

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 37313  
Docket No. MW-36122  
04-3-00-3-296

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 (J. G. Scott & Sons Railroad Contractor) to perform routine Track Subdepartment work (excavation and construction work) on road crossings on Track Nos. 1 and 2 between Mile Post 820 and 827 in the terminal trackage limits at El Paso, Texas beginning January 25, 1999 and continuing. (Carrier's File 1183648 SPW)
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman 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 violations referred to in Parts (1) and/or (2) above, Claimants K. L. Peveto, A. J. Bernal, E. E. Ortiz and J. G. Gutierrez shall now each ‘... be paid additional compensation of the proportional share of the total amount of straight time and overtime hours worked by the contractor \*\*\*beginning January 25, 1999 and continuing.’”

**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.

According to the instant claim filed by the Organization, the Carrier utilized contract forces during the period of January 25 through January 30, 1999 to remove and replace 12 mainline crossings on Tracks 1 and 2 between Mile Post 820.0 and 827.0 within the terminal trackage limits at El Paso, Texas. The Organization contends that this was scope covered BMW work and that advance written notice should have been provided.

In support of its claim, the Organization argues that the work in dispute is governed by Appendix "P" of the Southern Pacific (Western Lines) Agreement. Effective May 1, 1972, Appendix "P" provided that the yard limits of the El Paso Terminal would be considered terminal trackage. Within those terminal trackage limits, it was agreed that track maintenance would be performed by "terminal gangs" consisting of employees of both Pacific Lines and T & L lines seniority. The Organization contends that the road crossing renewal work at issue was track maintenance, and, because it was performed within the El Paso terminal limits, the Claimants - furloughed terminal gang employees - were entitled to the work.

The Carrier advanced numerous arguments in its defense but we need not address them all because its threshold contention is dispositive of the instant claim. The Carrier argues that Southern Pacific (Western) lines employees do not have the right to perform road crossing rehabilitation work on territory that is no longer covered by the Southern Pacific (Western) Lines Agreement. The Carrier contends

that contractor forces performed work on former T & L trackage which, effective January 1, 1998, came under the purview of the Missouri Pacific Agreement. Because the work in question was on T & L trackage no longer subject to Appendix P of the Southern Pacific (Western) Lines Agreement, the work was not, in the Carrier's view, contractually reserved to the Claimants.

After this material fact was put in dispute by the Carrier, the Organization provided no persuasive evidence that the outside forces had in fact performed the claimed work on territory governed by the Southern Pacific (Western) Lines Agreement. On the contrary, the Organization in its June 3, 1999 appeal of the claim stated:

"Contrary to Mr. Napier's contention the above listed work was not confined to the T & L trackage as the above statement would indicate. A careful review of the Map provided will show that the trackage in question is not exclusive to the Eastern Lines nor is the [Missouri Pacific] the predominate agreement. As this track is shared under the Western and Eastern Line and governed under the El Paso Agreement, the Carrier is clearly in violation of that Agreement...."

As the moving party, the Organization bears the overall burden of persuasion; it has the obligation to prove the elements necessary to make out a prima facie claim. By tacitly acknowledging in its appeal that the work was performed on T & L trackage and failing to identify any portion of the work that was performed on the Southern Pacific (Western) Lines, the Organization failed to meet its burden of proving that employees from the Southern Pacific (Western) Lines had a claim to the work. Accordingly, the claim must be denied.

AWARD

Claim denied.

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**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 21st day of December 2004.**