NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 30162
Docket No. MW-30178
94-3-91-3-623

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 Carrier violated the Agreement when it assigned outside forces (Tweedy Contracting) to cut brush and spray stumps along the right-of-way between Mile Post 331, Atchison, Kansas and Mile Post 350, Everest, Kansas from August 13 through and including August 31, 1990 (Carrier's File 910012 MPR).

2. The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with advance written notice of its intention to contract out said work.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman R. D. Underwood and Trackmen J. W. Moeck, M. F. Petesch, R. D. Smith and K. E. Handke shall each be compensated at their respective rates of pay in the amount of eight (8) hours per day at the straight time rate of pay and six (6) hours per day at the overtime rate of pay for August 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31 and fourteen (14) hours per day at the overtime rate of pay for August 18, 19, 25 and 26, 1990."

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.

On the dates and at the locations set forth in the claim, the Carrier contracted out brush cutting and stump spraying to Tweedy Contracting without advance notice to the Organization. This claim followed.

The number of claims progressed to this Board from this property on alleged contracting out violations is enormous. As usual, the parties' differences stem from the governing language of the Agreement concerning when the Carrier can contract out work and the Carrier's obligation to give prior notice of its intent to do so. But on this property, the parties differences have intensified due to the Organization's present attempts to enforce the relevant language after many years of allowing the Carrier's contracting out to go essentially unchallenged. The difficulty the Organization presently faces on this property is that when it now seeks to enforce the relevant language after not having previously done so, it faces a body of substantial past practices of contracting out for the various kinds of work that the Organization now claims were improperly removed from the employees. The Organization's difficulties in its attempts to enforce the language become compounded as Awards issued from this Board relying upon the past practices for the various areas of work that have been subcontracted. A substantial body of precedent Awards therefore has been evolving on this property concerning the relevant language which then requires this Board, for purposes of stability, to give due deference to the prior decisions whereas under the same language on another property, the result might be quite different.

But the Carrier's reliance upon the evolving Awards - which in turn rely upon the substantial past practices developed on this property, which in turn exist in great part because the contracting out was not challenged for many years on this property - has to be a two-way street. With respect to subcontracting brush cutting, the Carrier has not prevailed on its past practice arguments. See Third Division Award 29033:

> "Carrier contends that it has customarily and historically used contractors to perform the disputed work [brush cutting] without protest from the Organization, and it listed examples of such purported activity. The Organization, however, says it had no knowledge of such instances, and our review of the record reveals no affirmative evidence that the Organization was given actual notice of the listed instances.

We are, therefore, forced to infer from the numbers that the Organization simply must have known and acquiesced in the contracting out. The listing shows instances over 20 years for an average of less than nine instances per year on its system and just over once per year in each of the states it operated. Given the nature of the work and the size of Carrier's extensive system in several states, we do not find these numbers to be preponderant evidence that the Organization had actual knowledge of the contracting out and did not protest it.

We also find significant the fact that Carrier's listing contains no instances of contracting out the disputed work after 1979, a period of some eight years prior to the instant dispute. Whether this is the actual case or not, this record must be viewed as a demonstration that the employees have performed 100 percent of the disputed work since 1979. Moreover, the record says they have performed all of the disputed work since the issuance of the December 11, 1991 National Letter of Agreement whereby this Carrier, and others, undertook good faith efforts to reduce the instance of contracting out Scope covered work. This apparent abandonment of contracting out for several years is, in this regard, incompatible with Carrier's contention that it has customarily and historically contracted out the disputed work.

As a result of the foregoing findings, Carrier must be found, on these facts, to have improperly contracted out the work."

We find Award 29033 is not palpably erroneous. Like Award 29033, we shall therefore sustain the claim in this case. The Carrier improperly contracted out the brush cutting and stump spraying work in dispute.

Award 29033 also addressed a remedy:

"Carrier asserts, and the Organization does not deny, that one of the Claimants was fully employed on the day in question. The record does not support a finding of a lost work opportunity as to that Claimant. The other Claimant, however, was on furlough at the time and did, in our judgment, suffer a lost opportunity. In accordance with prior precedent of this Board regarding the nonpayment of the punitive rate for time not actually worked, this Claimant should receive the appropriate straight-time rate of pay and otherwise be made whole for his loss."

Again, while approaches to remedies differ with respect to loss of work opportunities, given that Award 29033 arose on this property concerning the subcontracting out of brush cutting work and further given that we cannot say that the remedial aspect of that Award is palpably erroneous, principles of stability require that we follow that Award on this property with respect to the remedy in this case. No relief is granted for employees working on the dates set forth in the Claim. Employees, if any, on furlough shall be entitled to relief at the straight-time rate. The Carrier's records supplied to us show that none of the Claimants were furloughed during the relevant period. No affirmative relief will be granted.

However, the Carrier must now be placed on notice. In the area of subcontracting brush cutting work, the Carrier can no longer rely upon past practice as a defense. The Carrier must henceforth comply with the relevant subcontracting language. Failure to do so in the future will require the imposition of more affirmative types of relief.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Linda Woods
Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 26th day April 1994.