

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31049
Docket No. MW-30135
95-3-91-3-574

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

(Brotherhood of Maintenance of Way Employes
(
PARTIES TO DISPUTE: (Southern Pacific Transportation Company
((Western Lines)

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

- (1) The Agreement was violated when the Carrier assigned outside forces (Fairmont Railway Motors) to perform switch grinding work on the San Joaquin Division near Tehachapi, California beginning June 4, 1990 and continuing (System File #2/MofW 152-1141 SPW).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance notice of its intention to contract out said work as required by Article IV of the May 17, 1968 National Agreement.
- (3) The claim as presented by former General Chairman D.E. McMahon, on August 30, 1990 to Superintendent R.A. Baker, shall be allowed as presented because said claim was not disallowed by the Superintendent in accordance with Rule 44.
- (4) As a consequence of the violations in Parts (1) and/or (2) and/or (3) above, the Claimants listed below shall each be allowed twelve (12) hours' pay at the grinder operator's rate of pay sixty (60) days retroactive from the date of the initial claim.

W. Clark, Jr.
J.S. Ledesma
T.C. Clemens
D.R. Hawthorne

E.C. Bourgeois
J.H. Porras
R.L. White
R.N. Jones"

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.

In this claim, filed on August 30, 1990, the Organization alleges that the Carrier violated the Agreement when it assigned outside forces to perform switch grinding work on the Carrier's San Joaquin Division, beginning June 4, 1990 and continuing. The claim is closely linked to a similar claim filed on July 23, 1990, which was the subject of Third Division Award 30751, in that it involves the same Claimants, the same kind of work performed by outside contractors, and the same period of time during which the work was performed. Award 30751 concerned rail grinding work performed on the Sacramento Division, and the instant case concerns switch grinding work performed on the San Joaquin Division, both beginning on June 4, 1990.

The merits of this dispute have been previously determined in Third Division Award 30180, where the Board concluded as follows:

"The Board concurs with the Organization that it need not meet an 'exclusivity' test to advance its Claim to rail grinding work. However, the Carrier has established that outside forces have performed rail grinding work over many years and have done so on repeated occasions during the period that the Carrier's own rail grinders were in operation. Further, the Carrier makes a credible case that the Loram equipment here under review provides service not obtainable from the Carrier's own equipment. On either of these bases, the Board determines that the currently cited instance of use of Loram equipment is not 'within the scope of the applicable schedule agreement' and thus not covered by Article 36."

The Organization contends, however, that this claim must be sustained on the procedural basis that the claim was not disallowed by the Carrier in a timely manner pursuant to Rule 44. The Carrier contends that it made a timely denial of the August 30, 1990 claim by letter of October 18, 1990, although that letter incorrectly refers to the July 23, 1990 claim.

The Board addressed the identical procedural issue in previously-referenced Award 30751:

"The Organization seeks to have the claim sustained on a procedural basis. The claim herein was initially filed under date of July 23, 1990. On October 1, 1990, the Organization wrote to the Carrier stating that it had received no reply to the claim and seeking to have the claim 'allowed as presented', as provided in Rule 44(1)(a). The Carrier replied stating that it had replied in timely fashion on August 24, 1990, and attached a copy of such letter.

The Board notes this is one of a number of closely similar claims initiated within a narrow time frame. The Board is prepared to accept that a timely Carrier response was prepared on August 24, 1990. Difficult or impossible to determine is whether it was properly dispatched and/or whether it was received and coordinated with the applicable claim. Thus, failure to comply with Rule 44 is not sufficiently demonstrated.

The dispute involves the contracting of rail grinding work. This subject was fully discussed in Third Division Award 30180, and the Board reaches the same conclusion in this instance."

We find this Award to be of direct precedential value in the instant dispute, and accordingly will resolve the procedural issue in this case in the same manner. We therefore conclude that the claim must be denied.

AWARD

Claim denied.

Form 1
Page 4

Award No. 31049
Docket No. MW-30135
95-3-91-3-574

ORDER

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

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.