

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30032
Docket No. MW-29467
94-3-90-3-396

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 Employes
(
(Union Pacific Railroad Company

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

- (1) The Agreement was violated when the Carrier assigned or otherwise permitted outside forces (Neosho Construction Company) to perform track construction work, i.e., laying track panels, dumping ballast, installing switch ties, construction of switches and other related work at the Ford Auto unloading facility at Mira Loma, California beginning on April 1, 1989 and continuing (System File S-178/890598).
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman prior advance written notice of its plans to contract out the work involved here, in accordance with Rule 52 and the December 11, 1981 Letter of Agreement.
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, California Division Track Subdepartment Track Machine Operator F. Stephens, Track Foreman K. A. Kranda, Extra Gang Laborers J. L. Gutierrez, G. Tso, A. Tso, T. M. Cuverwell and M. F. Dutson shall each be allowed:

'...at his applicable straight time rate three hundred and twelve (312) hours' pay as compensation for loss of work opportunity on regular days of assignment plus sixteen (16) hours' pay at the time and one-half (1 1/2) rate of pay for work on rest days starting on April 1, 1989. This claim is considered to be continuous for future dates for all track construction related work done by Neosho Construction Co. Inc. in behalf of Claimants as the work is still being performed by outside forces. Additionally, in an effort to make Claimants whole for all

losses suffered, we are also claiming that the Carrier must treat Claimants as an employes (sic) who render service on the days mentioned herein qualifying them for vacation credit days, railroad retirement credits, additional insurance coverage and any and all other benefits entitlements accrued because they will become furloughed because contractors are taking their work opportunity.'"

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 employe 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 dispute would appear simply to concern whether or not the Carrier is in violation of the Agreement by the contracting of work in connection with the auto unloading facility in Mira Loma, California. In this connection, the Carrier wrote the General Chairman on three occasions between November 1, 1988 and February 27, 1989, as to its intention to "solicit bids" for various phases of the construction of the facility. The Claim is not related to the overall project but is limited to track construction work.

Submissions to the Board by both parties deal extensively with the question of Scope Rule coverage, the concept of exclusivity as to performance of such work, alleged past practice, and interpretation of the Agreement provisions concerning the contracting of work to outside forces. These arguments have been reviewed by the Board in numerous other Awards and require no further comment here. This is the case because there is an element involved here which is determinative.

This factor has to do with the Carrier's assertion that, while much of the work in preparation for the Mira Loma facility was performed by Carrier forces and/or under the Carrier's control, other portions, including the track construction work in question,

were not under the control of the Carrier. Such assertion was made at each step of the claim handling procedure. As an example, the appeal response of the Assistant Director, Labor Relations stated:

"During conference you were again advised that the work in question and this project were under the control of Ford Motor Company. Ford Motor Company hired the general contractor, Commerce Construction Company. Neosho Construction Company was a sub-contractor for portions of the overall work contracted to Commerce Construction. Neosho was not contracted by Union Pacific but was sub-contracted by Commerce Construction Company for Ford Motor Company."

The Board perceives no convincing contradiction to these assertions in the record of the dispute.

Thus, the essence of the matter is that the work was not under the control of the Carrier and not for its primary benefit (except insofar as it represented a means to obtain additional freight traffic). Third Division Award 24078 is a denial Award in an instance in which "the Board again considers the question of a Carrier's responsibility to the Organization and the employees it represents as a result of work performed by an outside contractor under such contractor's arrangement with a third party." That Award cites a number of other Awards to the same effect. The Board here follows its previous reasoning that the Carrier may not be found in Rule violation in these circumstances.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.