be furnished to the general chairman.

* * *

Bridge & Building Department:

Foreman, B&B, Houston Terminal

Foreman, Other B&B and Painter

Foreman, Pile Driver

Foreman, Steel Bridge Gang (Construction Work)

Foreman, 16-Man Differential -- add

Assistant Foreman, B&B and Painter

Watchman, All Roadway Tools

Mechanic, Class A (Having 2 or more years
railroad experience in their class of work)

Mechanic, Class B (Having less than 2 years
railroad experience in their class of work)

Helper, Mechanics, in MofW & B&B Department."

In addition, the Organization maintains that B&B employees on the Dallas Division have been performing the work in question for many years, as evidenced by the attachment to its letter dated May 14, 1986, in which the Claimants state that they "have perform(ed) these duties in the past." Under these circumstances, the Carrier was obligated to notify the General Chairman of its intent to contract out the work in accordance with Article 36 and the December 11, 1981 Letter of Agreement.

Carrier contends that the work of cleaning the engine pits is not, by Agreement or practice, reserved exclusively to employees represented by the Organization. It is the Carrier's position that the pits have been cleaned by contractors, by mechanical department employees and others in the past. Therefore, there was no requirement to notify the General Chairman of its intent to contract out the work.

This Board has carefully reviewed the record of this case and the precedent Awards submitted by the parties. We are compelled to conclude that the Claim must fail, for several reasons. First, the Organization relied upon the Scope Rule for the first time in its Submission before this Board, and therefore it may not properly be considered. It is, after all, quite well-established at this point that the Board is precluded from considering arguments or evidence not raised on the property. Third Division Award 24977; Second Division Award 11077. Parties to disputes before this Board are not permitted to mend or vary their claims after they reach the Board on appeal, and therefore, any consideration of the Scope Rule is now barred.

Second, we note that even if the Scope Rule were to be considered, it is general in nature and neither this nor any of the other provisions of the Agreement relied upon by the Organization vests in the Claimants the exclusive and unequivocal right to perform the work of cleaning pits. In order to prevail in such circumstances, the Organization must prove that work of the nature claimed has been traditionally and exclusively reserved to its craft.

Unfortunately, the Organization's case falters on that crucial point. Carrier and the Organization have raised competing arguments as to who has traditionally performed the disputed work. The Organization's evidence that Claimants have performed the work in the past is not sufficiently specific or probative to meet its burden of proof on this particular point.


Finally, in the absence of evidence that Claimants were entitled to perform the work, we find that there was no obligation upon the Carrier to provide the General Chairman with advance notice. The requisite notification is required only where the planned contracting out is within the scope of the applicable Agreement. Since that has not been demonstrated herein, the Claim must be denied in its entirety.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of May 1991.