Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28007
Docket No. MW-27163
89-3-86-3-231

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

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 outside forces to dismantle the depot at Victoria, Texas on April 21, 25, 26, 29 and 30 and May 1 and 2, 1985 (System File MW-85-76/431-95-A).

(2) As a consequence of the aforesaid violation, furloughed Laborer-Drivers C. H. Mackey, M. J. Kubiak, J. D. Williamson and J. R. Clark and Machine Operators J. C. Simmons and C. R. Lapp shall each be allowed pay at their respective straight time rates for an equal proportionate share of the man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On March 21, 1985, the Carrier served notice upon the Organization that it intended to utilize a contractor to remove the remains of a building in Victoria, Texas. This building had originally served as the Carrier's depot, but had been retired some time before. According to the Carrier's notice, the building was no longer being used for railroad operations when it was destroyed by fire shortly before January 25, 1985. Although the Carrier took the position this work did not belong to members of the Organization, the notice was served under Article 36 of the Agreement, which governs contracting out. It is alleged the Carrier originally started to perform this work with its own employees and equipment, but shortly thereafter removed them and served the March 21, 1985 notice.

The Organization responded to this notice by letter dated March 22, 1985, noting there were qualified employees furloughed and denied that outside contractors could be used to perform this work. The Organization closed its letter by advising it would be available to discuss this subject at the Carrier's convenience.

No conference was held to discuss this matter prior to the contractor commencing work on April 21, 1985. This claim was then filed on behalf of four laborer-drivers and two roadway machine operators, all of whom were furloughed at the time. In progressing its claim, the Organization asserted the maintenance, tearing down, and removal of such buildings had always been performed by the Organization under the scope of the Agreement. The Organization noted there were furloughed, qualified employees available to perform the work, thereby making it unnecessary to contract out. Finally, the Organization contends that Article 36 of the Agreement had been violated because there was no conference prior to the contracting out.

In response, the Carrier reaffirmed its original position that the building was not used in the operation of the railroad. For this reason, the work was beyond the scope of the Agreement. With respect to the Organization's complaint regarding the lack of a conference, the Carrier asserted the Organization's letter of March 22, 1985, did not constitute a request for a conference. The Organization responded to this last point by asserting it had replied to the Carrier's notices in this manner for the last five years, and there had been a conference on almost every notice served without a specific request.

Article 36 requires the Carrier to notify the Organization if it intends to "contract out work within the scope of the applicable schedule agreement." The Carrier, therefore, is obligated to comply with the provisions of this Rule only when the subject work is within the scope of the Agreement. This presents the threshold issue and constitutes the defense asserted by the Carrier from the beginning.

In addition to its argument that the building was not used in the operation of the railroad, the Carrier argues the Organization must show it had performed this work throughout the system in the past to the exclusion of all other crafts and outsiders. The Organization, for its part, argues first that the Carrier has the burden of showing it has contracted out such work before, and secondly, that the Carrier's exclusivity argument had not been made during the handling of the dispute on the property. The record before the Board shows this second assertion is correct. The Carrier's exclusivity argument, accordingly, will not be considered.

Nevertheless, it remains the Organization's obligation to show the work is within the scope of the Agreement as required by Article 36. While the work of maintenance, tearing down and removal of buildings may generally be within the scope of the Agreement, the Carrier has characterized this as a special case because the depot had been retired for some time prior to the fire.

In Third Division Award 26212, involving these parties, the Board identified several categories of cases in which the Agreement will not be violated by use of outside forces. At a minimum, these included situations:

> (1) Where the work, while perhaps within the control of the Carrier, is totally unrelated to railroad operations.
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> (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.

In the case herein, the Carrier consistently maintained the building had no longer been used in connection with the operations of the railroad. During the handling of the dispute on the property, the Organization never refuted this position. In fact, in its letter of November 1, 1985, the Organization wrote, "The Organization clearly understood that the Carrier had not utilized the old depot building for anything other than storage for a number of years...." There is no evidence in the record to show what, if anything, may have been stored in the building. Absent any proof to the contrary, we must conclude the building was not a part of the operation of the railroad. In accordance with Third Division Award 26212, the Carrier was privileged to contract out the demolition and removal of debris as such work is not within the scope of the Agreement. Having reached this conclusion, we find it was not necessary for the Carrier to discuss the matter in conference under Article 36.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of July 1989.