

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30217
Docket No. MW-29544
94-3-90-3-488

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr., when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation
(Company (Eastern Lines)

STATEMENT OF CLAIM: "Claim of the System Committee of the
Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned an outside concern to perform machine operating work in connection with track material handling between Shreveport, Louisiana, and Lufkin, Texas, beginning July 3, 1989 (System File MW-89-98/485-65-A SPE).
- (2) The Carrier violated the Agreement when it assigned an outside concern to perform foreman's and machine operator's work in connection with track material handling between Shreveport, Louisiana, and Nacogdoches, Texas, from July 3, 1989, to July 31, 1989 (System File MW-89-83/484-56-A).
- (3) The Carrier violated the Agreement when it assigned an outside concern to perform foreman's and machine operator's work in connection with track material handling between Shreveport, Louisiana, and Nacogdoches, Texas, beginning August 1, 1989 (System File MW-89-103/485-74-A).
- (4) The Agreement was further violated when the Carrier entered into a contracting transaction concerning the work described in Parts (1), (2) and (3) above without giving the General Chairman proper advance written notice of its plan to do so.

- (5) As a consequence of the violations in either Part (1) and/or Part (4) above, Machine Operator J. H. Richards shall be allowed eight hundred forty-eight (848) hours at his pro rata rate of pay and two hundred twelve (212) hours at his time and one-half overtime rate of pay and continuing.
- (6) As a consequence of the violations in either Part (2) and/or Part (4) above, Foreman S. Randall and Machine Operator M. E. Henry shall each be allowed one hundred sixty-eight (168) hours at their respective pro rate of pay and forty-eight (48) hours at their respective time and one-half overtime rate of pay.
- (7) As a consequence of the violations referred to in either Part (3) and/or Part (4) above, Foreman A. Wrencher and Machine Operator R. Velasquez shall each be allowed six hundred eighty (680) hours at their respective pro rata rates of pay and three hundred forty-eight (348) hours at their respective time and one-half overtime rate of pay and continuing."

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.

This matter was progressed as three separate disputes on the property, but the Organization combined them for presentation to the Board. Despite the Carrier's objection, there is rational support for an single overall review of the disputes.

The disputes concern the contracting to outside forces of the specified loading, unloading and handling of track material, as well as the utilization therein of a "Switchmaster" (an on-track, off-track car mover) and a tractor backhoe balanced on top of gondola cars.

As to the merits, denial Third Division Award 26434, involving the same parties under closely similar circumstances, concerned the use by an outside firm of "two backhoe tractors mounted on gondola cars." After pointing out that the contractor had "provided such services for the past four or five years," Award 26434 stated as follows:

"After a careful review of the record evidence, we are convinced that the Organization's Claim must be rejected. That the work in question was in fact contracted out is not at issue, nor is there any dispute that Carrier gave proper notice. Furthermore, there is no disagreement here as to the seniority rights of Claimants under the Agreement. Such rights, however, are not relevant to this dispute unless it can first be established that the work at issue was Claimants' to perform either under the express coverage of the Scope Rule or under an exclusive Reservation of Work Rule. (See Third Division Awards 15943, 17943, 18243, 19032, and 20841.) Given the absence of any probative evidence by the Organization on either of these essential points we have no alternative but to conclude that the record does not support the Organization's Claim"

Some discussion as to "proper notice" follows. Except for this, the Board finds no basis not to accept the findings of Award 26434 as dispositive here.

By contrast, the Organization cites sustaining Third Division Award 28590, involving a different Carrier and the unloading of crossties by a contractor using particular equipment not available to the Carrier. Determining that the work could have been performed in another fashion, Award 28590 sustained the claim. While the type of work was similar to that here under review, the Board cannot, however, accept this Award as persuasive, since there is no indication, as here, concerning the history of a past mixed practice as to performance and assignment of such work.

As to notice, the Carrier did advise the General Chairman, by letter dated June 21, 1989, of its intention to contract the work. On June 22, 1989, the General Chairman replied, indicating his availability for conference but also stating:

"Please be advised that we cannot agree to outside contractors performing this Maintenance of Way work and claims will be filed."

Since the work began on July 3, 1989, the Organization makes the assumption that arrangements therefor had been made well before the notice to and conference with the General Chairman. The Carrier responds that, with the General Chairman's negative reply on June 22, it was free to proceed even prior to a conference. The Board is fully aware of the need for proper advance notice and, when requested, forthright discussion of the proposed work. Third Division Award 26547, involving the same parties, fully sustained the Claim based solely on the Carrier's "knowingly [violating] the Agreement by not notifying the General Chairman." Here, however, there was notice, even if perfunctory. Since the Organization immediately rejected the Carrier's proposal to contract work even before conference, the Board finds no remedy appropriate solely on the notice issue.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.