

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31420
Docket No. MW-30650
96-3-92-3-423

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(St. Louis Southwestern Railway Company

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

- (1) The Agreement was violated when the Carrier assigned an outside concern (Loram Maintenance of Way, Inc.) to perform rail grinding work between Illmo, Missouri and Pine Bluff, Arkansas beginning on March 4, 1991 (System Files MW-91-34-CB/501-13-A and MW-91-33-CB/501-12-A).
- (2) The Agreement was further violated when the Carrier used a laborer driver and two (2) laborers from various section gangs (Laborer Drivers D. E. Zimmerman, R. E. Hatch, C. L. Schaefer and B. P. Johnson and Laborers G. R. Lacy, D. L. Hitt, D. K. Perry, G. A. Perkins and T. S. Adams) to work with the Loram Rail Grinding Train as it moved across Carrier's section territories instead of advertising and assigning a rail grinding crew in accordance with the January 8, 1979 Multiple Rail Grinding Agreement.
- (3) The Agreement was further violated when the Carrier failed to furnish the General Chairman with fifteen (15) days' advance written notice of its plan to contract out the above-described work in accordance with Article 33.
- (4) As a consequence of the violations referred to in either Part (1) and/or Part (3) hereof, Welder Foreman D. W. Rice and Machine Operator R. L. Thrower shall each be allowed two hundred eight (208) hours' pay at their respective straight time rates of pay and one hundred sixty-four (164) hours' pay at their respective time and one-half overtime rates of pay and continuing.

- (5) As a consequence of the violation in Part (2) hereof, furloughed Laborer Driver W. A. Defoore, and Laborers W. R. Porter and R. L. Johnson shall each be allowed two hundred sixteen (216) hours' pay at their respective straight time rates of pay, one hundred sixty-eight (168) hours' pay at their respective time and one-half overtime rates of pay and twenty-seven (27) days' credit to be used as credit toward vacation qualification purposes, all on a continuing basis."

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 employees 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 1979, Carrier purchased two 40 stone rail grinders from Fairmont Motors to be used over the system to grind curves. The Fairmont grinders were built "especially" for Carrier and were operated by Carrier employees.

Concurrently, Carrier and the Organization entered into an Agreement to establish a class and wage schedule for a Multiple Rail Grinder Operator and Rail Grinder Foreman. It was also agreed that the bulletin for those positions would be issued on both the north and south end seniority districts in order that the positions would be awarded to the "most senior qualified machine operator making application without regard to his seniority district, and he may operate the machine over the entire St. Louis Southwestern Railway Company." Each grinder worked separately, one on the Western Lines, the other on the Eastern Lines and Cotton Belt. Due to "advanced technological needs," the two grinders were combined and are presently on the Oregon Division.

Carrier subsequently abolished these positions on its rail grinding train, and ceased operation. However, in 1989, due to an "increased need for rail grinding to prolong the service life of tangent rail," Carrier began using the services of Loram Maintenance of Way, Inc. ("Loram") to perform additional rail grinding on both the Western and Eastern Lines. Additionally, Carrier used the services of Fairmont Railway Motors to perform switch and crossing grinding.

It is not disputed that from March 4, through April 23, and from May 19, through May 22, 1991, Loram Maintenance of Way, Inc., performed rail grinding work between Illmo, Missouri, and Pine Bluff, Arkansas. It is also not disputed that as the Loram Rail Grinder moved across the system, various Carrier Maintenance of Way employees assisted when the grinder was on their assigned territory.

On April 9, 1991, the Organization submitted this claim alleging that:

"As of this date, these positions have not been advertised according to letters of Agreement dated January 8, 1979, May 5, 1983, September 9, 1987, and February 24, 1989 and our current bidding and assignment procedures.

The Claimants hold seniority in their respective classes and since these have always been system jobs they could have worked over both Districts 1 and 2, were willing, available and fully qualified to perform all nature of the duties here involved but were furloughed and not offered or allowed this work.

It is our position that by failing to advertise these positions, the Carrier has violated the current Agreement under, but not limited to, Article 2, Seniority Rules, Article 3, Force Reductions, Article 6, Seniority Rosters, Article 8, Promotions and Filling of Vacancies and the above named letters of Agreement."

In addition, the Organization alleged that Carrier violated Article 33 of the Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

Carrier denied the claim, submitting that the work "set out in your claim is work that has historically been handled by an outside contractor. For this reason, your claim is respectfully denied in its entirety."

The Organization responded to Carrier's denial asserting that "this work is currently being handled by Carrier Laborers and Laborer Drivers, not contractors." The Vice Chairman went on to note that the "Letter of Agreement dated 1-8-79 states, in part, that bulletins will be issued on both North and South end seniority Districts, and Letter of Agreement dated February 24, 1989 adds the Rail Grinder to Section 7, Article 18 of the current Agreement."

Carrier continued to deny the claim, noting that:

"Petitioner suggests that the Carrier, by creating a class and rate of pay for the Multiple Rail Grinder and Rail Grinder Train Foreman, intended the rail grinding work be performed by BMW employees exclusively. However, Petitioner's argument is without merit. These positions were established to use our employees when work is being performed by our forces, not an outside contractor.

Carrier's employees are neither trained nor equipped to run this machine. The Loram rail grinder is an expensive, complicated and unique piece of equipment which is designed and operated to accomplish a specific large-scale undertaking. Equipment of this size and complexity requires special skills for its maintenance and operation. This Carrier has never used its forces to operate such equipment on its property. Moreover, these machines are built for the manufacturer's own service contract work and such contractors will not permit this equipment to be operated by anyone except their own personnel."

Had this dispute occurred prior to June 1989, we would concur with the Organization that it need not prove exclusivity with regard to the work at issue. However, once Carrier abolished the positions in June 1989 and began to contract out the work, the original Agreements predicated on the rail grinding positions were no longer in effect. Carrier entered into agreements with outside contractors, each of whom used its own equipment and its own employees to operate that equipment. Therefore, it was no longer incumbent upon Carrier to advertise said positions, nor was Carrier obligated to meet and confer with the General Chairman with regard to the work in dispute. Based on the foregoing, this claim is denied.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of March 1996.