

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30410
Docket No. MW-29801
94-3-91-3-164

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr., when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company
((former Missouri Pacific Railroad Company)

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

- (1) The Agreement was violated when on November 20, 21, 22, 27, 28, 29, 30, December 1, 4, 5, 6, and 7, 1989, the Carrier assigned employees covered by the Union Pacific (UP) Agreement to perform track maintenance work on the Trigo Branch on the Kansas Division in the vicinity of Salinas, Kansas and at Kanopolis, Kansas which is territory covered by the Missouri Pacific Agreement (Carrier's File 900024 MPR).
- (2) As a consequence of the aforesaid violations, Kansas Division Foremen J. L. Jasper, R. W. Higgenbotham and L. R. Furman, Machine Operators T. L. Jordan, R. W. Reddig, and T. B. Vickers and Trackmen M. B. Clark, B. K. Morgan, B. L. Grant, R. D. Kohlenberg, D. E. Hanner, L. W. Engel, W. L. Poyner, D. D. Tooley and D. D. Engstrom shall each be allowed ninety-six (96) hours of pay at their respective straight time rates and twenty-four (24) hours of pay at their respective time and one-half overtime 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 employee or employees involved in this dispute are respectively carrier and employee 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.

By letter dated November 3, 1989, the Carrier advised the General Chairman, in pertinent part as follows:

"This is to advise of the intention of the Company to use a Union Pacific gang in lieu of a Missouri Pacific gang to perform the following work:

Place: Salina, Kansas, Trigo Branch at
Ohio Street near MP 494 and at
Broadway near MP 497

Specific Work: Renew Street crossings.

The use of a Union Pacific gang in lieu of a Missouri Pacific gang is predicated on the fact that the Kansas Division roster is exhausted, therefore there are no MP employees available to perform this work which the city is anxious to have completed."

There is no doubt that the reference to "Missouri Pacific gang" and "Union Pacific gang" indicates the understanding that Maintenance of Way gangs are assigned to territories of the former railroads of which the Carrier now consists; are covered by separate retained Agreements; and have seniority rights to locations separately from one another.

The quoted letter is in the general form utilized to advise the General Chairman when the Carrier contemplates contracting work to an outside firm. Indeed, the General Chairman replied as if this were the case. However, when the work proceeded as indicated by the Carrier, the Organization initiated a claim on the basis that work within the former Missouri Pacific Kansas Division Seniority District had been assigned to employees holding seniority only on former Union Pacific territory.

The Carrier has convincingly established that work of this nature is frequently contracted out, and such contracting has been determined not to be in Rule violation. Indeed, the Carrier gave notice to the General Chairman as if this were an instance of contracting out work. In fact, however, the work was not contracted, and so the Carrier's right to contract is not involved here. What occurred was the Carrier's assignment of its own forces from outside the seniority district in which the Claimants had legitimate claim. In doing so, the Carrier violated the Claimants' seniority rights to the work -- and the fact that the work might have been contracted to outside forces is without relevance.

As held in many other Awards, this would properly lead to a sustaining of the remedy portion of the Claim. There are, however, many instances in which granting of pay to the Claimants is denied, and the Board finds that such is appropriate here. This is based on a combination of circumstances applicable in this instance. During the claim handling procedure, the Carrier presented evidence that only three employees were involved in the work, while the Claim is on behalf of 15 Claimants. The Claimants were fully employed or on vacation or leave of absence during the Claim period. The Carrier, by its advance notice, openly advised as to the unavailability of forces within the seniority district to perform the work in timely fashion. On this basis, and without precedent, the Board finds that the requested payment is not appropriate.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 8th day of August 1994.