

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31603
Docket No. MW-30825
96-3-92-3-648**

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

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (CW&W) to repair track and renew a road crossing on the Port Neches Belt Line on October 25, 26, 29, 30 and 31, 1990 [Carrier's File 013.31-320(444)].
- (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 Norbert Hoose, Machine Operator Albert Clark and Laborers David Stevenson and R. S. Krebs shall each be allowed pay at their respective rates of pay for an equal proportionate share of the three hundred twenty (320) man-hours expended by the outside forces."

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.

On December 19, 1990, the Organization submitted a claim on behalf of the aforementioned Claimants alleging that Carrier assigned outside forces (CW&W) to repair track and renew a road crossing on the Port Neches Belt Line, work which members of the Organization had "traditionally and historically" performed. Specifically, the Organization asserted Carrier had violated Agreement Rules 1, Scope; Rule 2, Seniority; Addendum No. 9 Article IV-Contracting Out of May 17, 1968 and the "Letter of Understanding" of December 11, 1981 on contracting.

Carrier denied the claim, maintaining that the track in question did not belong to the Carrier, nor did Carrier have "any knowledge" as to any derailments or track repairs performed on another company's track. Carrier further maintained that: "Claimants did not suffer any loss of work or suffer any loss of work opportunity."

In further correspondence, the Organization reiterated its contention that CW&W had performed work, on Carrier property, which belonged to members of the Organization. Carrier continued to deny the claim, maintaining that the work at issue was not performed on Carrier property, nor did it have any knowledge of a derailment on any other property.

From the outset, Carrier maintained that the work in dispute was not performed on Carrier owned property. As the moving party, it was incumbent upon the Organization to prove, through a preponderance of record evidence, that the work at issue was actually performed on Carrier property. If that burden were met, it remained for the Organization to prove that the work in question had historically been performed by members of the Organization.

A careful review of the record demonstrates, and we find an irreconcilable difference of material fact concerning the location of the disputed work and whether it was performed on property under the dominion and control of the Carrier. As an appellate board, we are unable to resolve those conflicts. The factual stalemate

redounds to the disadvantage of the Party with the burden of persuasion on the disputed fact, in this case the Organization. Therefore, we must dismiss this claim for failure of proof.

AWARD

Claim dismissed.

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 29th day of August 1996.