Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36829
Docket No. MW-35978
04-3-00-3-71

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company [former 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 (Burtgon Construction Company) to perform routine Track Sub-department work (excavation and construction work) on road crossings on the Sacramento Division commencing on February 25, 1997 and continuing (Carrier's File 1086150 SPW).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work in Part (1) above in accordance with Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimant E. S. Haro, J. D. Freedle, R. J. Rodriguez, W. C. Salinas, R. P. Binder, A. L. Castillo, L. Galindo, A. Sanchez, L. Suarez and L. E. Acevedo shall each:

'be paid their proportionate share of the total man hours worked by Burtgon Construction Company employes. The total hours, as of the date of the filing of this claim, are two hundred and eighty (280) straight time man hours

and one hundred fifty-two and one-half (152.5) time and one half [overtime] man hours. Payment shall be at their respective rate of pay, commencing on February 25, 1997 *and continuing until the violations of the current* Agreement no longer exists. Because this is a continuing claims, all additional hours and days can no doubt be determined by a joint review of the service contract between Southern Pacific Transportation Company and Burtgon Construction Company. The above compensation shall be in addition to any compensation they may have already received.'"

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 were given due notice of hearing thereon.

The claim alleges that, without prior notice, the Carrier contracted out ". . . routine Track Sub-department work (excavation and construction work) on road crossings on the Sacramento Division commencing on February 25, 1997 and continuing. . . ."

In a Letter of Agreement dated May 3, 1985, the parties agreed with respect to the Carrier's ability to contract out paving or repairing crossings:

* * *

"The present procedure now requires a 15-day advance notice as required under the May 17, 1968 National Agreement, advising the

> Brotherhood of Maintenance of Way Employes that the Company intends to contract out for the paving or repaving of a street crossing(s) with a commitment from the Company that any involved track work would be performed by Maintenance of Way employes.
>
> This procedure generates a generous quantity of repetitious paper work; therefore, it is agreed to by the parties that effective May 6, 1985, the paving or repaving of street crossings by contractor employees may be performed without the written notification procedure provided for in the May 17, 1968 National Agreement (15 day advance notice) with the understanding that Company Maintenance of Way forces will perform any related track work in connection with the street crossings."

* * *

Thus, by agreement, with respect to "the paving or repaving of street crossings," the Carrier was not obligated to give prior notice to the Organization of its intent to contract out such work.

The Organization advises us in this case that it is not claiming the paving or repaving work performed by the contractor's forces. This case is therefore not about that aspect of the work performed by the contractor's forces on the dates in dispute. However, the May 3, 1985 Letter of Agreement contains ". . . a commitment from the Company that any involved track work would be performed by Maintenance of Way employes" and that "Maintenance of Way forces will perform any related track work in connection with the street crossings." Therefore, the question in this case is whether the Organization demonstrated that the contractor's forces performed ". . . related track work in connection with the street crossings." We find that the Organization made that demonstration.

Statements from Claimants Binder, Castillo, and Suarez have been submitted in this record. Those statements demonstrate the claim has merit.

According to Claimant Binder [sic]:

> "I saw these men working on Southern Pacific Rail Road tracks. They took out the pavement with back[hoe]. They moved rail out of

track. I remember this because if I was not alert the rail might have hit us. They also through rail plates into an endloader. They dug down prety close to where you are sopose to . . . [T]hey (Burton Construction Co) worked other places besides 8 Mile Road on the dates in question."

According to Claimant Castillo:

". . . [O]n the date of April 21, 1997 the work in question done by the contractor. What I saw was the contractor do was removal of asphalt from between the rail, digging in the new roadbed and installing the new panels . . . ."

According to Claimant Suarez [sic]:

". . . [L]ocated on the Sacramento Division Western Seniority district the work was done in April of 1997. . . . [T]heir job was to put Black top on sides walks only, they also did cut rails & took ties out of the rails . . . ."

Again, the Organization does not claim the paving and repaving work. The May 3, 1985 Letter of Agreement states that "Maintenance of Way forces will perform any related track work in connection with the street crossings." The statements of Claimants Binder, Castillo, and Suarez sufficiently show that the contractor's forces performed work beyond paving and repaving. According to those statements, the contractor's forces ". . . moved rail out track . . . through [sic] rail plates into an endloader . . . installing new panels . . . and cut rails & took ties out of the rails . . . ." Under the May 3, 1985 Letter of Agreement, that was Maintenance of Way work.

In effect then, because the contractor's forces performed work that the Carrier committed in the May 3, 1985 Letter of Agreement would be performed by Maintenance of Way forces, the Carrier contracted out that work to the contractor without giving the Organization prior notice that it was going to do so. Article IV requires notice "[i]n the event a carrier plans to contract out work within the scope of the applicable schedule agreement." Aside from the fact that the work described in the Claimants' statements was classic scope covered work, the Carrier's commitment in the May 3, 1985 Letter of Agreement that such work would be

performed by Maintenance of Way forces makes it scope covered work. Notice of the contracting of that work was therefore required, but was not given. Further, because the contractor's forces actually performed that work, the Carrier violated the specific "commitment" in the May 3, 1985 Letter of Agreement that Maintenance of Way forces would perform the related track work. A violation has been shown.

The Carrier's argument that the above quoted statements do not sufficiently demonstrate that the contractor improperly performed the work or that the work was not sufficiently identified is not persuasive. Read together, those statements adequately show that the contractor's forces performed "related track work" in connection with the paving and repaving work.

The supervisor's statement provided by the Carrier does not sufficiently refute the statements of the employees concerning the performance of related track work by the contractor's forces. While the supervisor's statement shows that the contractor's forces performed paving and repaving work, there is no denial or refuting of the specific assertions found in the employees' statements that the contractor's forces performed related track work in addition to paving and repaving work. There is no question that the contractor's forces performed paving and repaving work. That is not the issue. The issue in this case concerns the related track work performed by the contractor's forces beyond the permissible paving and repaving work. The extent of the improperly performed work will be part of the remedy and that question will be for the parties to sort out in the first instance. However, reading all of the statements provided to us, we do not find this to be a case where there is a factual dispute over what occurred which would cause a denial of the claim.

The fact that the Claimants may have been working at the locations in dispute and performed some related track work does not change the result. By the terms of the May 3, 1985 Letter of Agreement, Maintenance of Way forces were to perform all of the related track work, not just some of it. The Claimants were denied work opportunities when the contractor's forces performed the related track work.

The Carrier's assertion on the property that it is not required to piecemeal a project also does not change the result. Although the Carrier correctly states the principle for cases where work is properly contracted out, the May 3, 1985 Letter of

Agreement requires the peicemealing of this kind of work. There, the Carrier gave the Organization ". . . a commitment . . . that any involved track work would be performed by Maintenance of Way employes." The parties therefore agreed to piecemeal this kind of project.

The Carrier's argument concerning exclusivity also does not change the result. Exclusivity is not a defense in contracting out disputes. See Third Division Award 32862 and Awards cited therein (". . . [U]nder Article IV, exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims"). In any event, the May 3, 1985 Letter of Agreement guarantees that Maintenance of Way forces will perform the track related work.

We note that the Carrier submitted certain documents to the Board which were not part of the handling on the property. We have therefore not considered those documents.

With respect to the remedy, the claim seeks that the Claimants ". . . be paid their proportionate share of the total man hours worked by Burtgon Construction Company employes." That is clearly excessive. Under the May 3, 1985 Letter of Agreement, the Carrier had the right to contract out paving and repaving work. Compensating the Claimants for all of the work performed by the contractor's forces is therefore not warranted and would be inconsistent with the May 3, 1985 Letter of Agreement. The Claimants can only claim entitlement to the "related track work" which was improperly performed by the contractor's forces. From the record before us, we cannot ascertain how much of that related track work was improperly performed by the contractor's forces. We shall therefore remand this matter to the parties to attempt to ascertain the amount of "related track work" performed by the contractor's forces for the dates covered by the claim. The Claimants shall be compensated for those hours.

Again, with respect to the remedy, the fact that the Claimants may have been working on dates the contractor's forces performed the work is immaterial. The Claimants lost work opportunities. In order to make the Claimants whole, they shall be compensated for those losses.

The Board shall retain jurisdiction for any disputes which may arise after the parties attempt to determine the amounts due the Claimants.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of January 2004.