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NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29792
Docket No. MW-29600
93-3-90-3-570

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen 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 (Oberkramer Contracting) to perform track work (installing ties, track material handling and right of way cleaning) at various locations on the Sedalia Subdivision on August 29, 30, September 5, 6, 7 and 8, 1989 (Carrier's File 890653 MPR).
- (2) The Agreement was further violated when the Carrier failed and refused to furnish the General Chairman with 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, Machine Operator A. H. Luebbert shall be allowed forty-eight (48) hours of pay at the machine operator's straight time rate and compensation at the overtime and holiday rate for all overtime and holiday 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 employee or employees involved in this dispute are respectively carrier and employee 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 has established and holds seniority as a Machine Operator on the Eastern Division. Until 1989, Claimant was regularly assigned to operate a division backhoe headquartered at the old Eastern Division. However, in May 1989, the Carrier-owned back hoe and dump truck were sent to work on the Carthage subdivision. As the equipment was moved off Claimant's seniority district, positions were abolished and rebulletined for the appropriate seniority district. At the time of this dispute, therefore, Claimant was working as a Trackman.

Without prior notice to the Organization, the Carrier contracted with Oberkramer Contracting Co. to carry out machine operating work in connection with track work being performed by the Carrier's Track subdepartment forces on the Sedalia Subdivision on the Eastern District. On August 29 and 30, 1989, and again on September 5, 6, 7 and 8, 1989, an employee of Oberkramer operated a backhoe, performing such tasks as assisting in the installation of cross ties and bridge ties at various locations.

In a letter dated September 12, 1989, the Organization filed a Claim alleging that the Carrier was in violation of, among others, the general Scope Rule of the current Agreement, and in addition, the Carrier had failed to comply with the notice and conference provisions of Article IV of the 1968 National Agreement.

The principles which govern disposition of this case are set forth in a series of precedent decisions by this Board involving the identical Parties, issues, contract language and facts. Since the evidence indicates, at best a "mixed practice" under the general Scope Rule, we find no independent violation of the Scope Rule. See Third Division Awards 29034, 29019, 28654, 29007. As explained more fully in Award 29007, however, a showing of less than "exclusive" past performance of the disputed work by the employees is sufficient to establish coverage for purposes of Article IV Notice and conference provisions. In this regard, we find that the Organization was entitled to such notice and good faith discussions prior to the subcontracting. See also Third Division Awards 29021, 27011. Accordingly, we shall sustain the claim that Article IV was violated.

Finally, we remind Carrier it has been put on notice by this Board, most notably in Third Division Award 29021, that such failure of notification in most cases will warrant damages. But,

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for reasons set forth more fully in Third Division Awards 29303, 27011, 26031, we shall not award damages in this particular case which occurred in August-September 1989.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 29th day of September 1993.