

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(Union Pacific Railroad Company (Former Missouri Pacific Railroad Company)

STATEMENT OF CLAIM: "Claim of the system Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Robertson's Machine Shop) to perform routine maintenance on the Marley Bridge in Addis, Louisiana beginning September 21, 1987 (Carrier's File 871029 MPR).

(2) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman D. G. Townley, B&B Assistant Foreman R. H. Hutchins, B&B Helper M. L. Durant and First Class Ironworkers D. J. Smith, J. C. Williams and P. L. Ingram shall each be allowed pay at their respective straight time and overtime rates for all straight time and overtime hours expended by the contractor performing the work identified in Part (1) above beginning September 1, 1987 and continuing until the violation was corrected."

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 employees 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 waived right of appearance at hearing thereon.

On September 21-24, 1987, the Carrier engaged a contractor to make repairs on a bridge in the vicinity of Addis, Louisiana. No notice of such work was provided to the Organization under the provisions of Article IV-- Contracting Out of the May 17, 1968 National Agreement which reads in pertinent part as follows:

"In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith...."

In its defense, the Carrier cited in its Submission 269 instances of contracting bridge repair work (paralleling similar information provided on the property during the claim handling procedure). This includes many instances before and after the May 17, 1968 National Agreement became effective. The Carrier contends that such occurrences were not challenged by the Organization. However, there is substantial support for the Organization's contention that work of this type is also performed by employees it represents.

The Board does not support the Carrier's view that the Claim must fall based on a failure by the Organization to show that it has performed such work on an exclusive basis. Further, there is little support for the contention that such work must be found to be outside the Scope Rule of the applicable Agreement.

In view of the extended practice as to contracting work such as here under review, however, the Board is guided by previous Awards under parallel circumstances. As one example, Third Division Award 28610, reviewing closely similar if not identical Rule language, stated as follows:

"While the Board believes that the work in question is covered by the Scope Rule for the purpose of advance notice, we are also of the view that the remedy requested herein would, under the unique circumstances of this case, be inappropriate. The Board takes note that the work at issue has apparently been contracted out for over 35 years and therefore falls within the provision of the Agreement which states that 'nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out.' Thus, the claim would have to be denied on the merits and it is only on

the notice violation that the Organization could prevail. Given the long period of time during which the Organization has acquiesced in the practice of contracting out the disputed work, however, it is the opinion of the Board that the Organization cannot now claim a violation of Rule 52 without first putting Carrier on notice that it believed advance notification was required in this particular instance. Accordingly, it is our judgment that the Board herein is limited to directing Carrier to provide notice in the future, just as in Third Division Award 26301."

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois this 28th day of October 1991.