Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31260
Docket No. MW-30917
95-3-92-3-774

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

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

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

(1) The Agreement was violated when the Carrier assigned an employe of an outside concern (Core Trucking) to haul signal equipment (two signal houses) from the Houston Signal Shop on Fulton Street to Miller Yard at Dallas, Texas on August 26, 1991 (System File MW-91-130/503-96-A SPE).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its intention to contract out the work in question in accordance with Article 36.

(3) As a consequence of the violations referred to in either Parts (1) and/or (2) above, Heavy Duty Truck Driver L. E. Dube shall be compensated for eight (8) hours' pay at his pro rata straight time rate."

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.

On August 26, 1991, the Carrier utilized Core Trucking Company to haul two signal houses from Houston to Dallas, Texas. By letter dated September 23, 1991, the Organization alleged that the use of an outside contractor violated the Agreement.

The Organization argues that the hauling of signal materials is covered by the Agreement and is work performed for over twenty years by Heavy Duty Truck Operators under the Agreement. While it points to many Rules, it focuses particular emphasis on Article 22, Section 1 which states:

> "When heavy duty trucks assigned to the Roadway Machine Department are regularly used to transport material, roadway equipment, or to handle material for maintenance of way gangs in performance of their work, such trucks will be operated by Roadway Machine Operators...."

The Organization argues that the Carrier violated the Agreement by not utilizing the Claimant in the performance of the work. It further argues that the Carrier had an obligation to give notice to the General Chairman prior to contracting out. In that regard, Article 36 states:

> "In the event this carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto."

As the Carrier contracted out the work without notice, the Organization maintains that the Agreement was violated.

The Carrier denied any violation of the Agreement or notice requirement in contracting out the hauling of signal equipment. Of the numerous defenses raised to the alleged Agreement violation, the Carrier notes that the work is not exclusive to the Organization. The Carrier argues that such work had been performed for many years by others foreign to the Agreement.

Serious consideration has been given to all arguments and issues properly before this Board. The Board notes that materials received after the Notice of Intent dated October 7, 1992, was submitted by the Organization have not been properly argued while the dispute was on the property. They have not been considered herein. Similarly, arguments and issues raised for the first time in Submissions to this Board are beyond our review.

The substance of this dispute is whether the Carrier had the right to contract out the hauling of signal houses by heavy duty trucks. The burden of proof for the instant Claim rests with the Organization. Herein, the Organization has presented a statement dated November 27, 1991, from the General Chairman indicating that from the 1960s to the present the work belonged to the employees. He stated that "... we have always moved this type materials and when it was found that outside forces were used claims were filed." Additionally, four employees concurred in separate letters. They stated that they hauled "ALL of the signal material out of Houston" and that from 1962 to 1984, "I hauled Signal Houses..." for the Carrier. Certainly the Organization established a prima facie case.

In response, the substance of the Carrier's arguments revolve around exclusivity and past practice. As for exclusivity, the Board finds no evidence in the record that the work has been performed by any other craft or class. Nor do we find the language of the Agreement challenged, e.g. that the work is not encompassed by Article 22. Only Section 2 provides exceptions which are not an aspect of this dispute. As for past practice, the Carrier relies upon a sole letter from the Signal Shop Supervisor. Due to its crucial nature to this dispute, it is presented in its near complete form.

> "System Signal Shop has always used private carriers for signal shipments. If a company truck was available at the time for loading and delivery to site without delay, we used company trucks. Company drivers did not want to deliver into another drivers district, account of delay returning to his home district.
>
> Attached are copies of bill of lading of signal material shipped by private carriers from shop.
>
> We have used the following truck carriers:
> Arkansas Freight, Central Freight, Churchill Freight, Consolidated Freight, Pacer Truck Lines, Jones Truck Lines, and Merchants Fast Motor Lines.
>
> We also use Greyhound Bus Lines, U.P.S. and D.H.L for delivery.
>
> I have 42 years with Southern Pacific and have been Signal Shop Supervisor the last 12 years."

Nowhere in that letter does the Supervisor deny that the work belongs to the employees by Agreement. While the refutation states that the Carrier has always used private carriers for movement, the probative evidence does not support that assertion. A careful reading does not rebut the Organization's arguments that "contractors have not been used until just recently." In fact, the Freight Bills of Lading are mostly from the months preceding the date of Claim, with none prior to 1989.

Accordingly, the Board finds that the work disputed herein is work encompassed by Article 22. Given this record as developed on property, the probative evidence supports the Organization's assertion that heavy duty trucks were regularly used to transport the disputed items. We also find that there is no rebuttal by the Carrier to the Organization's assertion that when this recent contracting out began, claims were filed to known violations. Under these facts, the Claim must be sustained.

AWARD

Claim sustained.

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 1st day of November 1995.