

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30268
Docket No. MW-30049
94-3-91-3-460

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen 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 Agreement was violated when the Carrier assigned outside forces (Brewer and Anderson) to dismantle and recover track materials from the right of way between Durant to Muskogee, Oklahoma, Mile Posts 130.00 and 297.6 on the Oklahoma Subdivision beginning April 17, 1990 and continuing (Carrier's File 900540 MPR).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice 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 in Parts (1) and/or (2) above, Machine Operators N. L. Harjo, J. J. Boyd, B. W. Griffin, B. T. Brown, Trackmen J. C Lee and J. P. Mericle shall each be allowed pay for an equal proportionate share of the total number of man-hours worked by the contractor's forces in the performance of the work cited within Part (1) above, beginning April 17, 1990 and continuing."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 claims Carrier violated the Scope Rule, Rules 1 and 2 of the Agreement, the National Agreement of May 1968 and the "Letter of Good Faith" of December 11, 1981, when it "assigned outside forces to dismantle and recover track materials and failed to furnish the General Chairman with advance written notice." The work at issue involved removal of approximately 166.5 miles of abandoned track on the Oklahoma Subdivision between Muskogee, Oklahoma (MP 130.00) and KOG Junction, Oklahoma (MP 297.6).

In a letter dated December 28, 1989, Carrier advised the General Chairman of the Organization as follows:

"This is to advise of the Carrier's intent to solicit bids to cover the removal of trackage appurtenances on the Oklahoma Subdivision between Muskogee, Oklahoma (MP 130.00) and KOG Junction, Oklahoma (MP 297.6) in conjunction with Company forces. Estimated duration of project will be between six to twelve months.

This is the type of work that has customarily and traditionally been performed by outside contractor's forces. The Carrier has neither the skilled manpower nor the proper equipment to safely and competently undertake and complete this project in a timely manner.

Serving of this 'Notice' is not to be construed as an indication that the work described above necessarily falls within the 'scope' of your Agreement, nor as an indication that such work is necessarily reserved as a matter of practice, to those employees represented by the Brotherhood of Maintenance of Way Employees."

The Organization's claim that Carrier failed to give proper notice of its intention to contract out the aforementioned work as called for by the May 1968 National Agreement is dismissed without further discussion.

At a subsequent conference, to discuss the matter, the General Chairman protested Carrier's actions, asserting that the work in dispute had "always been performed by Maintenance of Way employees." In addition to challenging the adequacy of the December 28, 1989 Notice, the General Chairman submitted that the Carrier had violated the December 11, 1981 "Letter of Good Faith" which states:

"The Carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by Carrier employees.

The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

In late January 1990, the Organization filed a claim alleging that the Carrier was in violation of the "Scope" Rule, Rules 1 and 2 of the Agreement, the National Agreement of 1968, and 1981 Letter of Understanding. Carrier continued to solicit bids for the project. In February, 1990, Brewer and Anderson's bid for the removal and purchase of materials from the abandoned line was accepted.

There is no dispute that the abandoned track in question was purchased by the outside contractor on an "as is where is" basis. As this Board frequently has held, materials purchased and removed from Carrier's dominion and control are under the purchaser's purview. In the instant dispute, Brewer and Anderson contracted to purchase and remove approximately 166.5 miles of track which the Carrier had abandoned. The abandoned track was clearly sold on an "as is where is" basis. Once the contract was executed, Brewer and Anderson bore the responsibility for the removal of their property, and was well within its rights to use its own employees to perform the work in dispute. Carrier thereby committed no violation of the Scope Rule. See Third Division Awards 29873, 12918, 29394, 29559, 29016 and 28488.

Based on the foregoing, this Claim is denied.

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois this 19th day of July 1994.