

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 1
)
) Award No. 10
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 12, 2000

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned outside forces (Continental Rail Company) to perform track foremen and sectionmen's work of dismantling and stockpiling track materials, in addition to working with the Union Pacific Rail Train to load rail from Mile Post 99.0 to Mile Post 140.00 on the Julesburg Subdivision within the Nebraska Division on January 24, 25, 26 and 27, 1994 and on days subsequent thereto (System File C-28/940326)
2. The Agreement was further violated when the Carrier failed to provide a proper advance notice and make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).
3. As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Nebraska Division Track Subdepartment Group 8 Foreman K. S. Hoppes and Group 17 Sectionmen N. D. Scott, B. L. Cooper, E. T. Wagoner, C. A. Funk, L. E. Lentz and T. D. Kuenning shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by the contractor's forces beginning January 24, 1994 and continuing until the project was completed.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On November 3, 1993, Carrier served notice on the General Chairman of its intent to contract out the removal of trackage and appurtenances on the Julesburg Subdivision from Mile Post 98.78 to Mile Post 140.00. At the General Chairman's request, a conference was held but the parties did not reach an understanding concerning the proposed contracting out. Carrier proceeded to contract out the work and the Organization filed the instant claim.

The parties dispute numerous propositions related to contracting out on this property and cite numerous prior awards in support of their positions. The Organization contends that Rule 9 reserved the work in question exclusively for Track Department employees. Carrier contends that Rule 9 does not reserve work for any employees but is merely a classification of work Rule. In contrast, Carrier argues, Rule 1, the Scope Rule, is general in nature, thereby placing on the Organization the burden to prove that Agreement-covered employees performed the work in question system-wide to the exclusion of all others. The Organization responds that the exclusivity test applies only in jurisdictional disputes between crafts and does not apply in subcontracting cases. It maintains that, at most, it need establish that Agreement-covered employees customarily perform the work at issue.

Carrier argues further that Rule 52(b) retained prior and existing rights and practices to contract out work, and that Rule 52(d) recognized Carrier's right to contract out work not customarily performed by Agreement-covered employees. Carrier contends that both provisions apply in the instant case. The Organization disagrees.

Carrier further argues that the work fell outside the scope of the agreement because the track and other materials were sold to the contractor on an as-is-where-is basis. The Organization contends that Carrier retained a significant amount of material and thereby retained control over the work.

We have reviewed the plethora of awards cited by the parties. It is perhaps an understatement to say that the awards in this area are not entirely consistent with each other. However, we find that this case is governed by NRAB Third Division Award No. 32327, which also involved an as-is-where-is sale and held that "the portion of the work of dismantling and removing rail retained by Carrier is work 'customarily' performed by Maintenance of Way forces, and falls within the Scope Rule of this Agreement." The record discloses that Carrier retained a significant amount of material and, with respect to such material, Carrier violated the Agreement by contracting out the work. On the other hand, with respect to material actually sold to the contractor, Carrier committed no Agreement violation.

Carrier contends that the track at issue was removed from abandoned property and that Award No. 32327 failed to consider the effect of a track's status as abandoned on the contracting out issue. The Organization responds that, by retaining a significant amount of the material, Carrier retained control over the property.

Carrier is correct that the Board in Award No. 32327 observed that Carrier's

abandonment argument was not raised on the property nor supported in the record. However, other Third Division awards hold that the retention of more than an incidental amount of otherwise abandoned property is scope-covered work. See Third Division Award No. 31754.

Accordingly, we adopt the remedy ordered in Award No. 32327. Carrier and the Organization shall meet to determine what portion of the work falls into the category found violative herein and Carrier shall pay such proportion of straight time hours to appropriate Claimants.

AWARD

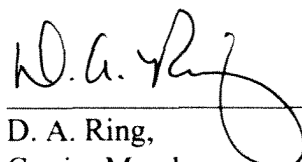
Claim sustained in accordance with the Findings.

ORDER

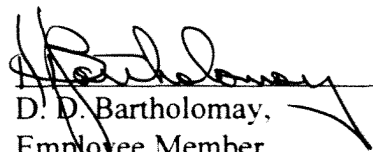
The Board, having determined that an award favorable to Claimant be made, hereby orders the Carrier to make the award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.



Martin H. Malin, Chairman



D. A. Ring,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, July 18, 2000.