

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri Pacific Railroad Company)

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

(1) The Carrier violated the Agreement when it assigned outside forces (Milam Construction Company) to perform track dismantling and construction work in the vicinity of the Wheel Shop in the North Little Rock terminal in North Little Rock, Arkansas beginning December 7, 1988 and continuing (Carrier's File 890127 MPR).

(2) As a consequence of the aforesaid violation, Foremen P. L. Jackson, Jr., Assistant Foreman F. P. McDougal, Machine Operator D. W. Burrows, Trackman Driver J. L. Bostic and Trackman G. L. Weems shall each be allowed eight (8) hours of pay at their respective time and one-half rates for each day the outside forces performed the work mentioned in Part (1) above beginning December 7, 1988 and continuing until the violation was 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 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.

This Claim contests the subcontracting of work to the Milam Construction Company in the vicinity of the Wheel Shop at North Little Rock. The work began on December 7, 1988, and involved the removal of 2,840 track feet of existing trackage, the removal of a concrete wall, and the grading and construction of approximately 2,250 track feet of new trackage.

The Carrier has raised a question in this case in regard to whether the work at issue, the dismantling and reconstruction of trackage, is subject to Article IV of the May 17, 1968, National Agreement (Contracting Out).

Under this Agreement, notice to the General Chairman of Carrier's intent to subcontract is only required where work is "within the scope of the applicable schedule agreement." It is Carrier's contention that the work performed by the outside contractor did not fall within the scope of the parties' Agreement.

In the final analysis, this issue, to which the parties have addressed considerable attention, is moot since Carrier did provide timely notice to the Chairman of its intent to subcontract. A request was made to meet to discuss matters relating to the contracting transaction and that meeting was held. In essence, Carrier is suggesting that although it complied with the notification requirements of Article IV, it need not have done so. Given the lack of a contractual violation in this regard, however, further investigation is not warranted.

While the debate over the level of proof required to show that the work in dispute accrues to craft members under a general Scope Rule may be of interest in a future case, in the present dispute it is immaterial, since both parties agree that there was no violation in regard to notification. Thus, whether the Organization must show that work accrues to its members by custom, history, and practice exclusively; whether it must prove that it has performed the work predominately in the past (that is, showing more than a shared or mixed practice); or whether some other standard must be met is a matter best left for another time.

The only other issue that remains is whether, in meeting on the issue of subcontracting, both Carrier and Organization representatives made "a good faith attempt to reach an understanding" as is required by Article IV. The Organization alleges that Carrier acted in bad faith, failing to rent or lease the necessary equipment and make other accommodations. Carrier, on the other hand, suggests that it was limited by the contractor's unwillingness to provide a backhoe and dump truck without its own operators.

From the record, this Board is unable to determine whether there is any merit to the Organization's charge. It appears that an attempt was made to address the issue, but that it was not met with success.

Based upon the entire record, this Board finds insufficient basis to sustain the Claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1992.