

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30830  
Docket No. MW-30256  
95-3-91-3-728

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 Employees  
(  
(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 the Carrier assigned outside forces (Marlatt Contracting) to build a new siding at Mile Post 401 in the vicinity of Stella, Nebraska on September 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, October 1, 2, 3, 4, 5 and 9, 1990 (Carrier's File 910122 (MPR).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foremen R. D. Underwood and E. D. Bonebrake (furloughed) and Machine Operators R. Z. Duran, G. E. Breen and K. D. Eichelberger (furloughed) shall each be allowed eight (8) hours' pay per day at their respective straight time rates of pay plus any overtime worked by the contractor's forces on the dates listed in Part (1) above."

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.

This claim concerns the construction by other than Carrier forces of a new siding at Mile Post 401 in the vicinity of Stella, Nebraska, in September-October 1990. The Organization contends that this work should properly have been assigned to Maintenance of Way forces.

The Carrier's primary defense is that the work involved was performed for and under the direction and control of an industrial client, which had entered into an agreement concerning a facility adjacent to the Carrier's right-of-way. During the claim handling procedure, the General Chairman was provided with an Industry Track Agreement, dated September 14, 1990, between the Carrier and the industry. This agreement makes specific reference to the right of the industry to construct "at its expense" the trackage concerning which the claim was initiated. There is no showing of any relationship between the Carrier and the contractor who performed the work for the industry.

The Organization responds that the work actually began ten days prior to the date of such agreement and that the agreement fails to make clear any abdication of the Carrier's responsibility for the track.

The Board determines, however, that the Carrier's assertion as to lack of control of the contracting is adequately supported by the cited Industry Track agreement. Where a carrier cannot be shown to be responsible for or in control of construction or related work, there can be no application of the contractual conditions and restrictions (including advance notice) which apply where the Carrier is responsible and in control.

#### AWARD

Claim denied.

#### ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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By Order of Third Division

Dated at Chicago, Illinois, this 27th day of April 1995.