

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19724
Docket Number MW-19597

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation Company (Pacific Lines)

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

(1) The Agreement was violated when, without prior notice to the General Chairman, outside forces were used June 4, 5, 8, 9 and 10, 1970 to clean debris from track and right-of-way between Planeport and Newman, New Mexico (System File MofW 152-733).

(2) Extra Gang Foreman J. W. Conyers and Laborers Ricardo Jimenez, Francisco Aguirre and Abraham Jimenez each be allowed forty (40) hours' pay at their respective straight time rates because of the aforesaid violation.

OPINION OF BOARD: Claimants are Extra Gang Foreman and three laborers. The Petitioner contends that Carrier violated the Agreement when without prior notice to the General Chairman, as required by Article IV of the May 17, 1968 National Agreement, it contracted the work of cleaning debris from the track right-of-way between Planeport and Newman, New Mexico. Contractors' forces were used to accomplish the work on June 4, 5, 8, 9, and 10, 1970.

The Carrier, while conceding that it did not give the notice required by Article IV, denies any liability to Claimants. On the property, Carrier initially raised the argument that the work in question was performed by contract "due to an emergency", but failed to support this contention with any evidence. Carrier further argues that the Scope Rule of this Agreement has repeatedly been found to be general in nature, and does not reserve the work in question exclusively to the employees covered by the Agreement. Carrier persuasively argues that Carrier's right to contract out work was carefully preserved by Article IV;

"Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out...."

In a series of Awards, starting with 18305, we have held that the phrase in Article IV "work within the scope of the applicable schedule agreement" does not require that the work be exclusively reserved to employees covered by the Agreement. We reaffirm this reasoning. We have found in an earlier case (Award 7583) that the work in question has been performed by employees covered by this Agreement (but not necessarily exclusively).

Carrier contends that no monetary damages have been proven by Petitioner. No mention of this issue on the property is evidenced by the record. In a related case, we dealt with this issue (Award 13349):

"The burden is upon employe to show what his loss has been. But upon showing that he has sustained a loss of certain work and what that work was he has overcome this burden. If the Carrier wishes to show in mitigation that the employee received other income, the burden of proof is upon the Carrier. Further, in a case such as this where the employee could have done the work at more than one time the Carrier must show that the employee was employed at all times when he could reasonably have done the work."

Since Carrier has presented no evidence on the property that Claimants were employed during the contractor's activities, we must reject Carrier's contention with respect to Part 2 of the Claim (See Awards 18030, 19028 and 19578).

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee 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 involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. G. Killen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1973.