Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30841
Docket No. MW-29314
95-3-90-3-223

The Third Division consisted of the regular members and in addition Referee Gil Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific 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 (Asplundh Tree Expert) to perform brush cutting work on the right of way between Mile Post at Rantoul and Mile Post 425 at Council Grove on the Kansas Division beginning November 28 and continuing through December 31, 1988 (Carrier's File 890066 MPR).

(2) The Agreement was further violated when the Carrier failed 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, furloughed Kansas City Division Trackman C. D. Ford, C. A. Clinton, D. E. Hanner, C. D. Chester, R. A. Watson, M. E. Zimmerman, L. J. Hartman and R. W. Roberts shall each be compensated for all straight time, overtime and holiday pay wage loss suffered beginning November 28 and continuing through December 31, 1988. In addition, they shall be made whole for any and all fringe benefit losses 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.

Two questions must be addressed at the outset. The first is whether, as a matter of contract, the Carrier was obligated to give advance notice of its intent to subcontract the work in question. The second question is if required to give notice, whether the Carrier as a factual matter did or did not comply with such a requirement.

The Carrier argues that notice was not required since the Organization failed to establish that it had exclusively performed brush cutting in the past. This Board has stated that exclusivity is too strict a standard for determining whether advance notice is required under Article IV. It was stated as such in Third Division Award 26301.

> "On the notice issue, the Carrier argues that the Organization must show that they have performed the work in question exclusively before notice is required.
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> The Board disagrees. It has been held previously that exclusivity need not be established to show that the disputed work is within the Scope Rule for purposes of notification. In this case, there are wage classifications covering fence work and on occasion fencing around a microwave tower has been performed by Maintenance of Way forces. This is sufficient for notice purposes to establish the work was covered by the Scope Rule. There is good reason not to interpret the notice provisions too strictly since conferences pursuant to Article IV may help eliminate disputes."

It should be added that the fact a Carrier may give notice does not constitute a concession that the work is scope covered. The basic rule is this - in cases of mixed practice where a reasonable argument can be made for coverage, the Carrier should give notice. This is exactly the case here. The practice is mixed and notice is required.

The next question is whether as a factual matter notice was given. In the opinion of the Board, it was not. The Carrier relies on a notice that is not applicable to the precise territory involved.

Based on the above findings of the Board, we must also conclude the agreement was violated by failure to give notice. Thus, it is necessary to consider a remedy. In this regard we must state we are not persuaded the Carrier forces were unable for lack of equipment or skill to do this work. For instance, the Carrier argues that the Claimants were not furloughed during this period. A review of the record, however, shows that all the Claimants may not have been on furlough the whole period. It is apparent that at least some of them were for some of the time. For instance, the records for Chester Ford suggest he was furloughed in November and not recalled until December 9. Thus, he was available for part of the time. This may be the case with others too. Accordingly, the Parties are directed to do a joint check of the records to determine on what dates during the claim period the Claimants were furloughed. They are entitled to pay for time lost for those days they were on furlough that the contractor worked.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

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 27th day of April 1995.