

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30029  
Docket No. MW-29280  
94-3-90-3-165

The Third Division consisted of the regular members and in addition Referee Charlotte Gold when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
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(The Kansas City Southern Railway Company

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

- (1) The Agreement was violated when the Carrier assigned outside forces (Cauhorn Construction Company) to clean ditches in the cut under the Highway 71 overpass at Mile Post 425 in Kings, Arkansas from January 20, 1987 through February 6, 1987 [Carrier's File 013.31-320 (216)].
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by Article IV of the May 17, 1968 National Agreement.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman D. L. Sherry and Trackmen S. D. Klitz, S. L. Dossett and R. D. Oglesby shall each be allowed sixty-three and one-half (63.5) hours of pay at their respective straight time rates."

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 employe 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 11 days between January 20 and February 6, 1987, Carrier utilized the services of an employe of an outside concern to operate a backhoe to clear mud and fouled ballast from right of way ditches. The work was done in conjunction with a project to undercut the main line in Kings, Arkansas, and reballast it. The backhoe operator assisted Carrier's forces and worked several hours on each of the claim dates.

The Organization alleges violations of Rule 1 (Scope); Rule 2 (Seniority), Addendum No. 9, which includes Article IV--Contracting Out--of the May 17, 1968, National Agreement; and the December 11, 1981, National Letter of Agreement. It points to Rules 500 through 512 (Roadbed and Drainage) of the Kansas City Southern Line Rules and Regulations for the Maintenance of Way and Signal Department to establish that the work in question accrues to maintenance of way forces.

The Organization maintains that Carrier failed to give proper notice of its intent to subcontract; the work, which was within the Scope of the Agreement, was reserved to the employes; and Claimants were deprived of an opportunity to perform Scope-covered work.

Carrier argues that it has been the practice to hire non-Carrier owned equipment to assist Carrier employes with their work and that had Carrier not used the backhoe, Carrier's employes could not have performed the work of removing mud from the drainage ditches. Essentially, what occurred here was that Carrier's forces handled the track undercutting project, while the outside concern did the ditch cleaning. Further, Carrier suggests that there is nothing in the Scope Rule covering assisting equipment needed to complete work. Carrier believes that since this work is not covered by the Scope Rule, no advance notice is required. Finally, since Claimants were either employed on the dates in question or on personal leave (in the case of one employe), they suffered no lost work opportunity.

Both parties contend that certain matters were not addressed on the property. The Organization argues that Carrier failed to raise the contention that it did not have the required equipment until its Submission and Carrier maintains that in granting the Organization an extension in time in which to file with the Board, it did not agree that the Organization could add more supporting data into the record.

As to the question of leased equipment, we note that in its letter of August 27, 1987, the Carrier wrote that "...the amount of fouled ballast deposited in the drainage ditches could not have been removed with only hand tools and Company owned equipment." Thus, the issue of leased equipment appears to have been considered

on the property. In regard to the charge of new information, the record reveals that following a conference held on April 19, 1988, numerous extensions requested by the Organization were granted by Carrier. In one request, dated June 23, 1989, the Organization specifically noted that extension was for the purpose of conducting "further research." Upon receipt of the next request, dated August 8, 1989, Carrier agreed to extend time limits until November 13, 1989. No specific reason for the extension was mentioned. On October 13, 1989, the Organization submitted the additional information that Carrier now disputes. This Board concludes that the June 23, 1989, request clearly placed Carrier on notice that the Organization was undertaking additional research for the purpose of supplementing the record. Given Carrier's concurrence in the request, we must conclude that the information in question is appropriately before us.

Because of the general nature of the Scope Rule, it is the Organization's burden to prove that its members have performed the work in question by custom, history, and practice in order to show that the work accrues to it. Based on the anecdotal material presented by the Organization, as well as on other relevant data in the record, it is clear that the cleaning up of debris in conjunction with an ongoing project has been performed by MW employees in the past. The record, however, is devoid of sufficient information to support the conclusion that this work has been done with the requisite regularity, consistency, and predominance in performance on a systemwide basis so as to establish the reservation of this work to these employees. The data is also insufficient to counter the suggestion that non-Carrier-owned equipment has been used for such projects over the years as well.

In this instant case, the use of a backhoe appears to have facilitated the work performed by Carrier personnel. While hand tools or a Pettibone might be used in general in such work, a backhoe was more efficient under the circumstances present here. There is no dispute that Carrier did not have a backhoe in its inventory.

Despite this finding, this Board concludes that where there is evidence that the work at issue has been performed in the past to the degree evident in this case, any doubts over the need to notify the Organization should be resolved in favor of providing proper notice. Carrier did not do so and thus this portion of the claim must be sustained.

We also note, however, that Claimants were fully employed during the time in question and thus suffered no loss. Consequently, no monetary remedy is awarded.

Form 1  
Page 4

Award No. 30029  
Docket No. MW-29280  
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Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Catherine Loughrin  
Catherine Loughrin Interim Secretary to the Board

Dated at Chicago, Illinois, this 17th day of February 1994.