

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31234
Docket No. MW-30800
95-3-92-3-602

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
((Western Lines)

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

- (1) The Agreement was violated when the Carrier assigned outside forces to construct a Shoo Fly at Cherry - 22nd Street in Tucson, Arizona commencing February 7, 1991 (Carrier's File MofW 152-1166 SPW).
- (2) The Carrier also violated 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, Foreman R. W. Sholl, Truck Driver C. A. Abraham, Machine Operator F. P. Saldivar and Laborers A. H. Luna, L. Davis, Jr., A. O. Langston and F. Valenzuela shall each be allowed two hundred seventy-two (272) hours of pay at their respective straight time 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 Arizona Department of Transportation Highways Division (State) entered into an agreement to construct a storm water drainage system, which required the laying of pipe underneath Carrier's track to realign a channel. In order for the State to construct the wash culvert, a shoo-fly was built to temporarily realign Carrier's track. The agreement stipulated that all labor, material, tools and equipment for the construction of the culvert and shoo-fly on Carrier's property would be furnished by the State, whether by competitive bid contract or otherwise. Carrier agreed to remove and replace the tracks over the area under construction, the actual cost of which was to be reimbursed by the State. The agreement also specified that, as part of the State's flood control project, the construction in issue was of no ascertainable net benefit to the Carrier.

The Organization argues that it is undisputed that Carrier's track forces previously performed identical work to that contracted out in this case, which is Scope covered, and failed to give advance notice as required by Article IV. It asserts that Carrier failed to meet its burden of proving lack of control, which is an affirmative defense. The Organization contends that Carrier's repeated notice violations are sufficient to subject it to an award of damages. The Carrier asserts that it was within its rights to enter into an agreement with the State, it did not contract out any work, it had no control over who was going to perform the work, and it did not pay for or benefit from the work. It argues that under such circumstances, the work in issue is not covered by the Scope Rule, and does not require advance notice for contracting.

The determinative issue is whether the disputed work of constructing the shoo-fly at Cherry - 22nd Street in Tucson, Arizona, was contracted out under Carrier's control. Third Division Awards 30944 and 30976, relied upon by the Organization, do not raise this issue. 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 contracting is not a violation of the Scope Rule of the Agreement. Third Division Awards 25011, 23422, 20644, 20280, 20156. In reviewing the record in this case, the Board agrees with Carrier that its agreement with the State 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 any control over the shoo-fly construction disputed in this case, or that it was performed at Carrier's expense or exclusively for its benefit. Third Division Award 26082.

The record reveals the opposite to be true. Moreover, there is no evidence that Carrier would have undertaken this project absent the State's request and need to lay pipe and realign a storm drainage channel on Carrier's property. Third Division Award 26816.

Having found that Carrier did not contract out the work in issue under the terms of the Agreement, it follows that it was not under any obligation to provide the General Chairman with notice under Article IV of the May 17, 1968 National Agreement. Third Division Awards 28788, 28786, 28248, 26816, 26082, 24078, and 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 1st day of November 1995.