

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 29502  
Docket No. MW-29728  
93-3-91-3-81

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro 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 (Marlatt Contracting) to perform track maintenance and repair work (hauling track materials) in the St. Joseph Terminal on December 4, 5, 6, 7, 8, 11, 12, 13, 26, 27, and 28, 1989.

(2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with proper 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 aforesaid violations, furloughed Machine Operator K. D. Eichelberger shall be allowed eight (8) hours of pay at the machine operator's straight time rate and he shall be compensated for all holiday pay wage loss suffered."

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 or 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.

Claimant was employed by the Carrier as a machine operator prior to the dates involved in this matter; however, most recently he had been working in the lower rated position of truck driver. On December 1, 1989, he was furloughed from the truck driver position because of force reductions. During the periods December 4, 5, 6, 7, 8, 11, 12, 13, and 26, 1989, the Carrier contracted with Marlatt to provide a back hoe and operator. On December 27 and 28, a dump truck and contractor employee were used to work at various locations in the St. Joseph terminal.

The Organization maintains that the Carrier violated the Agreement because it did not give the General Chairman fifteen days' advance written notice of its plan to contract out work which in the past had been performed by employees it represents. The Organization further argues that this dispute involves bad faith on the part of the Carrier. The Organization contends the Carrier's actions in this matter represent an example of the Carrier's total disregard for its contractual obligation, and its failure to live up to that obligation. The Carrier maintains that it served notice of its intent to contract the work on June 5, 1989. Moreover, the Carrier contends that it was not contractually required to serve notice of its intent to engage an outside contractor.

The Organization further argues that the Claimants were qualified, willing, and available to perform all the work involved. The Organization asserts that the Claimants suffered economically from the Carrier's action through lost straight time and overtime pay. The Carrier contends that the Agreement does not provide for a penalty to be paid, and that the Organization has not made an affirmative showing that the Claimants experienced a loss of earnings.

The Organization alleges that Carrier-owned equipment was available during this time period, or was available on a lease basis. The Carrier maintains that it did not have a back hoe or dump truck available in its equipment inventory, causing it to hire a contractor to provide the equipment along with an operator.

The Organization argues that the work done by the contractor was within the Scope of the Agreement. The Organization claims that the operation of equipment in the performance of track maintenance and repair work is reserved to and customarily performed by Carrier forces. The Carrier maintains that the Scope Rule does not set aside this work for exclusive performance by the Claimants or Carrier employees covered by the Agreement, which merely lists employee classifications and not work. The Carrier

maintains that it has the right to contract equipment work.

The Carrier suggests that the appropriate test is "exclusivity," which requires that the Organization must show that only members of a particular craft have performed the work at issue. The Carrier acknowledges that employees represented by the Organization have performed this work to some extent; but denies that these employees have performed this work exclusively, and cites numerous occasions when contractors have been engaged. The Organization asserts that the exclusivity test has no application in this dispute for five reasons: 1) the Carrier failed to act in good faith, 2) the test is of no effect in deciding disputes involving Article IV and the Agreement and the Carrier's failure to provide advance notice, 3) the test does not apply to disputes involving outside contractors, 4) it is in conflict with the intent and purpose of Article IV and the Agreement, and 5) because there is no evidence on the record that the work involved was customarily and traditionally contracted to outside forces.

The Board has reviewed the record as developed on the property. Based on that information, there is insufficient evidence to determine if there was a violation of the Agreement.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois this 3rd day of February 1993.