

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

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

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

(1) The Carrier violated the Agreement when it assigned outside forces (A. K. Gillis) to perform track and grade crossing rehabilitation work at Bostick Road Crossing (Mile Post 551) on June 1 and 2, 1987 [Carrier's File 013.31-320(234)].

(2) The Carrier also violated Addendum No. 9 (Article IV of the May 17, 1968 National Agreement) when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above:

'We are hereby filing claim in behalf of Messrs.
J. Davenport, A. E. Walte, J. Jackson, J. R. Moore;
Shreveport, Section and O. P. Turner, P. Stratton,
J. Baylor, Jr., R. Snell; Deramus Yard Extra Gang
and R. Hatcher, Pettibone Operator for twenty-four
hours at their respective straight time rate of pay
and for six (6) hours at their respective overtime
rate of pay on June 1, 1987 and for Messrs. J.
Davenport, J. Jackson and J. R. Moore and A. E.
Walters for twenty-four (24) hours at their respec-
tive straight time rate of pay on June 2, 1987
....'

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 asserts that Carrier violated the Scope Rule and other provisions of the Agreement when it contracted out certain renewal work at the Bostick Road crossing near its Shreveport, Louisiana, operations. Claimants are Track Department employees who performed all of the hand work at crossing renewal. The Claim is for the time spent by three employees of the contractor who operated machinery leased by the Carrier to assist its forces. The Organization also charges the Carrier's actions violated the Seniority Rule as well as Addendum No. 9, which contains Article IV - Contracting Out of the May 17, 1968 National Agreement, and the good faith requirements of the December 11, 1981 National Letter of Agreement regarding the contracting of work. The Organization charges Carrier did not notify of the intended contracting of work nor did it attempt to secure rental equipment for operation by its forces. In addition, the Organization alleges loss of future work opportunities as a result.

Carrier denies the work was contracted out. It asserts, rather, that Claimants actually did the work and were merely assisted by the rental of equipment it does not own. Carrier says the use of such hired equipment has traditionally and historically been the practice on the property. Accordingly, Carrier argues that no Agreement provisions were violated. Moreover, it asserts that all Claimants were fully employed and suffered no lost work opportunities. Carrier cites prior Third Division Award 26084, which involved a very similar situation, in support of its position.

In reviewing the instant dispute, we have confined our consideration, as we must, to those matters raised by the parties on the property. Our examination of the record reveals that the Organization did not raise the issue of notice there. That portion of the Claim may not, therefore, be addressed by this Board.

It cannot be disputed that outside forces performed some portion of the crossing renewal work even if their activities were limited, as Carrier asserts, to an assisting role. The parties dispute, however, whether any of the work was within the scope of the Agreement and reserved to the Organization. In such a situation, the Organization has the burden of proving, by either explicit Agreement language or by persuasive evidence of traditional and historic performance, that the work is reserved to its members.

In Third Division Award 26084 the Board found the Organization failed to satisfy its burden of proof. As we read that decision, the record there consisted of assertions without any supporting evidence. Accordingly, that claim was properly denied. The record here is different. On the property, the Organization produced substantial evidence of past performance of the disputed work as well as the availability of rental equipment that could have been operated by Carrier forces. Carrier did not respond to this evidence. Moreover, Carrier did not support with any evidence its assertion of a traditional and historical practice of augmenting its forces with hired equipment. The only references to such an alleged practice are found in some of

the statements provided by the Organization. These references, however, suggest such activities were neither wide spread nor of long standing duration. On this record, therefore, we find that the disputed work was within the scope of the Agreement. Without Carrier evidence showing a justification for its actions, and there is none in this record, the Carrier's use of outside forces must be found to have violated the Agreement.

The Organization asserts that Claimants have lost a future work opportunity. Carrier denies this and asserts that Claimants were fully employed. The Organization does not dispute that the Claimants were fully employed on the Claim dates. The record contains no evidence of lost earnings by any of the Claimants.


In the absence of unusual circumstances, which are not present in this record, the entitlement to a monetary claim is a separate issue requiring independent proof of loss. Loss does not automatically flow from a finding of Agreement violation. No actual loss has been substantiated herein. Therefore, the monetary portion of the Claim is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

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