

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Kansas City Southern Railway Company)

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

(1) The Agreement was violated when the Carrier assigned outside forces (Bolser Services Company) to perform track and material hauling work in the vicinity of Mile Post 3.9 at East Knoche on November 11, 1987 [Carrier's File 013.31-320 (281)].

(2) The Agreement was further violated when the Carrier failed to notify the General Chairman in writing of its intention to contract out said work as required by Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. D. Lopez, B. Cooper, J. Candillo, T. O'Donnell, R. Candillo, L. Williamson and B. Shrout shall each be allowed eight (8) 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 maintains that its Agreement was violated when Carrier used a contractor to perform work subject to the Agreement and did not advise in writing of its intent as required by Article IV of the May 17, 1968 National Agreement. Carrier defends against the Claim on a variety of grounds, the Scope Rule of the Agreement does not reserve the disputed work to Maintenance of Way employees, Claimants were employed on the dates involved and that Carrier did not have the necessary equipment to accomplish the work at the time it was completed. In support of its Scope Rule argument, Carrier relies on Third Division Award 26084 wherein it was concluded that for years Carrier used contractors' forces to assist its railway employees without prompting claims from its employees.

The first issue to be resolved is whether or not Carrier is obligated to provide an Article IV notice of intent to use an outside contractor, in the performance of track maintenance or bridge and building work, in situations where it is contended that the work is not exclusively within the scope of the Agreement. On many occasions this Board has stated that the lack of exclusive entitlement to the work does not excuse Carrier from providing the Organization with notice that it intends to use an outside contractor in its completion. (See Third Division Award 29121 and the Awards cited therein.) Thus, the notion that work not exclusively reserved to employees covered by the Agreement does not require an Article IV notice is again rejected.

The Agreement was violated when Carrier failed to provide the required notice that work subject to the Agreement was intended to be contracted out.

Carrier has stated that Claimants' did not suffer any loss in work in the circumstances of the activity of the contractor, thus, they have no entitlements to additional compensation. With this, the Board concurs. And while the Board has in a number of Awards provided compensation to claimants in situations where Carrier failed to provide an Article IV notice even though they were fully employed, in this matter, for several reasons this will not be done. The Organization accepted the practice of having outside forces perform work of the nature involved here without complaint for many years. If it now intends to insist that Carrier provide notice in such situations it must make its intentions known and provide Carrier with information that a failure to follow the procedures of Article IV will no longer be accepted.

Compensation will not be awarded Claimants.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 12th day of June 1992.