NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29479
Docket No. MW-28824
93-3-89-3-227

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of
(Way Employees
(
(The Kansas City Southern Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (Art Hathaway) to cut brush on the right-of-way between Mile Posts 23 and 26 on the KCS main line in the vicinity of Grandview, Missouri on May 27, 1987 (System File 013-31-320 [228]).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intention to contract out said work as required by Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. L. Favoroso, M. Herman, C. Esteban, J. Buchanan, H. Swinney, B. Wilkins, L. Darity, A. Cezar, J. Brewer and S. Johnson shall each be allowed eight (8) hours of pay at their respective straight time rates."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe and employes involved in this dispute are respectively carrier and employes 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.

The issue is whether the Carrier, on May 27, 1987, violated the Agreement when it contracted out work to outside forces instead of using maintenance of way forces, that work being cutting brush on the right-of-way between Mile Posts 23 and 26 in the vicinity

of Grandview, Missouri, which the Organization asserts is customarily and traditionally performed by the maintenance of way forces.

The Organization contends that the Carrier failed to notify the General Chairman of its plan to contract out work as required by the Agreement; the Claimants were qualified, willing, and available to perform; and all of the work involved is encompassed within the scope of the agreement between the parties.

The Carrier contends that the Scope Rule between the parties is general in nature and does not provide exclusive rights to the work in question. The Carrier argues that the right-of-way mowing and clearing of brush has never been exclusively performed by maintenance of way employees, and, in fact, has been performed by different methods and a variety of persons over a long period of time.

This Board has thoroughly reviewed the lengthy record and we find that the Carrier did not give the Organization the proper notice that is required before the Carrier contracts out work that is generally performed by Maintenance of Way employees. Therefore, the claim will be sustained.

Article IV of the May 17, 1968, National Agreement states in part:

> "Article IV -- Contracting Out
>
> 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 that 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."

Moreover, on December 11, 1981, in a letter to the Organization's president, the Carriers reaffirmed their position and stated:

> "The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

The record makes it clear that the Carrier failed to give the Organization the proper notice. The Carrier's unilateral action in prematurely contracting out the work was in violation of Article IV of the May 17, 1968, National Agreement. Since the work was improperly contracted out, the claims for pay must be sustained. However, a review of the record reveals that although the claim is for eighty man hours, the actual number of man hours worked by the outside contractor was twenty-four man hours of pay, and that amount shall be equally divided among the Claimants.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of January 1993.

CARRIER MEMBERS' DISSENT
TO
AWARD 29479, DOCKET MW-28824
(Referee Meyers)

If only the neutral in this case could recall the precedent he reaffirmed in Award 29393, the decision in this Docket would have been a denial.

In Award 29393, the precedent was reaffirmed that:

> "...a denial award is proper when an Organization has 'slept on its rights' in reference to advance notice concerning a particular type of contracted work."

In this Docket the Carrier, with copies of over 75 different contracts, checks, invoices, leases, etc. clearly, succinctly, and without rebuttal, established a Carrier practice of contracting brushcutting along its right-of-way since April of 1950, without complaint from the Employes. Of course, since 1968, Carrier continued to contract brushcutting without serving notice and without complaint. In fact, one of the contracts furnished by the Carrier as proof of practice was a contract with one Maintenance of Way employee who, for twenty dollars an hour, with his own tractor cleared the right-of-way in his off hours.

What else can a Carrier do to establish a prima facie case of the Employes sleeping on their rights than was done in this case? For some reason, the Majority somehow felt comfortable in overlooking the extended past practice and then compounded its faulty reasoning by sanctioning a damage award, paying fully employed Claimants an additional stipend.

To award damages to fully employed Claimants in circumstances such as is evident here does fly in the face of at least 57 other awards of this Board that have not ordered payment in cases where no notice was served but Claimants were fully employed. In fact, 10 of those 57 awards involved the same identical parties as involved here. See Third Division Awards: 29253, 29254, 29255, 29256, 29257, 29330, 29332, 29385, 29386, 29387.

The decision of the Majority is poorly reasoned and not based on the facts of the evidence adduced during the handling of the dispute on the property and must be considered for what it really is - an anomaly.

Robert L Hicks
R. L. Hicks

M W Fingerhut
M. W. Fingerhut

Michael C. Lesnik
M. C. Lesnik

P V Varga
P. V. Varga

James E. Yost
J. E. Yost