

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29825
Docket No. MW-29646
93-3-90-3-643

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 (Young Contracting) to perform track maintenance work (removing and installing crossties, installing ballast and cleaning drain pipes) at various locations on the Concordia Subdivision on August 22, 23, 24, September 25, 26, 27, 28, 29, October 2 and 3, 1989 (Carrier's File 890669 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 J. L. Hardenberger shall be allowed eighty (80) hours of pay at the machine operator's straight time rate and six (6) hours of pay at the machine operator's time and one-half rate."

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 employe 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 Organization has raised a timely objection to evidence offered by the Carrier *de novo* in its Submission. None of the evidence so offered will be considered by this Board. The Board's findings are based solely upon the record established on the property.

The essential facts of this case are not in dispute. On ten separate occasions in the months of August, September and October, 1989, Carrier used an outside contractor to perform track maintenance work -- remove and install crossties, install ballast, and clean drain pipes -- at various locations on its Concordia Subdivision. Carrier did not notify the Organization of its intent to use an outside contractor for the work in question. Claimant was fully employed at the time.

On October 8, 1989, the Organization submitted a claim on behalf of Claimant for the amount of time expended by the outside contracting force (one backhoe operator using a contractor backhoe) on the dates at issue: 80¹ hours of straight time, and six hours overtime. In its letter the Organization claimed that Carrier had violated Article IV of the May 17, 1968 National Agreement and the December 11, 1981 "Letter of Understanding" from NRLC Chairman C. I. Hopkins. Article IV and the "Letter of Understanding" read in pertinent part as follows:

"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 than 15 days prior thereto."

¹ The original claim was for twenty-four (24) hours straight time, as was later amended to eighty hours, as it appears in the "Statement of Claim".

Letter of Understanding -- December 11, 1981

"The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor."

The claim was denied by Carrier on December 7, 1989. The claim was subsequently processed up to and including the highest Carrier officer authorized to handle such matters.

As has been enunciated in greater detail in Third Division Award 29640, if the work at issue is work previously performed by Organization employees, the Organization need not prove exclusive performance to establish a violation of the notice requirement in Article IV. Evidence on the record before this Board clearly establishes that the work in question had been previously performed by maintenance of way employees. Accordingly, parts (1) and (2) of the Claim are sustained. The Organization has not proven, however, that the work has been reserved exclusively to maintenance of way employees. The Scope Rule contained in the Agreement between the Parties cites employee classifications, not work reserved to those employees. Accordingly, there is no basis for this Board to find that the Carrier is precluded from contracting out the work in question.

With respect to the Organization's claim for punitive monetary damages (Claimant was employed during the dates in question), for the reasons set forth in detail in Third Division Awards 29640, 23928, the Board finds that Carrier has been on notice since the issuance of Third Division Award 28849 involving these parties that it is "hereafter required to provide notice of plans to contract out." The events precipitating the instant case evolved prior to issuance of that Award on June 25, 1991. Therefore, the Board does not sustain paragraph (3) of the present claim. Future failure to comply with the notice provisions of Article IV, however, will likely subject Carrier to potential monetary damage awards, even in the absence of a showing of actual monetary loss by Claimants (See Third Division Awards 29034, 29303, 28513.)

Form 1
Page 4

Award No. 29825
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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.