SPECIAL BOARD OF ADJUSTMENT NO. 279

Award No. 478

Case No. 478
File 890518

Parties to Dispute: Brotherhood of Maintenance of Way Employes
and
Union Pacific Railroad Company
(Former Missouri Pacific Railroad

Statement of Claim: BMWE - (1) Carrier violated the rules of the Agreement, when Carrier engaged on the property a contractor performing various work.

(2) Claim in behalf of Messrs. Hoskins, et all for eight (8) hours per work day including one day at the overtime rate between March 1, 1989 and April 8, 1989.

Carrier - The claim as described by the Union, reads as follows:

"I am presenting a time claim by and in behalf of the below listed furloughed employees, who retain seniority on the Missouri division:

D. R. Hoskin	354-44-7416	Trackman Driver
W. J. Bathon	334-46-9862	Trackman Driver
M. J. Cushman	327-46-2741	Machine Operator

From Wednesday, March 1, 1989, through Saturday, April 8, 1989, the carrier had on the property at various locations on the Missouri division, a private contractor, Tweedy Brothers, from Pocahontas, Arkansas, engaged in performing various work which was that of the MofW employees. The contractor had on the property a back-hoe, two (2) dump trucks, with operators for each performing the below listed work:

3-1 to 3-13	Location: Sparta, IL. MP 56.7 Work: Repairing Derailment, Removing Track
3-14 to 3-23	Location: Ziegler Coal Company Work: Installing Road Crossings
3-24 to 4-8	Location: Coulterville, IL. MP 49 Work: Repairing Derailment Installing Cross Ties Remove, and Install Switch, Removing Siding

The above listed work was performed by the contractors five (5) days per week, at eight (8) hours per day, for a total of 28 days, at the straight time rate, and one (1) day at the overtime rate, for Saturday, April 8, 1989."

(The foregoing statement of claim is quoted from a letter dated April 27, 1989, from Assistant General Chairman Barker of the Brotherhood of Maintenance of Way Employes (Carrier's Exhibit "A") to Superintendent Barnes. It is used in this submission solely for identification purposes, and its quotation does not constitute an adoption thereof by the Union Pacific Railroad Company.)

Findings: The Board has jurisdiction of this case by reason of the parties Agreement establishing this Board therefor.

This dispute appears to be not the usual dispute over contracting or "farming" out work. The facts involved as indicated by the above claim differ. The Employees assert the work was performed over 28 days. The Carrier asserts that it was performed over 8 days.

The Employees assert that:

"The rules of the current Agreement were violated when the Carrier assigned outside the scope of the Agreement contractor to perform work on the Missouri Pacific Railroad in the area of Sparta, Illinois, MP 56.7 and Coulterville, Illinois in performing maintenance of way work.

The Carrier assigned outside contractor to perform work at various locations on the Missouri Division. The outside contractor, Tweedy Brothers from Pocahontas, Arkansas, had on the Missouri Pacific property 1 backhoe and 2 trucks with operators performing this work.

The Carrier has the following employes that were furloughed from their positions:

D. R. Hoskin - Trackman/Driver	Furloughed
W. J. Bathon - Trackman/Driver	Furloughed
M. J. Cushman - Machine Operator	Furloughed

The above employes hold seniority on the M. P. Missouri District. (Employes Exhibit A and B)

The Carrier contends that this work does not fall within the guidelines of our Agreement. However the work of this character has customarily, traditionally and historically been performed by maintenance of way employes and is

contractually reserved to them under the provisions of the scope rule,..."

Whereas the Carrier asserts that:

"A contractor, Tweedy Contractors, Inc., was used by the Company to perform service on 8 different days within the time frame covered by this case. Specifically, on March 24, 27, 29, 30, 31, 1989, and also April 3, 4 and 5, 1989, Tweedy worked for the company. On March 24 a backhoe, dozer, a 12 yard dump truck, and a 6 yard dump truck with operators were used at Sparta to repair derailment damage. The same equipment and operators were used at Sparta to continue the derailment repairs on March 27 and 29. On March 30, Tweedy employed the same equipment plus an air compressor and spiking hammer at Sparta. Once again four operators were involved and the crew spent the day removing and hauling ties. The following day, March 31, the same crew spent the day replacing and hauling ties. Then on April 3, 4 and 5 the same crew, working with a backhoe, dozer and two 12 yard dump trucks, removed and replaced ties at Sparta (Carrier's Exhibit "B").

The work performed at Ziegler Coal Company took only 2 days and not 10 days as alleged by the Organization in their April 27, 1989 letter (Carrier's Exhibit "A"). Moreover, that work was done at the direction of the coal company, not by order of the railroad. The work was also paid for by the coal company and not the railroad. Therefore, the work at Ziegler Coal Company had no connection with the railroad and provides no basis for a grievance.

As a final comment, it should be noted that contracting in this instance was driven primarily by the fact that the company did not have the necessary equipment."

This issue of contracting out has been previously disputed on this property. NRAB Third Division Award No. 16459, involving these parties (BMWE and the TP portion of the former MOP) found:

"The question to be resolved is whether the scope rule confers upon the organization exclusive right to perform the work done by the contractor.

The scope rule is general in nature, and does not specifically reserve the work in question. It neither describes or defines the work covered by the agreement, but only governs 'the hours of service and working conditions' of the classes of employes listed therein, and there is no prohibition in the agreement against contracting out. See

Award 10585 (Russell) (same parties). It therefore follows that where the scope rule of the agreement does not delineate the work covered, the employes have the burden of proving such exclusive past practice. This the organization has failed to do to the exclusion of all others.

The record clearly establishes that some clearing of the right-of-way has been performed by the maintenance of way forces and independent contractors have performed some of the work in question. In our opinion, the parties have acquiesced in such partial performance and contracting out by the other. Therefore, as stated in Award 5120 (Carter):

'...The parties by their mutual interpretation of the applicable rules, have recognized the right of each to perform the work and, likewise, they have recognized that neither group has the exclusive right to. We adhere to the interpretation which the parties themselves have made. It has become the fixed contract of the parties which can be changed by negotiation, but not by this Board. No basis for an affirmative award exists.'

The burden of proving such exclusive, customary and traditional work by the maintenance of way forces has not been sustained."

Carrier Exhibit "F" indicates that its Exhibits "L," "M," "N," "O," "P" and "Q" involved the past practice on contracting out in instances covering "cleaning up debris," "crossing work," "picking up scrap," "track dismantling," "track work" and "equipment rental." Hence, as pointed out in Third Division Award No. 28574 involving "contracting out"!

"This Board has required a demonstration of work performance by custom, practice or tradition in order to sustain a contracting-out violation. Here, the Organization offered no evidence whatsoever that its employees performed this work in the past, while the Carrier vigorously asserted that there has been a longstanding practice of using outside contractors to perform the work in question. Given this state of the record, we must conclude that the Organization has not met its burden of proving the essential elements of its claim."

Here, as there, and for the same reasons, the claim will be denied.

Award: Claim denied.

S. A. Hammons, Jr., Employee Member

D. A. Ring, Carrier Member

Arthur T. Van Wart, Chairman
and Neutral Member

Issued August 27, 1991.