NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26212

THIRD DIVISION Docket Number MW-26127

John E. Cloney, Referee

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

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

1. The Carrier violated the Agreement when it assigned and/or permitted outside forces to perform roadbed construction and ditching work at Mile Post 13 beginning February 14, 1983 (System File MW-83-28/382-38-A).

2. The Carrier also violated Article 36 when it did not give the General Chairman advance written notice of its intention to contract said work.

3. Because of the aforesaid violations, furloughed Laborer Drivers J. J. Sims, C. L. Carmouche and V. R. Delgado, Jr. and Machine Operators D. W. Stansberry, T. A. Plank and R. L. Warren shall each be allowed pay at their respective rates for an equal proportionate share of the total number of manhours expended by outside forces in performing the work referred to in Part (1) hereof."

OPINION OF BOARD: Article 36 of the Applicable Agreement states in part:

> "In the event this carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith."

On December 11, 1981, Charles I. Hopkins, Jr. of the National Railway Labor Conference wrote O. M. Berge, President of the Brotherhood of Maintenance of Way Employes stating:

> "The carriers assure you that they will assert good-faith efforts to reduce the evidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable. . . .
>
> The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to . . . ."

The Organization complains Carrier did not give advance written notice prior to allowing outside forces to perform the track construction/work at issue here.

Carrier contends the work was not under its control as the premises were leased to Coastal Material Company. In support, Carrier submitted an undated document entitled "Industrial Track Agreement" during the handling on the property. The document recites that:

> "The parties hereto desire to evidence their understanding and agreement with respect to the construction, maintenance and operation of industrial track facilities. . . ."

and states:

> "NOW THEREFORE, in consideration of the agreements hereinafter contained . . . it is mutually agreed that said Track shall be constructed, maintained and operated under the following terms, covenants and conditions."

The Agreement then defines the rights and obligations of the parties, including Carrier's agreement to operate the track "for the purpose of serving" Industry (i.e. Coastal Material Co.) and reserves its right to use the track when not to the detriment of Industry. In addition to numerous other provisions, the Agreement requires that upon termination "Industry shall promptly remove said facilities from Railroad's premises and restore said premises at its own expense and to the satisfaction of Railroad." It also allows Carrier

to "rearrange or reconstruct the Track or modify the elevation thereof whenever necessary or desirable in connection with the improvement of its property or changes in its tracks at or near the location of said Track . . . ."

The Agreement provides, in Section 12:

> "In order for Industry to properly assume responsibility for and control cars placed on said track Railroad hereby leases to Industry for construction, maintenance and use of said Track the premises of Railroad underlying Industry's portion of said Track."

On November 30, 1982, Carrier executed a "Contractors Right of Entry" allowing W. T. Byler Company to enter certain parts of its property for the purpose of construction of trackage.

Carrier asserts 7116 feet of industrial track was constructed by W. T. Byler Construction Company on behalf of Coastal Material Company to serve that firm's storage and distribution yard. Carrier concedes no Notice of Intent to Contract Work was given. It argues that by virtue of the lease Carrier did not have dominion and control of the premises and, since the construction was by and for another Company, the Agreement did not apply and no notice was necessary.

Carrier also now argues that even if the work had been in control of Carrier, the Organization has not established exclusivity and must do so to prevail because the Scope Rule is general. In furtherance of this position Carrier had attached to its Ex Parte Submission nine letters dated between 1968 and 1978 from Carrier to the Organization regarding contracting out of work. We find no suggestion that the exclusivity argument was ever raised, or that the nine letters were ever relied upon, in the handling on the property.

Our attention has been directed to several Awards of this Board dealing with the issue of whether work performed on a facility owned by Carrier, but leased by it to another, is within the Scope of the Agreement. We consider the issue important. Accordingly we will examine in some detail a selection of those cases.

In Third Division Award 19253 Carrier's Union Station Annex Building in Kansas City, Missouri, had been leased to a supply company whose use had no connection with Carrier's operation. The building suffered extensive fire damage and Carrier contracted out the repair work without notice. In its deliberations the Board stated the issue before it to be ". . . whether work on a facility, owned by Carrier but which is leased out and has no connection with the Carrier's railroad operation . . . ." is subject to notice requirements. The Board, following earlier Awards concluded,

". . . where a Carrier owns property used not in the operation or maintenance of its railroad, but for other and separate purposes, such property is outside the purview of the Agreement."

Third Division Award 19957 involved a situation in which the State of Colorado in constructing a highway created a drainage problem which required five culverts be installed to protect Carrier's tracks. It was agreed this would be done at State expense and the State contracted the work. In finding this work was not within the purview of the Agreement this Board commented:

". . . the work done was under the control of the State at all times - - not under control of 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 . . . "

Two Third Division Awards, very similar to each other are Awards 20280 and 20644. In each case local Public Utility Companies, in order to improve their facilities desired to install wiring which would interfere with Carrier's communication lines and signal equipment. In both cases the utilities agreed to, and did, at their expense, rearrange Carrier's facilities to protect them from the interference. This Board found in Award 20280:

"The facts seem clear and unequivocal; the work was contracted out by the Power Company, not the Carrier, and for the benefit directly of the Power Company, not the Carrier. . . ."

In Award 20644 it was noted that:

". . . In a long series of Awards going back to 1951 we have held consistently that work which is not for the exclusive benefit of Carrier and not within Carriers' control may be contracted out without violation of the Scope Rule . . . ."

Award 23422 is yet another Third Division Award which turned largely on the question of Carrier's degree of control. There Carrier operated trains on a right-of-way owned by Massachusetts Bay Transportation Authority (MBTA) from whom it was granted a license. MBTA contracted extensive track maintenance work. We held:

> "Recently, we have refined the general rule . . . . We ruled that the Carrier retains sufficient control over the disputed work if the Carrier participates in the contracting out process when it knows the work is covered by an applicable collective bargaining agreement. In those cases we were concerned with the Carrier's attempt to evade its collective bargaining obligations merely by inserting a clause in the Carrier's operating agreement with the state government authority which stated that an outside contractor would perform track rehabilitation work."

We then concluded Carrier had no control over MBTA action.

Thus it appears this Board has defined several categories of cases in which the Agreement will not be violated by use of outside forces. These, at a minimum include situations:

> (1) Where the work, while perhaps within the control of Carrier, is totally unrelated to railroad operations.
>
> (2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on Carrier's property and is undertaken at the sole expense of that other party.
>
> (3) Where Carrier has no control over the work for reasons unrelated to having itself contracted out the work.

Applying these criteria, and recognizing there may well be others which would apply in different circumstances we conclude the work at issue here was within the Scope Rule of the Agreement. The very instrument by which the property was leased to Coastal includes the parties' Agreement "with respect to the construction, maintenance and operation of industrial track." This constitutes an agreement by Carrier to have track built by the Lessee and is fairly within the Notice requirement of the Agreement as well as the December 11, 1981 letter. Further, significant control over the manner in

which the track is to be constructed, maintained and operated is reserved to Carrier and the operation of the track is certainly intimately connected with Carrier's railroad operation. Had Carrier directly let the work in question to Byler clearly the Agreement and notice requirements would apply. It seems equally clear that by leasing the property for the express purpose of construction of the track an attempt is made to do by indirection that which cannot be directly done. We conclude the Agreement was violated when no advance notice of the Lease was given.

We agree with Carrier that the Organization did not establish historic exclusivity in the handling of this Claim. However, without regard to the issue of whether it would otherwise be necessary to do so, we have repeatedly held such proof is not necessary when the question is one of Notice under the Agreement and the work is within the Scope of the Agreement.

The Organization assertion that Claimants were in furlough status is not disputed. Therefore we are not confronted with issues regarding whether compensation would amount to imposition of a penalty. We shall require the Claimants be compensated in the manner requested. We do note, however, that there are indications in the record that part of the property involved is owned by Coastal independent of the lease. As there is no evidence regarding control of that property we do not imply Claimants are to be compensated for man hours spent by outside forces, if any, performing work on property other than that owned by Carrier and leased by Carrier to Coastal.

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 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 involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of January 1987.