

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(Union Pacific Railroad Company

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

(1) The Agreement was violated when outside forces were used to perform track work at Capitol Avenue in Omaha, Nebraska July 1 through July 26, 1985 (System File M-175/013-210-52).

(2) The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plan to assign said work to outside forces.

(3) Because of the aforesaid violations, Roadway Equipment Operators C. Fisigaro, G. F. Dominguez, R. J. Hernandez, L. Goettsche and R. L. Wehrer and Track Laborers R. R. Rangel, T. E. Kula, T. L. Bogenreif, F. S. Robak, R. M. Rivera, K. D. Loudon, L. R. Rief, J. A. Miller, M. N. Murray, M. Sandoval, Jr. and D. J. Martinez, Jr. shall each be allowed pay at their respective rates for an equal proportionate share of the two thousand four hundred (2400) 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.

This subcontracting dispute was precipitated when, from July 1 through July 26, 1986, Carrier allegedly failed to assign the construction, maintenance and repair work involved with the renewal of trackage on Capitol Avenue in Omaha, Nebraska, to the Claimants and instead assigned the work to Peter Kewit Construction Company, an outside contractor. According to the Organization, this is work which is expressly reserved to it and additionally,

has been traditionally performed by its employees in the past. Furthermore, the Organization asserts that the burden of establishing an exception to the prohibition from subcontracting under Rule 52 is on the Carrier, and that burden has not been met here. The Organization rejects the Carrier's assertion that it had no control over the work in question because the trackage in question is part of the city street. In the Organization's view, the controlling factor is that the Carrier operated and maintained the track in connection with its operations as a common carrier.

Carrier advances the following arguments in support of its contention that this claim should be denied. First, Carrier maintains that Paragraph 2 of the instant claim, regarding Carrier's alleged failure to give prior written notification to the General Chairman that it assigned the work to outside forces, was raised for the first time on appeal. Given that posture, the issue cannot be considered by the Board as it is deemed waived. Second, it is urged that the employees have no right to the work in question, since it has not been shown that the Agreement conveys an exclusive right to construct, maintain and repair trackage that is not controlled by the Carrier. Third, Carrier stresses that even if the claim is meritorious, no damages are owing as Claimants were fully employed during the claim period.

The Board has carefully reviewed the record evidence in its entirety. At the outset, we reject Carrier's contention that Rule 52 was not timely raised. The claim initially submitted by the Organization, dated August 20, 1985, clearly cites Rule 52 as one, among others, violated by the Carrier. In addition, the Organization in that same letter of claim makes reference to the "advance notice requirements" and "good-faith discussions" which are required. It is our view that the information contained within the initial claim was sufficiently specific so as to inform the Carrier of the basis for the claim.

Moreover, the Organization by separate letter dated November 5, 1985, the day after its November 4, 1985 appeal, specifically informed Carrier that the claim was based, in part, on Carrier's alleged failure to provide advance notice to the General Chairman as required by Rule 52. While issues raised for the first time before the Board are generally deemed waived, on the theory that the parties should be afforded the opportunity to resolve any and all issues during the handling of the case on the property, it is our view that the Organization's November 5, 1985 letter did not come too late in the grievance process so as to now preclude our consideration. It is noted that the parties had the opportunity to discuss the issue at a conference subsequently held on June 11, 1986. Based on these facts, we find that Carrier was fully and timely informed that the notice issue was a part of the instant claim.

Turning to the substantive issue, it has been argued by the Carrier that it is not the sole owner of the trackage at issue and that the Omaha World Herald was to bear the cost of the track work pursuant to an Agreement between the Carrier and the World Herald. Reference is made by the Carrier to a portion of that Agreement, Section 10, which states, in part, that the cost of a "rearrangement or reconstruction" of track, where required by "public enactment or regulation, or other contingency over which Carrier has no control," shall be borne by the World Herald, not the Carrier.

It must be remembered, however, that Carrier had the burden of proving as an affirmative defense that it had no control over the disputed trackage. That burden of proof has not been met, we conclude. Significantly, Carrier never offered any direct proof of an Agreement with the Omaha World Herald. It merely quoted what it considered the pertinent portion thereof, and even that was not produced until well after the parties conferenced the subject. Having failed to produce the Agreement itself during the handling of this case on the property, we are unable to ascertain the significance of the portion thereof relied upon by the Carrier. An agreement, after all, must be read as a whole, and without the benefit of the entire Agreement, we cannot determine the context or significance of the quoted portion.

In addition, we are impelled to point out that the section of the Agreement relied upon by the Carrier refers to allocation of cost. It does not restrict the Carrier's contractual obligation to use its employees to perform the work in question in accordance with the Agreement. Thus, the question of whether Carrier retained or could retain control of the work in question is an issue not really addressed by Section 10.

Having proven a violation of the Agreement, the only remaining issue pertains to remedy. The record is undisputed that Claimants were fully employed and suffered no monetary loss as a result of the action claimed. Accordingly, Paragraphs 1 and 2 of the Statement of Claim are sustained, but Paragraph 3, which requests a monetary remedy, is denied.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1991.