AWARD NO. 37
CASE NO. 37

PUBLIC LAW BOARD NO. 4402

PARTIES TO DISPUTE	)	BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
	)	
	)	BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it assigned former St. Louis and San Francisco Railway Maintenance of Way employes to construct ten (10) track panels for placement in the 'C' Yards in North Kansas City, Missouri on Seniority District #4 (System File C-88-S091-3/EMWE 88-2-17).

2. Because of the aforesaid violation, Foreman J. W. Stewart, Group 3 Machine Operator J. B. Huxtable, Truck Driver J. M. Stewart and Laborer F. P. Garcia shall be allowed thirteen (13) hours and twenty (20) minutes pay at their respective rates.

OPINION OF BOARD

This dispute concerns the Carrier's use of pre-assembled rail panels that were assembled by employees represented by the Organization but who were not covered by the specific Agreement covering Claimants.

The initial claim in this matter dated November 27, 1987 stated as follows:

> On October 21, 22, and 23, 1987 pre-assembled panels were installed in "C" Yards in North Kansas City, Missouri. These panels were not assembled in district 4 or by district 4 employes. This work has been done by district 4 employes and is basic track work, which makes it past practice.
>
> It was reported that 6 panels were built a day by 4 Frisco Federation Employes whom are not covered by this agreement.
>
> It is my position that rules 1, 2, 3, 5, 6, 55, 66, 70, 78, and Appendix Y were violated but not limited there to.
>
> Since the carrier made no attempt to discuss this contracting out as required by them in Appendix Y, I request that the claimants be paid ....

The Carrier responded by letter of January 15, 1988 that:

> Panels were installed as stated to eliminate crossover switches on three tracks. The reason for using panels is because they were more economical and time

> saving for operation at the time. The carrier has built panels of track at both Springfield and Laurel for use on Northern territories for years without claim.

On February 17, 1988 the Organization responded:

> ... Maintenance of way forces on the former CB&Q portion of the Burlington Northern have built panels for years and the work has customarily been performed by District 4 employes for installation in North Kansas City.
>
> The employes who built the panels are not covered under the Scope of our Agreement. The Springfield Region employes are covered under a separate agreement from those on the Chicago Region.

By letter of December 9, 1988 the Carrier stated:

> ... [Y]ou have been furnished copies of requisitions covering over 200 panels that have been shipped to former CB&Q territory between 1983 and 1985 from the Springfield Panel Plant. In addition, there have probably been even more panels shipped to former CB&Q territory over the years from the Laurel Panel Plant than there have been from Springfield.
>
> * * *
>
> Attached are several more copies of requisitions as proof that the pre-assembled panels have been used for various types of track construction for several years. Such panels have been installed by Maintenance of Way employees with no objection until the instant claims.
>
> The Springfield Panel Plant has shipped more than 1,000 panels of track to former CB&Q, NP and GN territories since 1981 for use in track construction.
> ....

The Organization responded on December 21, 1988:

> Rule 6 is very clear and understandable in that the property is divided into seniority districts and for work to be performed on one seniority district by employes from another seniority district is in fact a clear violation of that Rule and that is exactly what has happened in the cases referred to here. Employes from the former Frisco constructed track that was installed on District #4 of the former CB&Q, a very clear Rule violation.

First, as the Organization ultimately recognizes, this is not a contracting out dispute. This is a dispute concerning the failure to assign certain work to Claimants but instead assigning that work to other similar classes of employees represented by the Organization, albeit technically under a separate agreement.

The Note to Rule 55 only governs [emphasis added]:

> ... the *contracting* of construction, maintenance or repair work, or dismantling work customarily performed by employes in the Maintenance of Way and Structures Department ... [which] may be *let* to contractors and be performed by contractors' forces.

The Carrier's action was not a "contracting" of work, nor was the work "let to contractors". *See e.g.*, SBA 570, Award 62:

> The Board finds "subcontracting" is usually conceived of as the Carrier sending work to be performed by a contractor in return for payment of monetary consideration. This is not the instant case. The record does not reveal that the Carrier was sending diesel units to be repaired and maintained or inspected for which it was paid a monetary consideration to the contractor in lieu of doing the repair and inspection work itself.

No outside entity was involved in the construction of the panels for monetary consideration. The Carrier's forces performed the work in dispute. Were this argument to prevail, then every dispute concerning work assignments to different classifications or crafts could be characterized as a contracting out dispute governed by the Note to Rule 55 and Appendix Y. Without clearer guidance from the Agreement that such a result was intended by the parties, we must reject the Organization's contracting out argument.

Second, aside from the arguments covered by the above discussion, in its Submission the Organization also relies upon Rules 1, 2, 5 and 6. The basic thrust of the Organization's position is that the if the panels at issue were going to be used in District 4, those panels had to be assembled by District 4 employees and not by Maintenance of Way employees in different districts or covered by a separate agreement. We find no support for that kind of argument in the cited rules.

Given the approach taken by the Organization in its arguments, the analysis must look at the dispute as the assignment of work to employees in another craft covered by another agreement from that governing Claimants. It is well-established that the Scope Rule of the Agreement is general. While we have agreed with the Organization in other awards of this Board that in contracting out disputes the principle of exclusivity is not applicable, to succeed with this type of work assignment claim which we have found not to be a contracting out dispute, under such a general rule it is well-established that the principle of exclusivity applies and the Organization must therefore demonstrate that its members perform the work exclusively on a system wide basis. Specifically, that means that the Organization must show that in each instance panels that are used in a certain

district have been constructed in that district, here, District 4.

The Organization has not met that burden in this case. The Carrier's evidence more than adequately shows that for years panels have been constructed in districts other than the one in which the panels were ultimately installed. Specifically, the Carrier has demonstrated that Maintenance of Way Employees in the Springfield Panel Plant (the former Frisco) constructed panels that have been shipped to and installed in the former CB&Q territory (covered by the present District 4).

The claim must therefore be denied.

AWARD

Claim denied.

Edwin H. Benn
Neutral Member

E. J. Kallinen
Carrier Member

P. S. Swanson
Organization Member

Chicago, Illinois

Dated: _____