

PUBLIC LAW BOARD NO. 6205
AWARD NO. 18
CASE NO. 18

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

PARTIES

TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement and the December 11, 1981 Letter of Understanding between NRLC Chairman C. I. Hopkins, Jr. and BMWWE President O. M. Berge, were violated when the Carrier assigned outside forces to perform work of constructing a new track structure, drilling, assembling and spiking rail, installing rack bolts, spreading ballast, dressing track and cleanup work between Mile Posts 23.90 and 23.40 on the main line on the California Division on August 16, 17, 18, 19, 20, 22, 24, 25, September 1, 2, 3, 7, and 8, 1993 (System File N-16/930780).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance written notice of its intent to contract out the work involved here in accordance with Rule 52.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed California Division Track Subdepartment Group 18 Class A Extra Gang Laborers A. G. Ittner, K. Woody, Jr., E. McCabe, A. T. Nez, O. Begay and T. Begay shall each be allowed ninety and one-third (90 1/3) hours' pay at the extra gang laborer's straight time rate."

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

The instant claim, filed on October 12, 1993, protests the assignment to Southern Pacific Construction Company of work related to constructing a new lead track on Carrier's property on the claim dates, and makes clear that no track construction work performed on Majestic Realty's industrial park property is encompassed within the claim. The work in issue is the portion of the work between the new switch built by employees off the main line and Majestic's connection to that switch across Carrier's right-of-way. The claim contends that Rule 9 reserves this work to employees and that no notice was given concerning the contracting of the work. The claim seeks compensation for the lost work opportunity represented by the number of hours worked by contractor's forces on this track construction.

Carrier's November 23, 1993 denial of the claim sets forth its position that (1) the trackage in issue is not owned by Carrier, (2) no work was done on the main line on the claim dates, (3) Carrier has no record of any such contractor performing work for it and (4) it has no jurisdiction over how Majestic Realty chooses to construct its trackage or what contractor they decide to use.

In its December 20, 1993 appeal, the Organization notes that two employees witnessed the contractor working on Carrier property, submitting statements from Local Chairman Gary Mang and James Murphy

concerning what work was performed and where. This evidence states that the West Azusa switch was built by employees on Carrier property and contractor forces built out from the industry track to that switch on Carrier's right-of-way. In fact, Murphy indicated that he flagged for contractor forces on those dates.

Carrier presented a response indicating that the work in issue was not under its control and positing that the contractor named in the claim may have been a subcontractor working for Majestic. It submitted a letter dated April 26, 1993 from Carrier to Majestic's Project Manager regarding its proposed tracks stating that a Carrier flagman must be provided during the grading and track construction work within its right-of-way at their expense. Carrier also provided a copy of both its Industry Track and Lead Track Agreements with Majestic, setting forth whose responsibility and expense certain work concerning the construction of spur tracks would be. In brief, the Industry Track Agreement provides that Majestic would do all of the grading and drainage work for the project and construct 1401 feet of track from the point of the switch to the end of the track and will give Carrier title to 108 feet of the B spur from the point of switch to the right-of-way and 85 feet of the C Spur track to the right-of-way. The Lead Track Agreement provides that Majestic would construct 2732 feet of lead track with Carrier to do the construction of a specific 159 foot section at developer's expense, and that the lead track would be sold back to Carrier. Thus, Carrier would own the right-of-way and the portion of track on it as well as the lead track.

As noted, this claim protests the building, assembly and connection of a track on Carrier's right-of-way between the new switch at Mile Post 23.9 and Mile Post 23.4 where a fence separates Majestic's property and

trackage. The Organization argues that Carrier did not meet its burden of showing that this section of the work, performed on its property and right-of-way, was not under its control. It contends that it fell within the scope of the agreement and required notice under Rule 52(a).

Carrier initially argues that this claim is duplicative of another claim filed by the Organization and subsequently withdrawn, making it procedurally defective. Carrier also contends that this was part of an overall project over which it had no control, and notes that it submitted the agreements in support of the fact that it did no contracting in this case. Carrier also presented evidence that it had a past practice of contracting the work of construction of buildings and trackage.

The Board has carefully reviewed the record and we find that Carrier has substantiated its burden of proving that the portion of the work being disputed herein was not within Carrier's control at the time of the contracting. The Agreements in evidence reveal that Majestic undertook to perform the track construction project for the purpose of connecting its industrial property to the main line, and that it was obliged to sell back to Carrier the small portion of the track and spur that was on Carrier's right-of-way after construction. There is no doubt that this construction was performed as part of the overall project which was the subject of the Agreements in evidence, was solely for the benefit of Majestic, and that Carrier played no part in the contracting decision nor bore any of the cost. To the extent that Carrier had any say in the trackage work performed on the small portion of its right-of-way, it required Majestic to provide and pay for a flagman from Carrier's work force for the duration of the grading and track construction work. Under such circumstances, we find that Carrier was not obliged to give the Organization advance notice of the

contracting over which it had no control, and that it did not violate Rule 52 in this case. See Third Division Awards 29017, 30032, 32994, 29561, 29431.

AWARD:

The claim is denied.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

D.A. Ring

Dominic A. Ring
Carrier Member

Dated: _____

R.B. Wehrli

Rick B. Wehrli
Employee Member

Dated: 7-5-00