

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39500
Docket No. MW-37622
09-3-NRAB-00003-020690
(02-3-690)

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former 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 (J. G. Scott and Sons Railroad Contractor) to perform routine Track Sub-department work (assemble and install main line switch) at Mile Post 1279.96 at Strauss, New Mexico on July 2, 3, 4, 5, 6, 17 and August 15, 2001 and continuing, instead of Messrs. R. Gonzalez, R. Galindo, Jr., J. Rodriguez, O. Calvillo and J. Marquez (Carrier's File 1286447 SPW).
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work in Part (1) above in accordance with Article IV of the May 17, 1968 National Agreement.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Gonzalez, R. Galindo, Jr., J. Rodriguez, O. Calvillo and J. Marquez shall now each be compensated for an equal proportionate share of the total number of man-hours expended by the outside forces, including overtime, in the

performance of the aforesaid work at their respective rates of pay.”

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.

The Claimants have established and hold seniority in various classes in the Track Sub-department on the Eastern Seniority District, Tucson Division. At the time that the instant dispute arose, they were regularly assigned to a gang headquartered at El Paso, Texas, working a Monday through Friday workweek with Saturday and Sunday as designated rest days.

On July 2, 3, 4, 5, 6, 17 and August 15, 2001, an outside contractor (J. G. Scott and Sons Railroad Contractor) was hired to construct and install a main line track switch at Mile Post 1279.96 at Strauss, New Mexico, on the Tucson Division. Five employees of the outside contractor used an end loader and dump trucks to accomplish the work.

The Organization contends that the Agreement was violated when the Carrier assigned J. G. Scott and Sons Railroad Contractor the work of constructing and installing a main line track switch on the relevant dates in 2001. The Organization claims that there was no notice of intent to subcontract and also that the Carrier improperly contracted out the above-mentioned work that is properly reserved to the Organization.

The Organization further claims that the work in question is consistent with the Scope Rule. According to the Organization, the work done by the contractor is within the jurisdiction of the Organization and, therefore, the Claimants should have performed said work. The Carrier's forces are fully qualified and capable of performing the designated work. The Organization argues that because the Claimants were denied the opportunity to perform the relevant work, they should be compensated for the lost work opportunity.

According to the Carrier, the Organization has not met its burden to prove that the Carrier violated the Agreement. According to the Carrier, the crux of the matter stems from a third party's (Santa Teresa Limited Partnership (STLP)) hiring of a contractor to construct an industrial spur on the STLP's industrial tract at Stauss, New Mexico. STLP had the contractor construct the industrial spur to provide its tenants with access to rail transportation. A necessary element of this spur was the switch in question that is used to connect the STLP's industrial spur to the Carrier's mainline.

According to the Carrier, the work did not belong to the Organization because the work in question was located on the third party's property. According to the Carrier, there is no question that the Organization had no right to the work. However, it further contends that even if the work somehow could have been performed by BMW-represented employees, said work does not belong to the them under either the express language of the Scope Rule or any binding past practice.

After a review of the facts and circumstances in this matter, we find that the work in question was performed by a contractor on a third party's property. As such, the Organization has not met its burden of proof to show that the work was within its jurisdiction.

Third Division Award 30824 dealt with a similar situation and had similar results:

"After a careful review of this record, we find that the disputed work was not the Carrier's work. There is no evidence that the

work was done on the property owned or leased by Carrier or that Carrier was responsible for or in control of the work. The fact that the Carrier may have sold labor and materials does not alter this finding. . . .

. . . the Board is persuaded, however, that the work in question was actually under the control of a lessee of Carrier property . . . and that the work was performed for the benefit and under the control of the lessee. Under these circumstances, it is well established that the application of the Scope Rule is simply not appropriate.”

In the instant case, we have determined that the work in question was completed on the property of STLP and as such, was not within the province of the Organization. Because we have made this determination, we need not reach the question of whether the work is scope covered work. The claim is therefore 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 2nd day of February 2009.