

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19957
Docket Number MW-19922

Burl E. Hays, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(The Denver and Rio Grande Western Railroad Company

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

(1-a) The Agreement was violated when the Carrier assigned the work of installing two culverts between Mile Posts 322 and 323 to other than Maintenance of Way forces.

(1-b) The Agreement was further violated when the Carrier failed to give General Chairman Fraser written advance notice of its intention to assign this work to outside forces as it is required to do under Article IV of the May 17, 1968 National Agreement (System File D-9-59/MW-11-71).

(2) Each claimant* be allowed pay at his respective straight time rate for an equal proportionate share of the total number of man hours (768) expended by outside forces in the performance of this work.

*A. T. Spicer	R. N. Westbrook
Don Robinson	C. V. Landers
O. S. Dunbar	M. C. Laman
F. C. Cesario	L. E. Laman
R. R. Zerfes	J. K. Kirby
P. H. Kirscht	A. Sandoval
L. T. Wells	L. O. Blake
L. L. Richie	D. Pisarosyk
J. J. Jeuch	P. C. O'Brien
J. F. Kiefer	J. A. Otteson
E. A. Elving	F. O. Curtis

OPINION OF BOARD: There is no dispute in connection with the facts in this case. When a portion of Interstate Highway I-70 near Wolcott, Colorado, was constructed by the Colorado State Department of Highways it created a drainage problem and necessitated the installation of five culverts (two of which are involved here) to protect Carrier's tracks.

Claimant contends the Agreement was violated when Carrier "assigned the work" of installing these culverts "to other than Maintenance of Way forces."

What happened is that Carrier entered into an agreement with the Department of Highways providing that this work be done at the expense of the State. The Department of Highways then contracted the work to Pascal Construction Company. Carrier furnished flagging service and inspectors, also at State expense.

The controlling issue here is whether or not this work was "assigned out" or "contracted out" by Carrier in violation of Rules 1,2,3 and 4 of the Agreement of January 1, 1969.

Had the Carrier violated the aforementioned Rules then the other questions raised would be given due consideration. However, we find that Carrier had no contract or agreement with the contractor who placed these culverts, and that Carrier's agreement with the Colorado State Highway Department to have this work done at the expense of the State was justified and in no way violated the Agreement.

In support of our position we quote from Award 15906 (Referee McGovern) which we believe to be directly in point with our conclusion:

"We cannot find a violation of the Scope Rule in a situation when the State conceives, directs and is responsible for the work in question. The Carrier did not enter into a contract in this case. It was the State Highway Department."

Furthermore, the work done here was under the control of the State at all times -- not under control of the Carrier. The Carrier, at the request of the State Highway Department, granted a license to the State to install the culverts which were necessary to protect Carrier's tracks because of the drainage problem caused by construction of the State's new highway. We refer you to the following Awards of this Division which have adhered to the principle that the Agreement or Scope Rule applies only to that work over which Carrier has control: 8076 by Bailer; 19381 by Hayes; and 15906 by McGovern.

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 Employees involved in this dispute are respectively Carrier and Employees 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 not violated.

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Claim Denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1973.