

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30263
Docket No. MW-30168
94-3-91-3-609

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(St. Louis Southwestern Railway Company

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

- (1) The Agreement was violated when the Carrier assigned an outside concern (W. M. Farms Contracting Company) to perform machine operating in connection with dirt work, excavating trenches on the right of way between Brinkley and West Memphis, Arkansas on the Memphis Subdivision beginning on September 10, 1990 (System File MW-90-78-CB/497-14-A SSW).
- (2) The Agreement was further violated when the Carrier entered into the above contracting transaction without giving the General Chairman at least fifteen (15) days' advance written notice of its plan to do so as required by Article 33.
- (3) As a consequence of the violations in either Part (1) and/or Part (2) above, Roadway Machine Operator J. G. Waters shall be allowed forty (40) hours' pay at his dragline operator's rate of pay and pay continuing in the amount of the total number of man-hours expended by the outside forces."

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.

The underlying facts in this case are not in dispute. Without first notifying the Organization and conferring with the General Chairman, the Carrier engaged an outside contractor beginning on September 10, 1990, to dig french drains in roadbed on the Memphis Subdivision, during which time an employee of the contractor operated a HI-HO tractor in performing the work.

The Carrier contends that it does not own this type of equipment and does not have a qualified operator for it. It also contends that it assigned a Machine Operator to work with the contractor to assure that the Organization did not lose any work. The Organization disputes these contentions, and contends that the work could have been performed with a Grad-All or Backhoe, both of which are in the Carrier's possession.

The Organization also contends that this kind of machine operating work has been traditionally and historically assigned to and performed by employees subject to the Agreement, and that Claimants were equipped, fully qualified, and readily available to perform the work if given the opportunity to do so.

The Carrier, on the other hand, contends that this is work which has historically been performed by other than Maintenance of Way employees, and is not work which is exclusively reserved for them under the Agreement.

The following Rules are pertinent to a resolution of this dispute:

" Article 1 Scope

Section 1.

These Rules govern rates of pay, hours of service and working conditions of all employees in the Maintenance of Way and Structures Department (not including supervisory forces above the rank of inspectors) represented by the Brotherhood of Maintenance of Way Employees as follows:

* * *

Article 33 Contracting Out

In the event this 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.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Article shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

The Carrier contends essentially that it need not comply with the notice and meeting requirements of Article 33 if the Organization has not demonstrated exclusive rights to the work. Numerous prior Awards of the Board, however, have held that issues of exclusivity are not a defense to notice and meeting requirements. The question presented to the Board is thus not whether the Organization has demonstrated exclusivity, but whether the work is covered by the Agreement, making the provisions of Article 33 applicable.

The Board concludes that the work in question is covered by the Agreement and that the Carrier is bound by the notice and meeting requirements of Article 33. Accordingly, we find that the Carrier violated the Agreement when it contracted out the work without giving notice and engaging in the required discussions.

The remaining issue is the question of damages. The record is undisputed that the Claimant was fully employed and suffered no monetary loss as a result of the action claimed. We will therefore sustain the Organization's claim that the Carrier violated the Agreement, but deny that part of the Claim which seeks a monetary remedy.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of July 1994.