

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33210
Docket No. MW-32540
99-3-95-3-446**

The Third Division consisted of the regular members and in addition Referee John H. Abernathy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Southern Pacific Rail Corporation (Eastern Lines))

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Track Work Railroad Construction) to perform routine track maintenance work (built two tracks with switches on each end of the tracks and connected the tracks to the Carrier's main track) in the vicinity of Mile Post 17.10 at Missouri City, Texas beginning April 19 through June 6, 1994 (System File MW-94-344/BMW 94-638 SPE).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intention to contract out said work as required by Article 36 and to attempt to reduce the incidence of contracting out scope covered work as envisaged by the December 11, 1981 Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and /or (2) above, Foreman S. A. Deleon, Assistant Foreman J. T. Howard, Machine Operators R. W. Holley, M. Cedillo, M. A. Reyna, Jr., J. G. Ramirez, Laborer Drivers J. A. Mosby, Jr., L. E. Rockins and Laborers A. H. Salas and R. L. Julien shall each be allowed pay at their respective straight time and time and one-half rates for an equal proportionate share of the total number of man-hours expended by the outside forces in performing the work in question and thirty-five (35) days' credit for vacation purposes."**

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 were given due notice of hearing thereon.

Beginning April 19 and running through June 6, 1994, Carrier assigned contractor forces, Track Railroad Construction, to construct track and switches in a shoofly. On June 18, 1994 the Organization filed a claim alleging that the current Agreement was violated in two ways; first, because work of this character has been customarily and historically performed by the Carrier's Maintenance of Way forces and is reserved for them under the Agreement, and second, because the Carrier failed to notify and confer with the General Chairman regarding the use of outside forces to accomplish this work.

Carrier denied this claim for the following reasons: First, some of the complained of work was never performed by the Contractor. The Contractor did construct a shoofly track, but did not connect any tracks to the Carrier's main line. Carrier crews installed a switch and connected the shoofly to the main line. Second, this work was performed at the request of the State of Texas and at the State's expense. Third, this Board has previously considered this issue and found that contracting out work under these conditions does not violate the Agreement. Third Division Award 31234 provides:

"This Board has consistently held that where work is not performed at Carrier's instigation, nor under its control, is not performed at its expense or exclusively for its benefit, the contacting is not a violation of the Scope Rule of the Agreement.

We find no evidence that Carrier instigated or retained any control over the shoofly construction disputed in this case, or that it was performed at Carrier's expense or exclusively for its benefit.

* * *

Having found that Carrier did not contact out the work in issue under the terms of the Agreement, it follows that it was not under any obligation to provide the General Chairman with notice under Article IV of the May 17, 1968 National Agreement."

The Board finds that the work in question was not performed at Carrier's stipulation, nor for the Carrier's benefit, nor at Carrier's expense, or under Carrier's control. Under these conditions Award 31234 controls.

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 April 1999.