

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31650
Docket No. MW-31011
96-3-92-3-947**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Elgin, Joliet and Eastern Railway 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 METRA employees to haul and grade stone on its property at Smith Road crossing near St. Charles, Illinois on May 7, 1991 (System Files BJ-7&8-91/UM-8&9-91).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants G. Haggerty and K. DeCamp shall each be allowed eight (8) hours' pay at their respective time and one-half rates."

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.

In 1991, METRA planned a railroad excursion for approximately 400 guests between Chicago and Spaulding, Illinois, in conjunction with its hosting of Operation Lifesaver. The Carrier issued track warrants for a specific length of time to permit METRA to operate over a portion of its track. During the trip, the train was stopped at Smith Road, a rural location on the Carrier's track, where the guests were met by buses which transported them to lunch at a restaurant in St. Charles. In order to enable the buses to properly maneuver, METRA spread additional gravel in an area adjacent to the track and southeast of the railroad crossing. METRA also provided wooden platforms for ease of tour participants in making the transition from train to bus. The train remained parked at Smith Road until the participants returned from lunch, and the walkways were removed by METRA when the train departed the area.

This claim involves the hauling and grading of gravel performed by METRA employees at the Smith Road location. The Organization argues that this work, regardless of why it was performed, is contractually reserved to its employees who have customarily and historically performed work of this nature on Carrier's right of way. It contends that the Carrier must have known of the performance of this work, and cannot claim lack of control for work performed on its property from which it derived a benefit. The Organization requests the granting of a monetary remedy to Claimants, a crane operator and truck driver, despite the Carrier's "fully employed" defense, citing Third Division Awards 17224, 29232, 30035, 30867.

The Carrier argues that no contracting out occurred in this case, relying upon Third Division Award 31013. It contends that it did not authorize METRA employees to perform any work, was not aware of its performance, did not enter into any contract concerning this work, it made no payment nor derived any benefit from it, and it exercised no control over the work. The Carrier states that the entire project was within METRA's control. It also argues that the work of transporting and spreading gravel is not reserved exclusively to the Organization's employees nor traditionally performed by them. The Carrier asserts that no pecuniary loss was suffered by any Claimant, thereby negating the appropriateness of any monetary damages. Third Division Award 29741.

The Organization's arguments raise two issues in this claim. First, whether the disputed work was contracted out in violation of the Scope rule, and second, whether

the Carrier is responsible for applying the terms of its Agreement to work performed on its right of way regardless of its knowledge of, or control over, such work.

With respect to the first 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 Organization cannot claim improper contracting out in violation of the Scope rule. Third Division Awards 31013, 23422, 20644, 20280. We find no evidence in this record that the Carrier instigated, controlled, paid for, or benefited from the work in issue. Thus, we find no improper contracting out in this case.

With respect to the second argument raised by the Organization, the Board finds no evidence to support its contention that the Carrier knew about the performance of the work in issue. Prior knowledge that a train would be stopped on its line for a period of time, and the issuance of a track warrant to operate over its tracks, does not prove that the Carrier was informed by METRA that it intended to apply additional gravel near Smith Road to facilitate bus movement in the area. From the record we are unable to conclude that the Carrier derived any ascertainable benefit from this additional gravel located adjacent to a remote section of its track which is not normally used as a passenger loading area. This fact differentiates this case from the situation in Third Division Award 25402, where a majority of the Board held that the unauthorized performance by others of a function which needed to be performed by Carrier's employees in any case, bestowed a benefit on the Carrier which should have been transferred to the employees under the Agreement.

The Board concludes that the Organization has failed to meet its burden of proving that a contracting out occurred, or that the Carrier had knowledge of the performance of the work in issue and benefited from it.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders
than 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.