

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31013
Docket No. MW-30717
95-3-92-3-516

The Third Division consisted of the regular members and in addition Referee Margo R. Newman, when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Southern Pacific Transportation Company
((Eastern Lines)

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

- (1) The Agreement was violated when the Carrier assigned Cameron County forces to install a 5' x 130' drainage pipe at Mile Post 262.70 between Harlingen and Edinburg, Texas on May 7, 8, 9 and 10, 1991 (System File MW-91-80/501-51-A SPE).
- (2) The Agreement was further violated when the Carrier entered into the above-described contracting transaction without giving the General Chairman at least fifteen (15) days' advance written notice of its plan to do so as set forth in Article 36.
- (3) As a consequence of the violations referred to in either Part (1) and/or Part (2) above, B&B Foreman A. Diaz, B&B Carpenters L.N. Ward, M.W. Woytasczyk, J.D. Ebner and furloughed Machine Operators R.E. McKinley and H.R. Magallanes shall each be allowed thirty-two (32) hours' pay at their respective straight time rates of pay and eight (8) hours' pay at their respective time and one-half overtime rates of pay."

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.

Carrier and the County of Cameron entered into an agreement whereby Carrier allowed the County to dig across its property to upsize existing pipe to handle the drainage problem in the area caused by increased farm loads. The County asked for the Carrier's help, and Carrier supplied the pipe, a Track gang to remove the track, and B&B personnel to install bands on the pipe and help its placement. The work was performed between May 7 and 10, 1991 as a joint effort between six County employees and the Carrier forces mentioned, with B&B Bridge Inspectors present to inspect the pipe.

Correspondence on the property reveals Carrier's position that since upscaling of pipe was involved, and not repair or cleaning, it was the responsibility of the County to install and pay for the pipe. Carrier argues that it had no control over the project or who was to perform the work, it was not done for its benefit, it did not pay for the work, and that no contracting out occurred necessitating notice to the Organization. Carrier further argues that the Organization has failed to meet its burden of proving that the work in issue was scope covered. The Organization claims that the work was done solely for the benefit of Carrier because standing water was causing damage to the dump and road bed, and that Carrier's statements cannot be relied upon since it initially denied supplying the pipe to the County. The Organization argues that Carrier cannot rely upon an agreement with a third party government agency as an excuse for violating the Agreement.

The determinative issue is whether the disputed work of installing the pipe was contracted out under Carrier's control. This Board has consistently held that where work is not performed at Carrier's instigation, nor under its control, is not performed at its expense or exclusively for its benefit, the Organization cannot claim improper contracting out in violation of the Scope rule. Third Division Awards 23422, 20644, 20280. In reviewing this case, the Board concurs with Carrier that its agreement permitting the County access to dig across its property and its supply of material and labor to aid in the pipe installation effort does not constitute contracting out work as that concept is contemplated within the meaning of the Scope rule. We find no evidence that Carrier instigated or retained sufficient control over the disputed work performed by County employees, or that it was performed at Carrier's expense or exclusively for its benefit. Third Division Award 26082. Moreover, there is no evidence to support the Organization's claim that this work was done because standing water was causing damage to the dump and road bed, or that Carrier would have undertaken the project without County initiation. Third Division Award 26816.

Having found that Carrier did not contract out the work in issue, it follows that it was not under any obligation to provide

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the General Chairman with notice under Article 36. Third Division Awards 26816, 24078, 28248, 26082, 19957.

AWARD

Claim denied.

ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of July 1995.