Award No. 13318
Docket No. MW-13267

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Hamilton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when, without benefit of notice to or discussion and agreement with the employes, it assigned or otherwise permitted forces outside the scope of the Agreement to perform the work of renewing highway crossings at eight (8) locations * in Joplin, Missouri.

(2) Track Foreman T. Roath and Trackmen C. M. Goodson, H. A. Griner, V. D. Williams, W. H. Pope, J. W. Axtell, Marquis and George Dutcher each be allowed eight days' * * pay at their respective straight-time rates because of the violation referred to above.

*Broadway at Railroad Avenue
4th Street at Porter
Tenth Street between Byers and Moffett
Moffett Avenue, North of 10th Street
Main Street, South of 10th Street
Joplin Avenue, between 13th and 14th Streets
Joplin Avenue, between 10th and 11th Streets
12th Street and Byers Avenue.

**This is a conservative estimate of the amount of time which claimants would have consumed if they had performed the subject work.

EMPLOYES' STATEMENT OF FACTS: Through an exchange of correspondence between the Carrier's Division Engineer and the Director of Public Works for the City of Joplin, Missouri, the work of renewing eight (8) highway crossings was contracted to the City of Joplin, Missouri, and the City of Joplin promptly sub-contracted the work of the Independent Gravel Company.

Work of installing and repairing highway crossings has traditionally and customarily been assigned to and performed by track forces under the supervision of a track foreman.

The claimant employes were available, fully qualified and could have efficiently performed the subject work, having theretofore performed work of a similar character.

". . . The work you refer to is the type of paving which has been done for forty years to my personal knowledge at Joplin without any previous complaints."

The Chief Engineer went on to point out that:

"We have neither the equipment nor the facilities for the mixing of hot asphalt nor for its application, and it is physically impossible for us to handle this phase of the crossing work with our forces."

The Chief Engineer's first statement was never denied by the Organization.

With respect to the Carrier's lack of equipment and facilities for the mixing and application of hot asphalt mix, employes of the Maintenance of Way class or craft have never been used to apply hot asphalt mix, except as mentioned above. They have, however, been used to apply cold mix asphalt for patching purposes. In these circumstances the Carrier's small vibratory equipment is satisfactory and accomplishes the desired result, but where a better quality surface is required, the Carrier has contracted such work to outside companies.

Thirdly, had the disputed work been reserved by agreement to the Maintenance of Way class or craft and had the Carrier been equipped in this instance to perform the work in question, Maintenance of Way employes other than claimants would have been utilized to perform such work. In other words, the claimants named by the Organization are improper claimants.

The track work of preparing the crossings in question for the hot asphalt topping was performed with regular track forces in line with the usual practice. If employes of the Carrier had been utilized to perform the disputed work, two Special Equipment Operators would have been used, and not the claimants. The claim should be denied for this reason alone, if for none other.

Fourth, the claimants in the instant dispute were on duty and under pay during the period in question and there has been no showing that such claimants suffered a monetary loss as a result of the complained of incident.

Fifth, there is a basic procedural defect in this case. While handling the dispute on the property, the only date specified in the Organization's claim was October 3, 1960, which is the date the Organization contends that the Carrier authorized the contracting of crossing improvements at eight locations in the City of Joplin. The days or dates for which monetary amounts are claimed are left to speculation and conjecture. See Award 10392 (Stark).

In these circumstances the instant claim before the Board has neither merit nor Agreement support and the Board is requested to so find. It is requested that the Board find in favor of the Carrier and deny the Organization's claim in its entirety.

(Exhibits not reproduced).

OPINION OF BOARD: The initial issue raised in this case is the argument of the Carrier that the claim presented to the Board is at variance with the claim presented on the property. We have examined the language involved and we hold that the Carrier was put on notice of the nature of the claim and that such discrepancies which may exist are neither material nor significant.

The claim presented on the property fully advised Carrier of the violation charged and gave sufficient information to allow the Carrier to properly defend against the alleged violation.

The basic question to be determined in this case, is whether or not this is a contracting out case.

The city adopted declarations of necessity requiring the renewal of certain street crossings on Carrier's property.

The record indicates that the Carrier and the city agreed that the city would supervise the work involved, and that a contractor, upon whom both the city and the Carrier agreed, would actually perform the work. The railroad agreed to pay the cost of the operation.

It appears to us, that under these circumstances, the city acted actually as an agent for the railroad. The railroad paid the bill and the city made the specific arrangements to have the work performed. If this type of situation were allowed to continue uncontrolled, the Carrier could conceivably contract out its entire operation. We hold that this type of agency agreement constituted a contracting out case. The determination of this question of fact, seems to us to be the controlling issue in the instant case.

Having determined that this is a case of contracting out, we do not need to go into the merits of the various arguments advanced by both parties, in view of the February 12, 1952 Agreement. That Agreement provided for a conference between representatives of the Railway and representatives of the Brotherhood before work is contracted. This situation requires a sustaining award. Cf. Awards 3215, 4888, 5041, 5848, 6199, 6645, 7060, 7199 and 11984,

We are of the opinion that the named employes are entitled to compensation at their individual straight time rate of pay for an amount of hours actually consumed by the outside contractors in the performance of this work, all as per the records of the Carrier.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1965.